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WESTERN CORNICE & MANUFACTURING WORKS, APPELLEE, V. EDWARD A. LEAVENWORTH ET AL., APPELLANTS.

FILED OCTOBER 20, 1897. No. 7438.

1. **Review**: CONFLICTING EVIDENCE. A finding or decree on conflicting evidence will not be disturbed or reversed unless it is clearly wrong.

2. **Mechanics' Liens**: DESCRIPTION OF PROPERTY. The sworn statement filed of a claim of mechanic's lien must contain a description of the land on which the building stands, for which the material was furnished, or on which the labor was performed, the account for which is the basis of such claim of lien.

3. ———: ———. If in the statement filed the property to be affected is described as a lot in a designated block, and the evidence discloses that the major portion of the material was furnished and labor performed on a part of the building erected which stands on a piece or strip of land adjoining said lot, which is not a part of the lot, the lien cannot be enforced against the lot described for the material furnished, or work done, not used on the part of the building which stands thereon.

4. ———: ———. Whether the lien might be enforced against the lot described for material used and labor performed in and on the part of the building which stands on said lot was not presented in this case, hence not discussed or adjudicated.

5. **Appeal and Error**: DISTINCTION. A clear distinction exists in this state between proceedings by petition in error and an appeal.

6. ———: JUDGMENT IN APPELLATE COURT. In an appeal, that the final adjudication may affirm the decree of the trial court in some particular or particulars, as to the rights of one appellant, does not necessitate the affirmance of the decree as an entirety and against all appellants.

APPEAL from the district court of Douglas county. Heard below before FERGUSON, J. *Affirmed in part and reversed in part.*

H. H. Baldrige and *Bartlett, Baldrige & De Bord*, for appellants.

T. J. Mahoney, James W. Carr, and *Mahoney, Minahan & Smyth, contra.*

HARRISON, J.

It appears herein that one E. A. Leavenworth, of appellants, began, during the year 1891, the erection of a hotel building in the city of Omaha (the building has since been named and is known as the "Madison Hotel"), and during the course of its construction entered into contracts with various firms and persons to furnish material and perform labor therefor and thereon. Leavenworth failed to pay the accounts for labor and material as they matured, and claims of liens therefor were prepared and filed. Of these claims was one in favor of Christian Specht, which was assigned to the Western Cornice Manufacturing Works, and this suit was originally instituted in its behalf. The claim was afterward transferred to John McVoy & Co., and it became a party to the suit by intervention and filed a petition in which were set forth its claim and demand for relief. Answers were filed for several of the defendants. Issues were joined and tried, the decree resultant being favorable to the asserted rights of the lien-holder, the assignee of the special claim. The defendants have appealed to this court.

In August or September, E. A. Leavenworth conveyed the premises on which the hotel was being erected to Helen E. Hunt, the instrument of conveyance being in purport a warranty deed. Helen E. Hunt executed and delivered to Leavenworth a power of attorney by which he was authorized to sell and convey the property for her. On March 3, 1892, Leavenworth, as attorney-in-fact for Helen E. Hunt, conveyed the property to Charles L. Gyger, as trustee for a number of parties who had each filed a mechanic's lien against the premises. Gyger, after the commencement of this suit, pursuant to directions from the parties for whom he was holding in trust, conveyed the property to the Madison Hotel Company.

It was pleaded for appellants that the contract under which the claim of lien, the foreclosure of which was the object of this action, was not made with Christian Specht,

but with one George Specht; that no contract was entered into with Christian Specht to furnish any material or perform any labor in, on, or about the building of said hotel; hence there could exist no account or lien in his favor. There is a conflict in the evidence on this point, but after a review of it we are satisfied that there is sufficient to sustain the finding of the trial court that there was a contract with Christian Specht; and agreeably to a well settled rule of this court the finding will not be disturbed. (*Steinkraus v. Korth*, 44 Neb., 777.)

The claim for the lien prepared and filed was for material furnished and labor performed in and upon a building on "lot eight (8), in block forty-eight (48), city of Omaha," and the evidence disclosed that the hotel was erected partly on said lot eight and in part on the strip of land contiguous thereto, twenty feet in width and one hundred and thirty-two feet in length, which had never been a portion of said block, but had been of the adjoining street, which had been reduced in width and the strip to which we have referred sold to the proprietor of the adjoining lot 8. It was further shown by the evidence that the major portion of the material furnished and labor performed included in the lien in suit were for and upon the part of the hotel built on the strip of land, and not on lot 8. The decree of the trial court established the lien on lot 8, block 48, for the full amount claimed therein, and in this was wrong and cannot prevail. Our statute on the subject of mechanics' and laborers' liens provides: "Any person who shall perform any labor, or furnish any material or machinery or fixtures for the erection, reparation, or removal of any house, mill, manufactory, or building or appurtenance by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, mill, manufactory, building or appurtenance, and the lot of land upon which the same shall stand." (Compiled Statutes, 1895, sec. 1, art. 1, ch. 54.) There are further provisions in succeeding sections

of the same chapter in regard to filing in a designated office a sworn statement of the claim of lien. It has been held by this court in regard to these provisions: "One who claims the benefits of the mechanic's lien law must show a substantial compliance with each essential requirement thereof, one of which is that the sworn statement to be filed shall contain a description of the land upon which the labor was done or material was furnished, for the purpose contemplated by such law. A description of property in such statement which is entirely inapplicable to the land actually benefited cannot be made effective to any extent for the purpose of subjecting the land actually built upon to the operation of the lien claimed. (*Holmes v. Hutchins*, 38 Neb., 601, followed.)" "This rule holds good as well in favor of one who was the owner of the land at the time the improvements were erected as in favor of a subsequent purchaser." (*Bell v. Bosche*, 41 Neb., 853. See, also, *Holmes v. Hutchins*, 38 Neb., 601.) It is clear that under the terms of the section of the statute quoted above, lot 8, block 48, cannot be sold for labor done and material supplied on and for a building on the strip of land adjacent to it. The lien is confined to the building and the lot of land upon which it stands.

The statement of lien was defective, in that it wholly failed to describe the property on which stood the portion of the building on which had been incurred the greater portion of the expenses of which the account was the basis of the lien in suit. The question is not presented of the right to enforce the lien on lot 8, block 48, for so much of the account as may have been for material used and labor done on the part of the building which stands thereon. The trial court was not asked to consider it; neither is this court. Of the evidence introduced there was none from which a computation of the sum which might be adjudged chargeable against lot 8, considered separately from the adjacent strip of land, can be made; hence the statement of lien, when considered in connec-

tion with the evidence, must be pronounced so imperfect in its description of the premises against which it might have been made potential as to be unenforceable in this action.

An examination of the record discloses that the judgment against E. A. Leavenworth for the amount due on the account must be affirmed; and it was urged in the argument in the brief filed for the appellee that if any of the judgment or decree is affirmed, then all must be; that, all parties having appealed, if the decree is correct as to one appellant it must be affirmed as to all. In support of this contention our attention is directed to the rule in error cases that when a motion for a new trial is made jointly by two or more parties, if it cannot be allowed as to all it must be overruled as to all. (*Dorsey v. McGee*, 30 Neb., 657.) Also, "A joint assignment of error in a petition of error made by two or more persons which is not good as to all who joined therein will be overruled as to all." (*Gordon v. Little*, 41 Neb., 250.) In the body of the opinion in *Dorsey v. McGee, supra*, it was observed in regard to the rule: "The reason for this is that to make a ruling, judgment, and decision of a trial court overruling and denying a motion a ground of reversal on error, the motion must be presented to the court in the very terms in which it ought to be sustained and allowed. This is not the case where a motion is made jointly by two parties, one of whom is not entitled to a favorable ruling thereon, although the other one is entitled to such ruling." If this is the reason for the rule, then it does not apply to an appeal; for in an appeal the appellate court does not merely review the actions of the trial court, but reexamines the questions presented,—in effect affords a retrial of them. It has been said of an appeal: "The term 'appeal' is, in the several states, used in very different senses, and has to a great extent, in statutes and decisions, lost its distinctive meaning, having become the generic term for all forms of rehearing, or else nearly or quite synonymous with 'error' or 'new trial'" (2 Am. &

Eng. Ency. of Law [2d ed.], 425-6, note; *Swenson v. Girard Fire & Marine Ins. Co.*, 4 Colo., 478); but, on the other hand, "An appeal is a process of civil law origin, and removes a cause entirely, subjecting the fact, as well as the law, to a review and retrial." (*Wiscart v. D'Auchy*, 3 Dallas [U. S.], 327*.) "It is in fact granting a new trial, upon the same issue, in a higher court." (*Rawson v. Adams*, 17 Johns. [N. Y.], 131; Winfield, Adjudged Words and Phrases, p. 38.)

There is a clear distinction made in the Code of Civil Procedure of this state between proceedings by petition in error and appeal. See the Code of Civil Procedure, under titles "Error in Civil Cases," and "Appeals from the District to the Supreme Court;" and the distinction has been recognized by this court in its opinions. (See *McHugh v. Smiley*, 17 Neb., 626; *Polk v. Covell*, 43 Neb., 884.) In an appeal in this state the hearing in the appellate court may be said to be a trial *de novo*,—a retrial of the same issues on the same record, subject, however, to the rule in regard to questions of fact that the supreme court, though trying a case *de novo* on appeal, will not disturb the finding of a district court based on conflicting evidence unless such finding is clearly wrong (*Gadsden v. Phelps*, 37 Neb., 590; *Swartz v. Duncan*, 38 Neb., 782; *Steinkraus v. Korth*, 44 Neb., 777; *Johnson v. McLennan*, 43 Neb., 684), which is but saying that in the examination of an appeal in the supreme court the findings of the trial court on questions of fact will be accorded great weight,—will be conclusive, unless there is a preponderance of the evidence against them and they are palpably erroneous.

We can discover no valid reasons why all parties concerned may not appeal and remove a cause to the higher court for a retrial of the issues and such judgment be entered as the appellate court may determine should be rendered, although the judgment in the appellate court may not in some particulars, as in the present case, affect all parties to the appeal in the same manner or to the same extent.

The decree of the district court, in that it accorded a judgment against E. A. Leavenworth on the account in suit and for costs is affirmed. In all other respects it is reversed, and, as to the appellants other than E. A. Leavenworth, the cause is dismissed, all costs as to such parties to be taxed to the appellee.

JUDGMENT ACCORDINGLY.

ANHEUSER-BUSCH BREWING ASSOCIATION, APPELLEE, V. BENNETT HIER ET AL., APPELLANTS.

FILED OCTOBER 20, 1897. No. 7458.

1. **Money in Court:** CREDITORS' BILL. An action in equity will not lie to subject to the payment of the claims of a creditor money held by the clerk of the court in his official capacity.

2. ———: ———. The second subdivision of the syllabus in *Weaver v. Cressman*, 21 Neb., 675, disapproved.

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

The opinion contains a statement of the case.

F. I. Foss and *W. R. Matson*, for appellants:

The money in the hands of the clerk of the district court being *in custodia legis*, cannot, in equity, be subjected to payment of plaintiff's claim. There was an adequate remedy at law. (*Tuck v. Manning*, 22 N. E. Rep. [Mass.], 1001; *Dubois v. Dubois*, 6 Cow. [N. Y.], 496; *Hanna v. Bry*, 5 La. Ann., 651; *Murrell v. Johnson*, 3 Hill [S. Car.], 12; *Wehle v. Connor*, 83 N. Y., 231; *Leroux v. Baldus*, 13 S. W. Rep. [Tex.], 1019; *Curtis v. Ford*, 14 S. W. Rep. [Tex.], 614; *Wilbur v. Flannery*, 60 Vt., 581; *Nolte v. Van Gassy*, 15 Ill. App., 230; *Langdon v. Lockett*, 6 Ala., 727; *Lord v.*

Collins, 79 Me., 227; *Clarke v. Shaw*, 28 Fed. Rep., 356; *Hill v. La Crosse & M. R. Co.*, 14 Wis., 291; *Dawson v. Holcombe*, 1 O., 275; *Reddick v. Smith*, 3 Scam. [Ill.], 451; *Chapin v. James*, 11 R. I., 86; *Van Winkle v. Udall*, 1 Hill [N. Y.], 559; *Birdseye v. Ray*, 4 Hill [N. Y.], 158; *Van Loan v. Kline*, 10 Johns. [N. Y.], 129; *Hartwell v. Bissel*, 17 Johns. [N. Y.], 128; *Dubois v. Harcourt*, 20 Wend. [N. Y.], 41; *Streling v. Welcome*, 20 Wend. [N. Y.], 238; *Cumberland Bank v. Hann*, 19 N. J. Law, 166; *Winegardner v. Hafer*, 15 Pa., 144; *Hagan v. Lucas*, 10 Pet. [U. S.], 400; *Pierce v. Scott*, 4 Watts & S. [Pa.], 344; *Sweetzer v. Claflin*, 74 Tex., 667; *Gaither v. Ballew*, 4 Jones Law [N. Car.], 488; *Adams v. Newell*, 8 Vt., 190; *Thompson v. Brown*, 17 Pick. [Mass.], 462; *Hackley v. Swigert*, 41 Am. Dec. [Ky.], 256; *Daley v. Cunningham*, 3 La. Ann., 55; *Glenn v. Gill*, 2 Md., 1; *McKenzie v. Noble*, 13 Rich. [S. Car.], 147; *Goodrich v. Church*, 20 Vt., 187; *Alston v. Clay*, 2 Haywood [N. Car.], 360; *Turner v. Fendall*, 1 Cranch [U. S.], 117; *Tooke v. Newman*, 75 Ill., 215.)

Abbott & Abbott, contra, cited: *Weaver v. Cressman*, 21 Neb., 675.

NORVAL, J.

The plaintiff and appellee, the Anheuser-Busch Brewing Association, recovered a judgment in the county court of Saline county against Bennett Hier and J. A. Derse for $891.96. An execution was issued thereon, which was returned by the sheriff wholly unsatisfied for want of property of the execution debtors whereon to make a levy. It is also disclosed that said Hier commenced in the district court of Saline county an action by attachment against the said Derse, which terminated in favor of Hier; that the attached property was sold, and the proceeds arising therefrom, amounting to about $900, were paid into said court and into the hands of the clerk thereof, Albert N. Dodson, one of the defendants herein, who holds the same in his official capacity. This was an action in

equity to subject the said amount in Dodson's hands to the payment of the judgment in favor of the Anheuser-Busch Brewing Association against Hier. The defendants have appealed from the decree rendered against them.

If the money in controversy is not *in custodia legis*, it is conceded that this action cannot be maintained, since the remedy by garnishment would be adequate. The contention of plaintiff is that this money is held by defendant Dodson in his official capacity as clerk of the district court, and cannot be reached by means of the process of garnishment, but that relief may be had in this form of action. It was said in *Weaver v. Cressman*, 21 Neb., 675, that while ordinarily funds held by the clerk of the court in his official character are not subject to garnishment, a court of equity, in a proper case, may subject such funds to the payment of the claim of a creditor. It is perfectly plain that the statement in the opinion upon the subject is mere *obiter*, and unnecessary to a decision of the case. Relief was denied for the reason, among others, that no judgment had been recovered in this state, and the debtor was not made a party defendant to the proceedings. The rule that personal property *in custodia legis* is not subject to attachment or garnishment was adopted for the protection of the officer, and to avoid collision of authority and conflict of title. And the same principle forbids the maintaining of an independent equitable action to subject money in the hands of the clerk of the court in his official character. Our Code contains very liberal provisions relating to intervention. It seems to us that the proper practice would have been for the plaintiff to have intervened in the case of Hier against Derse, and asserted its claims to the fund in controversy and obtained an adjudication of the question therein. This mode of procedure would have afforded ample protection to the officer, as well as avoided any possible conflict of authority or jurisdiction. No case has been cited by counsel, nor by diligent search have we been able to find a single one, in which money in the custody of the

law has been subjected to the claim of a creditor by means of an action like the one before us. We do not think it can be maintained on principle. The decree is reversed and the action dismissed.

REVERSED AND DISMISSED.

CHARLES KLOSE V. C. H. BOGUE ET AL.

FILED OCTOBER 20, 1897. No. 7491.

Review: SUFFICIENCY OF EVIDENCE. There is involved in this case only a question of fact, and the evidence being sufficient to support the finding of the trial court, the judgment is affirmed.

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

W. A. Prince, for plaintiff in error.

W. H. Thompson, *contra.*

NORVAL, J.

A single question is presented for review, which is that the verdict is unsupported by the evidence. The action was by Charles Klose to recover the sum of $423.08 as a balance alleged to be due him on the purchase price of 192,000 bricks at $8.25 per 1,000. There is no controversy over the number of bricks sold and the price per 1,000. It it undisputed that $1,160.92 had been paid plaintiff prior to the bringing of this suit. The defense interposed is that the bricks were sold to one S. D. Kelley, and not to defendants, and that the contract was that plaintiff was to accept, as part of the consideration, lot 16, in block 11, College Addition to West Lawn, in the city of Grand Island, at the agreed price of $250; that subsequently defendants, at the request of Kelley, agreed to pay for the bricks the sum of $1,584, less $250, the price of

the lot; that they have paid $1,160.92, and tendered plaintiff a warranty deed to the lot in question, and $173.08, and kept the tender good by bringing the deed and money into court and depositing the same with the clerk thereof. The proofs, while conflicting, are ample to sustain the defense and the findings of the trial court. It can serve no useful purpose to set out the testimony of the several witnesses, or review the same here.

It is argued that the contract, so far as it related to the acceptance of the lot as a part of the consideration, is within the statute of frauds and void, since the agreement was oral and no note or memorandum thereof was reduced to writing. A sufficient answer to this contention is that the evidence tends to show that defendants have complied with their agreement, the deed for the lot has been executed and tendered, and plaintiff has fully performed by the delivery of the bricks. The action is not to enforce the specific performance of a contract claimed to be void under the statute, but which defendants have fully executed. The judgment is right and it must be

AFFIRMED.

DWIGHT H. HURLBURT V. STATE OF NEBRASKA.

FILED OCTOBER 20, 1897. No. 9363.

1. **Larceny:** VENUE. Where property is stolen in one county of this state and is taken by the thief into another, he may be prosecuted and convicted in either county.

2. ———: ———: INFORMATION. Where goods are stolen in one county and carried into another, it is sufficient to lay the offense in the county of the prosecution without setting out the transaction in the other county.

3. **Indictment and Information.** Averments in an information of matters which are immaterial, and not necessary ingredients of the offense charged, may be rejected as surplusage.

4. ———: COUNTS: VERDICT. A general verdict of guilty against a defendant on an indictment consisting of two or more counts which

charge a single offense, is sufficient without specifying the count on which the jury find him guilty.

5. ———: ELECTION AS TO COUNTS. Where an information contains two counts charging one offense, the prosecutor is not obliged to elect upon which count he will rely for a conviction.

ERROR to the district court for Scott's Bluff county. Tried below before GRIMES, J. *Affirmed.*

R. C. Noleman, for plaintiff in error.

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

NORVAL, J.

Dwight H. Hurlburt was tried and convicted of horse stealing in the district court of Scott's Bluff county. The amended information contained two counts, each charging the defendant with the larceny of the same horses in Scott's Bluff county. In the second count it is alleged that the accused, "on or about the 8th day of May, A. D. 1896, in the county of Cheyenne and state of Nebraska, did unlawfully and feloniously steal, take, drive, and lead away three yearling horse colts, * * * all of the value of twenty dollars and more, and all being the personal property of William H. Swan, and thereafter did unlawfully and feloniously take, lead, carry, and drive said colts, so stolen, into Scott's Bluff county, state of Nebraska, and did then and there, on or about the 19th day of June, A. D. 1896, in said county of Scott's Bluff, unlawfully and feloniously take, steal, carry, lead, and drive away said personal property of William H. Swan, all of the value of ($20) twenty dollars and more, and being the same personal property described in the first count of this information." The first count differed from the above in that it laid the original larceny in Box Butte county, instead of the county of Cheyenne.

It is insisted that the district court of Scott's Bluff county did not have jurisdiction to try the cause, since

the information affirmatively shows that the original larceny of the property was committed in another county; and there is no statute in this state which authorizes a prosecution for larceny in any county where the stolen property may be found in the possession of the thief. It required no statutory provision to confer jurisdiction upon the district court of Scott's Bluff county to try and determine this cause. If the offense was not committed in that county, no statute could authorize the bringing of the prosecution in such county. (*Olive v. State*, 11 Neb., 1; *State v. Crinklaw*, 40 Neb., 759.) For by section 11 of the bill of rights of the constitution of this state a criminal prosecution must be instituted in the county or district where the crime is alleged to have occurred. The crime is laid in the information in Scott's Bluff county. It is true the allegation is that the property in controversy was first stolen by the defendant in another county, but it is likewise charged that the property was taken by the accused into Scott's Bluff county, and that he there stole the same. For the purposes of prosecution and trial the offense is regarded as having been committed in that county. The rule is,—and such was the practice at common law,—that when property is stolen in one county, and it is afterwards found in possession of the thief in another county, he may be prosecuted and convicted in either county, but not in both. (*Hamilton v. State*, 11 O., 435; *State v. Ellis*, 3 Conn., 185; *State v. Bartlett*, 11 Vt., 650; *State v. Bennett*, 14 Ia., 479; *State v. Douglas*, 17 Me., 193; *State v. Ware*, 62 Mo., 597; *State v. Smith*, 66 Mo., 62; *Lucas v. State*, 62 Ala., 26; *Commonwealth v. Rand*, 7 Met. [Mass.], 475.) It is well settled that the offense of larceny is committed in every county into which the thief carries the stolen property. Each asportation into another county is a new and fresh theft. (*Supra.*) In each count the defendant is charged with the larceny of the property in Scott's Bluff county. That alone was sufficient. It was unnecessary to have stated in the information the county in which the original larceny occurred.

(2 Bishop, Criminal Procedure, sec. 727, and cases there cited.) The averments relating to the original stealing in counties other than the one where the prosecution was brought being immaterial, and not necesssary ingredients of the offense charged, may be rejected as surplusage. (*State v. Kendall*, 38 Neb., 817; *Tracy v. State*, 46 Neb., 361; *State v. Harris*, 11 S. E. Rep. [N. Car.], 377; *Snell v. People*, 29 Ill. App., 470; *Adams v. State*, 13 S. W. Rep. [Tex.], 1009; *State v. Kern*, 51 N. J. Law, 259; *State v. Broughton*, 13 So. Rep. [Miss.], 885.) After eliminating from the information the redundant and immaterial averments, there is no repugnance between the two counts.

A general verdict of guilty was returned, without specifying the count of the information under which the defendant was convicted. There was no error in this. But one larceny was charged to have been committed within the county where the trial took place; hence it was not necessary for the jury to have passed upon each count of the information separately. (*Candy v. State*, 8 Neb., 482; *Griffen v. State*, 46 Neb., 282; 1 Bishop, New Criminal Procedure, sec. 1015*a*; *Commonwealth v. Desmarteau*, 82 Mass., 1; *State v. Baker*, 70 N. Car., 530; *Brown v. State*, 105 Ind., 385; *State v. Rounds*, 76 Me., 123.)

There was no error in overruling the motion to require the state to elect upon which count it would proceed to trial because only one crime is charged. (*Candy v. State*, 8 Neb., 482.)

The assignments relating to the rulings of the court upon the admission and exclusion of testimony, not having been argued in the brief or at the bar, are deemed waived.

It is finally insisted that the record is defective, in that the transcript does not give the names of the jurors who tried the cause. This point cannot be considered, for the reason that it does not appear that a full and complete transcript of the proceedings in the lower court is before us. The clerk of the district court merely authenticates certain enumerated papers and one journal entry. For

all that is disclosed by this transcript, the names of the trial jurors are entered upon the record in the court below. No reversible error appearing, the judgment is

AFFIRMED.

CHARLES FERGUSON V. STATE OF NEBRASKA.

FILED OCTOBER 20, 1897. No. 9229.

1. **Burglary:** BREAKING. It is a familiar principle that a breaking necessary to constitute the crime of burglary may be by any act of physical force, however slight, by which the obstruction to the entering is removed.

2. ———: ———. The lifting of a hook with which a door is fastened, or the opening of a closed door in order to enter a building, is a "breaking" within the accepted definition of burglary, although the entry might have been effected through a door already open.

3. **Instructions:** HARMLESS ERROR. A slight error in an instruction will not work a reversal where it is evident that the party complying could not have been prejudiced thereby.

4. **Burglary:** TIME: INFORMATION. Proof that the burglary was committed on the precise day laid in the information is not essential to a conviction. It is sufficient if it be proved that the crime was committed within the period limited by statute for the prosecution of the offense.

5. ———: ———. INSTRUCTIONS. In a prosecution for burglary it is not error to instruct the jury that it is sufficient to find that the crime was committed "on or about" the date charged in the information, or at any date within the statute of limitations.

6. ———: INSTRUCTIONS. *Held*, That instruction No. 8 given by the court on its own motion does not assume that a burglary had been committed. *Metz v. State*, 46 Neb., 547, distinguished.

7. **Reasonable Doubt:** INSTRUCTIONS. An instruction which defined a reasonable doubt as being an actual, substantial doubt of guilt arising from the evidence or want of evidence in the case, upheld.

8. **Instructions:** FAILURE TO REQUEST. One cannot predicate error upon a vague instruction unless he has requested a proper one.

9. **Criminal Law:** FAILURE OF ACCUSED TO TESTIFY: INSTRUCTIONS. Where, in a criminal prosecution, a defendant does not testify in his own behalf, it is not reversible error for the trial court to

mention such neglect or omission in its instructions, when followed in the same connection with the direction that "nothing must be taken against him because he had not so testified."

10. **Alibi:** FAILURE TO REQUEST INSTRUCTION. It is not reversible error to fail to instruct on the subject of an alibi, where no request to charge upon that feature of the case has been tendered.

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

Bane & Altschuler, for plaintiff in error.

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

NORVAL, J.

The defendant, Charles Ferguson, was prosecuted for, and found guilty of, the crime of burglary; and from a judgment of conviction error proceedings have been prosecuted to this court. The information charges the crime to have been committed by breaking and entering, in the night-season, a certain barn owned by Adolph Zimmerer, with the intent to commit a larceny.

The first contention is that the evidence is insufficient to sustain the verdict. The testimony adduced by the state on the trial, and which is incorporated in the bill of exceptions, establishes beyond a shadow of doubt that during the night of the 28th day of May, 1896, the accused entered the barn of the prosecuting witness, in Otoe county, and stole therefrom a set of harness; that the door through which the entry was effected was a double door, sawed in two parts, one being immediately above the other. In the evening in question the upper door was left standing open, while the other was fastened, closed with a hook and staple; that the defendant raised this hook and opened the lower door in order to enter the barn. The point is made, in argument, that this did not constitute a breaking and entering, or a burglary, because the upper door being open at the time,

there was no obstruction of the free ingress to, or egress from, the barn. That a person could have bounded over the lower door and entered the building is wholly immaterial, unless the entrance was actually effected in that manner, which the proofs disclose was not the case. The question was not whether the defendant could have entered the barn without a breaking had he so desired, but did the lifting of the hook and opening the door which it fastened constitute a breaking within the meaning of the law? The answer must be in the affirmative. (*State v. O'Brien*, 81 Ia., 88.) In *Metz v. State*, 46 Neb., 547, it was decided that a breaking, to constitute the crime of burglary, may be by any act of physical force, however slight, by which the obstruction to entering is removed. This is a familiar principle of criminal law, and applying it to the facts in this case, there is no room to doubt that there was a "breaking" within the definition of burglary.

In the sixth instruction the jury were told that if the defendant, with a felonious intent, entered the barn "by opening a door or removing a window," it constituted burglary. The instruction is not assailed because it gave an incorrect definition of the crime charged, but that the use of the words "or removing a window," injected a matter not in evidence. This criticism is well founded, but we are unwilling to predicate a reversal upon that slight error, since it is very evident that the rights of the defendant were in no manner prejudiced by this slight inaccuracy in the instruction. (*Converse v. Meyer*, 14 Neb., 190; *Powder River Live Stock Co. v. Lamb*, 38 Neb., 339; *Debney v. State*, 45 Neb., 856.)

Exception is taken to the giving of the following instruction: "7. The court instructs the jury that the allegation of time in the information filed in this case is only material for the purpose of fixing the commission of the crime within the statute of limitations, which, in the state of Nebraska, is three years for the crime of burglary. And if you find from the evidence, beyond a reasonable doubt, that the defendant forcibly, feloniously, and bur-

glariously, did, on or about the 28th day of May, 1896, in the night-season, at the place charged in the information, break and enter the barn of Adolph Zimmerer by opening a closed door, as explained in these instructions, and after so entering said barn of said Adolph Zimmerer, did feloniously take therefrom any property of any value belonging to said Adolph Zimmerer, then your verdict should be guilty as charged in the information." The objection to this portion of the charge is two-fold: (1.) The authorization of a conviction if the offense was committed at any time within the statute of limitations is claimed to be wrong. The decisions are the other way. The identical question was passed upon in *Palin v. State*, 38 Neb., 862, where this language was used: "The allegation in the information as to the time the crime was committed is not material. The state was not required to prove that the transaction occurred on the day alleged, but it is sufficient if proven to have been committed within the time limited by the statute for the prosecution of the offense." In *Yeoman v. State*, 21 Neb., 171, the same principle was stated and applied. The question has been set at rest by those decisions, if, indeed, it was ever a doubtful one in this state. (2.) The instruction quoted is further criticised for the use of the words "on or about." Time was not of the essence of the offense and it was not error to direct the jury that it was sufficient to find that the crime was committed on or about the time charged in the information. (*State v. Fry*, 67 Ia., 475; *State v. Williams*, 43 Pac. Rep. [Wash.], 15; *State v. Thompson*, 27 Pac. Rep. [Mont.], 349; *State v. Harp*, 3 Pac. Rep. [Kan.], 432.)

The next assignment of error relates to the giving of the following portion of the eighth instruction: "8. The jury are instructed that under an information for burglary the accused may be found guilty of larceny, and if in this case the jury are not satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the burglary as charged in the information, still, if

the jury believe from the evidence, beyond a reasonable doubt, that the defendant did steal the goods described in the information, from the possession of the said Adolph Zimmerer, then the jury may, under this information, find the defendant guilty of larceny." The objection brought forward against the foregoing is that it assumed a burglary had been committed, and withdrew that question of fact from the consideration of the jury, and *Metz v. State*, 46 Neb., 547, is relied upon to sustain the argument. This criticism is absolutely without foundation. From the language complained of no fair inference can be drawn that the trial court assumed or stated as a fact that a burglary had been committed by any one, much less by the defendant. That question was left for the jury to ascertain from the evidence, and if they failed to find that the crime of burglary had been committed, as charged in the information, then the jury were directed to ascertain and determine whether or not the accused was guilty of larceny of the harness. The decision in the Metz case lacks analogy. There the trial court instructed the jury: "If you believe from the evidence, beyond a reasonable doubt, that soon after the burglary of the storehouse or warehouse of the said Jasper N. Binford, and the larceny of the corn therefrom, portion of the said corn so stolen was in the exclusive possession of the defendant George Metz, you are instructed that this circumstance, if so proven, is presumptive, but not conclusive, evidence of the defendant's guilt." Undoubtedly the foregoing practically told the jury that a burglary had been committed at the storehouse, and that the corn had been stolen therefrom; and this court so held. The mere quoting of the two instructions is sufficient to make plain that the case cited has no bearing upon the question under consideration.

The ninth instruction is assailed, which is in this language: "9. You are instructed that by the words 'reasonable doubt,' as used in these instructions, is meant an actual, substantial doubt of guilt arising from the evi-

dence, or want of evidence, in the case." The objection raised by counsel for the accused to this instruction is that "it is impossible to tell from the instruction whether the doubt of guilt must arise from the evidence on the part of the state, or want of evidence on the part of the defendant." The court's definition of a reasonable doubt will not bear any such interpretation. The idea plainly conveyed by this portion of the charge is that if the jury, on the consideration of the evidence introduced by the state and defense, or for any lack of evidence in the case, entertain a reasonable doubt of the guilt of the accused, there must be an acquittal. The court's definition of a "reasonable doubt" was in form approved by this court in *Langford v. State*, 32 Neb., 782.

Objection is made to the tenth instruction given by the court on its own motion, which reads: "10. You are instructed that the defendant has not testified on his own behalf in this case as he had a lawful right to do. Nothing must be taken against him because he has not so testified." Two criticisms are urged against the giving of this portion of the charge: First, That it is too indefinite and uncertain; second, that without a request it was error for the court, in any manner, to refer to the fact that the defendant had not himself given testimony in the case. If counsel for accused did not regard the words, "nothing must be taken against him because he has not so testified," sufficiently specific and definite, he should have drafted and presented to the court an instruction embodying his views upon the point. Having failed to do so, he cannot complain of the vagueness of the instruction. (*Gran v. Houston*, 45 Neb., 813; *Carter White Lead Co. v. Kinlin*, 47 Neb., 409.) The provision of the statute relied upon in support of the second objection to said instruction is section 473 of the Criminal Code, which provides: "In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent

witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal." The argument of the prisoner's counsel is that this statute expressly prohibits any reference whatever being made to the fact that the defendant omitted to testify, at least unless there is a request for an instruction to that effect; and in support of the point is cited the case of *State v. Pearce*, 57 N. W. Rep. [Minn.], 652. In *Metz v. State*, 46 Neb., 547, a reversal was sought on the ground that the court failed to instruct that the neglect of the defendant to testify created no presumption against him. The court quoted section 473 of the Criminal Code, and said: "The defendant having availed himself of the protection of the statute he might have requested the court to instruct the jury that no presumption of guilt arose from his failure to testify; but he did not request the court to so charge, and error cannot be successfully assigned upon the omission of the court to give such an instruction on its own motion." The fair and reasonable inference to be drawn from this language is that it is discretionary with the trial judge whether he will instruct, or will not charge, the jury upon the question where no request has been made to so instruct. And counsel for defendant concede that with a request for such an instruction by the accused, it may be properly given. It is evident that if the court had the right to give such instruction, had it been requested to do so by the defendant, it was not reversible error to give it in the absence of such request. Under the statute of this state persons upon trial for crime may, at their own request, but not otherwise, be competent witnesses. The failure of a prisoner to avail himself of the right to be sworn and testify in his own behalf the legislature has declared shall create no presumption against him, and that no reference shall be made to it, nor any comment upon such neglect or refusal. Certainly it would be reversible error for the prosecuting officer to allude to the fact that the defendant had failed to be

sworn, or for the judge to refer to it, or comment upon such omission in his instructions unless explained to the jury in the same connection by a direction that the omission to be a witness created no presumption of guilt against the accused, or by the use of some other equivalent statement of the effect of the statute. When a prisoner is not sworn it is the duty of the court to inform the jury, if requested to do so, that they are not to draw any inference of guilt from the fact that he did not testify. If the jury in the case at bar had not been so directed, they might have regarded, as a criminating circumstance, the fact that he had not been sworn. The instruction, instead of being prejudicial to the accused, was favorable to him. The Minnesota case* cited by counsel is predicated upon a law materially different from the section of the statute of this state relating to the question of a defendant being sworn in his own behalf on a criminal trial. In that state the court as well as the prosecuting attorney is prohibited by express statutory provision from making any reference or comment upon the neglect or refusal of defendant to testify. Our statute is not so broad. It does not forbid the trial court from stating the fact of the omission to testify, and informing the jury, in the same connection, that no presumption of guilt should be indulged from such omission or neglect. The statute of Illinois upon the subject provides: "A defendant in a criminal case or proceeding shall at his own request be deemed a competent witness, and his neglect to testify shall not create a presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." The supreme court in that state, in *Farrell v. People*, 24 N. E. Rep., 423, construing said statute, which is almost in the same language as our own, held: "When defendant does not testify, it is reversible error to refuse to instruct the jury that no presumption of guilt should be indulged against him on that account." There was no prejudicial error in giving the tenth instruction in the case before us.

**State v. Pearce*, 57 N. W. Rep., 652.

The next assignment relates to the failure of the court to instruct the jury upon the defense of an alibi. No instruction having been requested upon this branch of the case, error cannot be successfully assigned upon the omission of the court to instruct the jury on the law of an alibi. (*Hill v. State*, 42 Neb., 503; *Housh v. State*, 43 Neb., 163; *Metz v. State*, 46 Neb., 552; *Pjarrou v. State*, 47 Neb., 294.)

We have carefully considered the other assignments of error which relate to the rulings of the court upon the admission of testimony and find nothing therein prejudicial to the rights of the accused. The judgment is

AFFIRMED.

W. E. DORRINGTON ET AL. V. JOHN W. POWELL.

FILED OCTOBER 20, 1897. No. 7498.

1. **Factors and Brokers:** CONTRACT TO MAKE SALE: COMPENSATION. In an action for the recovery of an agreed compensation to be paid on the making of a sale or disposition of property, a broker is not entitled to recover for merely finding a purchaser, where the sale failed of consummation.

2. ——: ——: ——. A party cannot recover on a *quantum meruit* where he pleads and relies on the trial solely upon a special contract.

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

Reavis & Reavis, for plaintiffs in error.

F. Martin, contra.

RYAN, C.

As this case was tried in the district court of Richardson county on the same pleadings that it had been determined upon in the county court of that county, it

will be necessary to describe them but once in a general way. John W. Powell, by his petition, claimed of the defendants, W. E. Dorrington and David D. Reavis, partners doing business under the firm name of Dorrington & Reavis, the sum of $225, with interest. His cause of action was stated in the following language: "On the 10th day of January, 1893, the plaintiff entered into the service of the defendants at their request as agent to sell and dispose of certain goods of the value of $8,000, there in a storeroom in the city of Falls City, Richardson county, Nebraska, for which the defendants agreed to pay the plaintiff the sum of $225. The plaintiff sold said goods for the benefit of the defendants and has duly performed all the conditions in the contract on his part to be performed." Following the above averments there were allegations of a refusal to pay, and a prayer for judgment in the sum of $225 and interest. The answer was a general denial. There was a verdict and judgment in favor of Powell in the sum of $112.50, for the reversal of which judgment Dorrington & Reavis have prosecuted error proceedings to this court.

On the trial, to sustain his action, Powell introduced in evidence a paper of which the following is a copy:

"This agreement, made this 10th day of July, 1893, between W. E. Dorrington and David D. Reavis, of the first part, and F. S. Colby, witnesseth: That said first party agrees to sell to said second party their full stock of furniture, carpets, coffins and hearse, and all undertaker's goods at wholesale cash prices, including hearse, and on all damaged goods a reduction shall be made in proportion to the amount of the damages; and second party agrees to pay for the same as follows: Said first party to have the option of taking all of three separate tracts of land in Kansas, described as follows, to-wit: South ½ of the southwest ¼ sec. 2, and the E. ½ of the S. E. ¼ of section 3, town 2, south of range 25, west. Cash. 160 acres in Norton Co. at $2,000 for said ¼ sec., subject to a mortgage of $1,200 (the R. G. Doom place, 6 miles south-

east of Kanona). Cash. 160 acres near Kanona, Decatur Co. at $12.50 per acre (south ½ of S. W. ¼ & N. E. ⅓ of the S. W. ¼ and the southeast of the N. W. ¼, sec. 9, town 2, south of range 29). Cash. 160 acres near Oberlin, Decatur Co., at $8 per acre. Said two last pieces are clear of incumbrances. Also a house and two lots in Lincoln, Neb., described as follows: Lots 5 and 6, block 88, University Place, Lincoln, Neb., at $3,000, clear. Of the said house and lots below trade of land—and the balance over and above such amounts and up to the invoice of said store, to be paid in cash by the second party, it is understood that all over the property and $2,500 cash, said Dorrington and Reavis will take good secured notes. Said invoice to be made and this contract carried out as soon as said first party can personally examine said property and the said invoice be made.

"Each of said parties hereto agree to place in the hands of J. W. Powell the sum of $100, which sum shall be forfeited by the party refusing to execute this contract, and be paid by said Powell to the party willing to carry out this contract. * * * The price of all goods that cannot be agreed upon shall be left to some wholesale furniture house. Hearse to be taken at the present value.

"W. E. DORRINGTON.
"DAVID D. REAVIS.
"S. F. COLBY.

"Witness: JOHN W. POWELL.

"We, the undersigned, agree to take the Lincoln property and one hundred and sixty acres north of Oberlin, Kansas, Decatur Co., as looked at and above described.

"DORRINGTON & REAVIS,
"By W. E. DORRINGTON."

It is observable that the value of the property to be transferred to Colby was not fixed by the above agreement. That fact was afterwards to be determined. The property itself was described in general terms, and when the parties attempted to fix values there arose a dispute as to whether or not certain property which Dorrington

& Reavis insisted Colby should take was within the scope of the general terms above noted. This property was a hearse, house, refrigerator, and some walnut lumber. While this property does not seem to have been of great value, the difference in respect to it prevented the consummation of the sale. Plaintiff alleged that the property sold was of the value of $8,000, and certainly by this statement he at least should be bound. Dorrington & Reavis agreed to accept the 160 acres near Oberlin at $8 per acre, and the Lincoln property at a valuation of $3,000. This covered $4,280 of the consideration to be paid by Colby. He was also to pay $2,500 in cash. This made the amount as to which the media of payment was agreed upon $6,780. The balance of the consideration (which, under the averments of the plaintiff's petition, must be assumed to be at least $1,220) Dorrrington & Reavis agreed to take in good secured notes. In view of these matters of difference, the contract to sell was not complete. In *Wallingford v. Burr*, 15 Neb., 204, the principles applicable, as stated in the syllabus, are in this language: "When anything remains to be done between the buyer and seller before the goods are to be delivered, a present right of property does not attach in the buyer. An agreement to sell and transfer property at prices to be afterwards determined is an executory contract." The jury were instructed, in effect, that if the agreement between plaintiff and defendants was that plaintiff should find a purchaser for or make a sale of the property, plaintiff would be entitled to recover the usual or regular commission paid for finding such purchaser or making such sale. This was erroneous in two respects. There was in the petition no averment of a contract to find a purchaser. The undertaking of plaintiff, as he himself described it, was to sell and dispose of the property. The instruction therefore recognized a right of recovery for services for the rendition of which plaintiff had asserted no claim. Again, the right of recovery was in the petition based solely on a special contract which was pleaded,

and under these issues an inquiry as to the usual or regular commission on sales was wholly irrelevant. (*Imhoff v. House*, 36 Neb., 28; *Powder River Live Stock Co. v. Lamb*, 38 Neb., 339; *Mayer v. Ver Bryck*, 46 Neb., 221; *Smith v. Brown*, 46 Neb., 230.)

Because of the errors indicated, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND DISMISSED.

GAGE COUNTY V. J. E. HILL ET AL.

FILED OCTOBER 20, 1897. No. 7508.

Orders of County Boards in Passing on Claims: CONCLUSIVENESS. The facts and questions of law in this case are in all respects similar to those in *Sioux City v. Jameson*, 43 Neb., 265, and, on the authority of that case and of others cited which approve its doctrine, the judgment of the district court rendered herein is affirmed.

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

R. W. Sabin, for plaintiff in error.

Griggs, Rinaker & Bibb, contra.

RYAN, C.

This action was brought in the district court of Gage county on the official bond of J. E. Hill as county clerk of said county for his alleged failure to account for and pay over the fees of his office in excess of the sum of $4,200, the amount which he might lawfully retain for the compensation of himself and his deputy. In the answer there were averments that said Hill, during the entire period of his office, had made full and complete settlements with the county board of said county while

such board was in session, and had fully, completely, accurately, and faithfully accounted to the said board for the several sums for which the action was brought; that the amounts ascertained on said settlements to be due from said Hill had been paid by said Hill to the person and officers entitled to receive the same, and that he had, at the termination of his term of office, fully accounted for all sums found by said board to be in his hands, and by said board he had, at the expiration of his said term of office, been discharged for all moneys, fees, and warrants received by him during the term of his office.

There was a general demurrer to this answer, which was overruled, and the county electing to stand thereon there was a judgment for the defendants dismissing the action. The contentions of the county presented by its petition in error are fully met by *Sioux County v. Jameson*, 43 Neb., 265, and the cases therein cited, as well as by the subsequently considered cases of *Heald v. Polk County*, 46 Neb., 28; *Ragoss v. Cuming County*, 46 Neb., 36; *State v. Vincent*, 46 Neb., 408. The judgment of the district court is

AFFIRMED.

S. R. SMITH V. PEOPLE'S BUILDING, LOAN & SAVINGS ASSOCIATION.

FILED OCTOBER 20, 1897. No. 7493.

Affirmance in Absence of a Transcript of the Proceedings Below.

ERROR from the district court of Red Willow county. Tried below before WELTY, J. *Affirmed.*

W. R. Starr, for plaintiff in error.

W. S. Morlan, contra.

RYAN, C.

As there is in the record of this court nothing even purporting to be a transcript of the pleadings filed in this case in the district court of Red Willow county, the errors assigned by the plaintiff in error cannot be considered. (*Moore v. Waterman*, 40 Neb., 498; *Bell v. Beller*, 40 Neb., 501; *School District v. Cooper*, 44 Neb., 714.) The judgment of the district court is therefore

AFFIRMED.

J. L. MOORE V. FRANKLIN BOYER ET AL.

FILED OCTOBER 20, 1897. No. 7516.

Judicial Sale After Payment of Judgment: CONFIRMATION. Where the judgment defendant paid to the clerk of the district court the entire amount necessary to satisfy a judgment which has been rendered by such court, and such payment was so received by said clerk, by whom, however, no discharge of judgment was entered, *held*, that of the sheriff's sale subsequently made to the judgment plaintiff by virtue of said judgment as though unpaid, confirmation was properly refused.

ERROR from the district court of Dawes county. Tried below before BARTOW, J. *Affirmed.*

W. W. Wood and *Stewart & Munger*, for plaintiff in error.

I. N. Harbaugh and *Bane & Altschuler*, *contra.*

RYAN, C.

There was a decree of foreclosure in this case in the district court of Dawes county, followed in due time by a request for stay. Before the expiration of the period of stay fixed by statute the full amount of the judgment, interest, and costs were paid to the clerk of said district court. The payment noted was never credited on the judgment of foreclosure, but the clerk absconded without having paid the amount received for plaintiff. When the

period of stay expired the order of sale was placed in the hands of the sheriff, by whom the lands described in the decree were advertised and sold to the plaintiff. Confirmation was resisted because the sale had been made to plaintiff on a judgment which at the date of the sale had been fully satisfied. The district court refused to confirm the sheriff's sale and this error proceeding is prosecuted to reverse the order of refusal.

In *McDonald v. Atkins*, 13 Neb., 568, it was held that the receipt of money by a clerk of a court of record upon a judgment in his office is an official act, and that the failure to faithfully account for such money so received by him is breach of his bond for which his sureties thereon are liable. This being true it necessarily follows that the payment to the clerk in this case operated to discharge the judgment on which the money was paid, even though the payment was made to him in a bank whither he had gone to receive it. The order of the district court denying confirmation is therefore

AFFIRMED.

A. W. OCOBOCK, APPELLANT, V. A. H. BAKER ET AL., APPELLEES.

FILED OCTOBER 20, 1897. No. 7492.

1. **Judgment:** TIME LIEN ATTACHES: LIEN OF MORTGAGE. A term of a district court began on the 20th of November, during which a judgment was rendered, not by confession, in an action commenced prior to the beginning of the term. During said term, but before the rendition of the judgment, the judgment debtor mortgaged his real estate. *Held* (1) That the lien of the judgment attached against the real estate of the judgment debtor on the 20th day of November; (2) that the lien of the judgment was prior to the lien of the mortgage, though the latter was filed for record prior to the date of the rendition of the judgment. *Norfolk State Bank v. Murphy*, 40 Neb., 735, followed.

2. ———: ———: ———: SUBROGATION. Such judgment was a lien upon lands not covered by the mortgage, and the judgment creditor, with notice of the existence of the mortgage, released from

the lien of his judgment lands not covered by the mortgage of value sufficient to satisfy his judgment. At no time prior to the judgment creditor's releasing the lands from the lien of his judgment was he notified by the mortgagee that he would be required or expected to collect his judgment from the lands of the debtor upon which the mortgage was not a lien. *Held*, That the mortgagee was not entitled to be subrogated to the first lien of the judgment creditor against the land covered by the mortgage.

APPEAL from the district court of Hall county. Heard below before KENDALL, J. *Affirmed.*

George H. Thummel, for appellant.

References: 2 Pomeroy, Equity Jurisprudence, sec. 592; *Lodge v. Simonton*, 2 P. & W. [Pa.], 439; *Tardy v. Morgan*, 3 McLean [U. S.], 358; *Hill v. Epley*, 7 Casey [Pa.], 331; *May v. Hanks*, Phillips Eq. [N. Car.], 310; *Knapp v. Bailey*, 79 Me., 196; *Mulliken v. Graham*, 72 Pa. St., 484; *Curtis v. Mundy*, 3 Met. [Mass.], 405; *Inglehart v. Crane*, 42 Ill., 261.

R. R. Horth, W. H. Thompson, W. H. Platt, Charles G. Ryan, Abbott & Caldwell, and *W. A. Prince, contra.*

RAGAN, C.

This is an appeal from a decree of the district court of Hall county. The undisputed facts are briefly as follows: On November 20, 1893, A. H. Baker owned certain real estate in Hall county. On that date was begun a term of the district court of said county. During the term a judgment was rendered against Baker in favor of the Security National Bank. The judgment was not by confession and the action in which it was rendered was not commenced at or during the term at which the judgment was rendered. On December 2, 1893, Baker mortgaged certain real estate in said Hall county to A. W. Ocobock, which mortgage was duly filed in the office of the register of deeds of said county on said date. Subsequent to the filing of Ocobock's mortgage the bank released from the lien of its judgment a large amount of real estate sit-

uate in Hall county belonging to Baker, and which real estate was not covered by the Ocobock mortgage. The value of the real estate released by the bank from the lien of its judgment exceeded the amount of its judgment against Baker. At the time the bank released these lands from its judgment lien it had no actual knowledge of the existence of the Ocobock mortgage. Ocobock at no time prior to the bank's releasing its judgment liens notified it that he desired it would first exhaust its liens upon the lands of Baker not covered by his mortgage; nor that he should require it, the bank, to first exhaust the lands of Baker on which he, Ocobock, had no lien. The lands covered by the Ocobock mortgage are not of sufficient value to pay the debt secured and the bank's judgment.

During the month of December, 1893, one Vest was the cashier and managing officer of the bank. During that month there was a daily publication, or "daily report," circulated among subscribers in the city of Grand Island, where the bank was situated, of the transactions occurring the previous day in the office of the register of deeds, so far as the same affected conveyances and incumbrances of real estate. This daily publication, or report, gave the names of the grantors and mortgagors, grantees and mortgagees, the character and date of the instrument, the consideration for the conveyance, and a description of the real estate incumbered. The cashier of the bank was a subscriber to this publication. The fact of the making of the mortgage by Baker and wife to Ocobock was set out in the publication, and this publication the cashier of the bank saw and read prior to the date of releasing the bank's judgment lien on the lands of Baker not covered by the Ocobock mortgage. Ocobock brought suit to foreclose his mortgage and made the bank a party defendant. The bank filed a cross-petition setting up its judgment and claimed a first lien upon the real estate described in Ocobock's mortgage. The latter claimed that, by reason of the bank's having released

from the lien of its judgment lands of Baker not covered by his mortgage of greater value than the amount of the bank's judgment, he was entitled to be subrogated to the bank's lien upon the lands of Baker covered by the mortgage. The district court decreed that the bank was entitled to a first lien upon the mortgaged real estate and Ocobock has appealed. The decree of the district court is right.

1. The judgment of the bank not being by confession, and having been rendered in an action commenced prior to the beginning of the term at which the judgment was rendered, became a lien upon the lands of Baker situate in Hall county from and after the first day of the term of court at which the judgment was rendered, namely, November 20, 1893, and such a lien was a superior lien to the mortgage of Ocobock filed December 2, 1893, though the mortgage was filed before the date the judgment was actually rendered. (See Code of Civil Procedure, sec. 477; *Norfolk State Bank v. Murphy*, 40 Neb., 735.)

2. It is a general rule that if a creditor having a choice of two funds should, contrary to equity, so exercise his legal rights as to exhaust that fund to which only other creditors can resort, then those other creditors will be placed by a court of equity in his situation so far as he has applied their fund to the satisfaction of his claim. (Chief Justice Marshall in *Alston v. Munford*, 1 Brock. [U. S.], 279. See, also, *Cheesebrough v. Millard*, 1 Johns. Ch. [N. Y.], 409; *Iglehart v. Crane*, 42 Ill., 261; *Hosmer v. Campbell*, 98 Ill., 572.)

3. The record of Ocobock's mortgage was not constructive notice of its existence to the bank. The bank was not charged with notice of deeds or mortgages affecting the real estate upon which its judgment was a lien filed for record subsequent to November 20, 1893. The registry laws apply to subsequent purchasers and incumbrancers only. (*Hosmer v. Campbell*, 98 Ill., 572.) And paradoxical as it may seem, the bank was a prior incumbrancer of this land to Ocobock, though its judgment was

not rendered until after the filing of Ocobock's mortgage. This is because the statute makes a judgment not rendered by confession, and not rendered at the same term of court at which the action is brought, a lien upon the lands of the judgment debtor from the first day of the term of court at which the judgment is rendered, and parties dealing with real estate are charged with notice of pending suits against their grantor in the district courts of the county where the land is situate.

4. We do not decide whether the bank had notice of the existence of Ocobock's mortgage prior to the date it released Baker's lands from the lien of its judgment, because its cashier subscribed for and read the daily publication of the transactions occurring in the office of the register of deeds, but, for the purposes of this case, assume that it had such notice. For, if it be held that the taking and reading of this daily publication by the cashier of the bank was notice to the bank of the Ocobock mortgage, that fact would not entitle the appellant to be substituted or subrogated to the first lien of the bank against the property on which the appellant has a mortgage. This doctrine of subrogation or substitution does not flow from any fixed rule of law. It is applied by courts of equity to prevent a miscarriage of justice, and it is a familiar principle that "he who asks equity must do equity."

As already stated, Ocobock neglected to notify the bank that he had a lien upon the real estate on which the bank's judgment was a lien, which lien was subordinate to the bank's; and he neglected to notify the bank that he desired it to first exhaust the real estate of Baker upon which his mortgage was not a lien before going upon the mortgaged property; nor did he notify the bank that it would be required or expected to exhaust the real estate upon which he, Ocobock, held no lien. Not having done this the bank has not been guilty of any inequity towards Ocobock. How was the bank to know that Ocobock's debt was unpaid, or that the real

estate pledged by the mortgage was not sufficient to satisfy Ocobock's debt as well as the bank's lien? Ocobock was a subsequent encumbrancer upon the real estate on which the bank had a lien. He was charged with notice of the existence of this judgment, and had he desired that the bank first exhaust the property of Baker, not incumbered by his mortgage, he should have notified that fact to the bank; and then, had the bank, with a knowledge of the existence of Ocobock's mortgage, and with the knowledge in its possession that he required it to first exhaust the property of Baker not covered by the mortgage, released the lands from the lien of its judgment, Ocobock would be in a position here to invoke the doctrine of subrogation, or substitution, and have the bank's lien subrogated to the lien of his mortgage. But neither constructive notice nor actual knowledge on the part of the bank of the existence of Ocobock's mortgage was alone sufficient to postpone the bank's judgment lien to his mortgage, because the bank, in possession of such notice or knowledge, released certain lands of Baker's from the lien of its judgment. Ocobock being a subsequent incumbrancer, he was the party that the law required to be vigilant, and the bank was under no obligation to inquire of him as to the amount of his debt, the sufficiency of the security, nor whether he desired it to first exhaust its lien upon lands not covered by its mortgage, or whether he desired it not to release those lands from the lien of its judgment. Ocobock, by his laches, has forfeited the right to have the court apply to his case the doctrine of subrogation. (*Clarke v. Bancroft*, 13 Ia., 320; *Ross v. Duggan*, 5 Colo., 85; *Iglehart v. Crane*, 42 Ill., 261; *Hosmer v. Campbell*, 98 Ill., 572; *Taylor's Executors v. Maris*, 5 Rawle [Pa.], 50.) The decree of the district court is

AFFIRMED.

NEBRASKA WESLEYAN UNIVERSITY V. H. ALMENA PARKER.

FILED OCTOBER 20, 1897. No. 7511.

1. **Instructions:** PRINCIPAL AND AGENT: AUTHORITY OF AGENT. Where it is sought to hold a principal liable on a contract made by his agent, and the authority of the agent to make the contract is one of the issues being tried, unless there is some evidence to show that the agent had authority to make the contract, it is error for the court to instruct the jury that they may determine whether the agent had authority to make such contract.

2. **Principal and Agent:** RATIFICATION. Where it is sought to hold a principal liable on an unauthorized contract of his agent, and the issue is whether the principal ratified the contract, it is error for the court to instruct the jury that they may find that the principal by his acts ratified such contract, when there is no evidence that the principal knew of the existence of the contract at the time he performed the acts which it is claimed amounted to a ratification.

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

Stewart & Munger, for plaintiff in error.

C. M. Parker and *John P. Maule*, *contra.*

RAGAN, C.

In the district court of Lancaster county Miss H. Almena Parker sued the Nebraska Wesleyan University. Miss Parker claimed in her petition that the university employed her as a teacher of elocution for one year at a salary of $1,000; that she had rendered the services for which she was employed, and that the compensation had not been paid. She had a verdict and judgment and the university brings the case here for review on error.

1. The university is an educational institution incorporated under the laws of this state. Its affairs are managed by a board of trustees. One Creighton was a member of this board of trustees and was the chancellor, or

chief officer, of the university. The chancellor was appointed one of a committee of three to select professors for the university upon examination of applications on file, and to report to the board of trustees. This board of trustees was by the charter of the institution invested with the power to employ professors and fix their salaries. The chancellor, as chairman of the committee appointed to recommend teachers, reported to the board, in effect, that, subject to its order, he had employed Miss Parker as a teacher in elocution for one year; that the university was not to pay her any salary but that whatever charges were made to students for elocution lessons should be turned into the treasury of the university and Miss Parker should be entitled to these fees and should take the same in full compensation for the services she might render as a teacher of elocution; or, to use the language of the board of trustees, the chair of elocution was to be "self-sustaining." The university contended that the services rendered by Miss Parker were rendered under this contract. On the other hand Miss Parker contended that she entered into a contract with the chancellor as a member of the committee to employ teachers, in and by which she was to serve the university one year as a teacher of elocution and was to be paid therefor a salary of $1,000. The jury found that Miss Parker's version of the contract was the correct one and the evidence abundantly sustains the finding made. Counsel for the university do not call in question the sufficiency of the evidence to sustain the finding of the jury on this point.

2. The evidence in behalf of Miss Parker all tended to show that the contract between her and the university was made on behalf of the latter by its chancellor and by no one else; and one of her contentions was that he had authority to make this contract. Another one of her contentions was that, if he made the contract without authority, the university had ratified it; while the university contended that the chancellor had no authority to make the contract and, if he did make it, the university

had never ratified it. The district court on its own motion instructed the jury that, if it found the chancellor had entered into the contract with Miss Parker, as she claimed, and if it further found that the chancellor was authorized and empowered by the university to make this contract, then the university would be bound. There is no objection to the instruction as a matter of law, but the trouble with it is there was no evidence on which to base it. The undisputed evidence in the record is that neither by the charter, by-laws, nor board of trustees of the university, was the chancellor invested with authority to employ teachers. The extent of his authority was to recommend teachers to the board of trustees.

By another instruction, the district court told the jury that if they should find the chancellor and Miss Parker made the contract which the latter claimed, and the chancellor was not authorized to make such a contract, still the university would be liable on the contract if the jury should find that its board of trustees ratified the same. This instruction as a proposition of law is unobjectionable, but we have looked in vain throughout this record for one word of evidence which even tends to show that the board of trustees ever had any knowledge, until after this suit was brought, that the chancellor had made the contract with Miss Parker, which she alleges he made and which the jury has found he did make. Since it was sought to hold the university liable on the contract made by its chancellor on the theory of a ratification of that contract, the giving of the last instruction was prejudicially erroneous, as the jury may have concluded, and probably did conclude, that because Miss Parker had served the university for a year with the knowledge and consent of the board of trustees, therefore they had ratified the contract made. The fact that Miss Parker served the university as a teacher of elocution for a year does not alone justify the inference that the board of trustees knew of the contract existing between her and the chancellor. When it is sought to estop a principal because of

his ratification of an unauthorized act of his agent it is not enough to show that he has in some manner approved of the act, but it must be made to appear that such approval was with knowledge of what the agent had done and promised in the premises on behalf of his principal. (*Cram v. Sickel*, 51 Neb., 828, and cases there cited.) The board of trustees did know that Miss Parker was teaching elocution in the university. They knew that her employment had been recommended by the chancellor, but they did not know at any time until after her employment terminated of the existence of the contract which she pleads in this action. The judgment of the district court is reversed.

REVERSED AND REMANDED.

PETER HEAD V. JACOB LEVY ET AL.

FILED OCTOBER 20, 1897. No. 7504.

1. **Justice of the Peace:** ISSUANCE OF ATTACHMENT WITHOUT BOND: DAMAGES. A justice of the peace who issues an order of attachment against a resident of the state, without an undertaking therefor first having been executed, is liable for nominal damages to the defendant in such attachment, although the latter suffer no actual injury therefrom.

2. **Change of Venue:** COSTS: JUSTICE OF THE PEACE: MALFEASANCE. Where a change of venue is granted by a justice of the peace on application of the defendant, such justice can tax to such defendant only "costs which have accrued for issuing subpœnas for witnesses and service thereof, witness fees, and costs of the justice for transferring the cause to the docket of the other justice." (Code of Civil Procedure, sec. 958.)

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

F. W. Fitch, for plaintiff in error.

Lane & Murdock, contra.

RAGAN, C.

In the district court of Douglas county Peter Head sued Jacob Levy, a justice of the peace, and the sureties on his official bond, for damages. The case was tried to the court without a jury and resulted in a judgment for the defendants below, and Head prosecutes to this court a petition in error.

1. Head, in his petition in the court below, alleged for a first cause of action, that on a certain date Levy was justice of the peace and the other parties sued were the sureties on his official bond; that he, Head, was then and there a citizen and resident of the county of Douglas and state of Nebraska; that on said date one Blair brought suit before said justice of the peace against him, Head, and that said justice of the peace wrongfully issued, and delivered to the constable for service, a writ of attachment against Head's property without any undertaking for an attachment having first been executed by Blair as required by law. Head failed to prove that he had sustained any actual damages by the issuance by the justice of the peace of this order of attachment, but he claims that he was entitled to recover nominal damages because of the issuance of the order of attachment without an undertaking having been previously executed by the plaintiff in the attachment suit. Until an undertaking in attachment as required by section 926 of the Code of Civil Procedure had been executed by the plaintiff in the attachment suit, the justice of the peace was without jurisdiction to issue the order of attachment, and his act in so issuing it was not merely erroneous but was absolutely void and rendered him a trespasser. Had the officer levied this writ upon the property of Head then the justice of the peace would have been liable in trespass for all damages which Head sustained by reason of the wrongful issuance of this order of attachment. But the rule seems to be that a public officer is liable for nominal damages for a breach of duty towards an individual though no actual damages result.

In *Laflin v. Willard*, 33 Mass., 64, an officer neglected to return an unsatisfied execution. The court held that the officer was liable for nominal damages to the execution creditor though the latter had not sustained any damages. In that case it was said that where there has been a neglect to perform a duty the law presumes damages to have been sustained. The issuing by the justice of the peace of the order of attachment against the property of Head without an undertaking having been first executed, as required by the statute, was an infringement by the justice of the peace upon the rights of Head. The evidence in the case leaves no doubt in our minds that the order of attachment in controversy was issued without an undertaking in attachment having been executed, and even before an affidavit for an attachment was filed with the justice.

2. For a second cause of action, Head alleged in his petition that he duly made application to Levy, the justice of the peace, for a change of the venue of the action pending before him, in which he, Head, was the defendant, and that Levy demanded and collected from him, Head, illegal fees for granting the change of venue applied for, contrary to the statutes, and for the taking of which illegal fees he demanded judgment against Levy and the sureties on his bond for the $50 penalty provided by statute for the taking of illegal fees.

The evidence shows that the justice charged and collected from Head fees and costs amounting to $6 at the time he granted the change of venue asked for. Section 958 of the Civil Code provides that when a defendant in a suit before a justice of the peace shall be granted a change of venue such defendant "shall be taxed for the costs which have accrued for issuing subpœnas for witnesses and service thereof, witness fees, and costs of the justice for transferring the cause to the docket of the other justice." Levy claims in his testimony that he issued one subpœna for three witnesses named therein; that these three witnesses were served;

that they were each given a mileage of two miles, and each paid for an attendance of one day. Assuming this to be correct, Levy was entitled to charge fees as follows: Issuing the subpœna, 50 cents; officer's cost of serving same, 75 cents; mileage of the officer, 10 cents; fees and mileage of the three witnesses, $3.30, or a total of $4.65. (See Compiled Statutes, sec. 11, ch. 28.)

The evidence further tends to show that he charged Head 50 cents for transferring the papers in the case to the next justice of the peace, and this charge appears to have been agreed upon between the justice and Head, so that the legal fees which Levy might collect amounted to $5.15; that is, he collected from Head 85 cents in excess of what the law allowed for the services performed. The judgment of the district court is wrong. This record reveals a condition of affairs calculated to bring into disrepute the administration of justice. It appears that the suit of Blair against Head was brought before the justice of the peace on the 24th day of January, 1893, and on that date the justice issued an order of attachment against Head's property; but the affidavit for this attachment was not made until three days later,—the 27th of January,—and no undertaking in attachment appears to have ever been executed. On January 27, Head made application for a change of venue, and on that day, and after such application was made, or the justice knew it was about to be made, a subpœna was issued by the justice for three witnesses named therein. The justice's filing mark on the back of the subpœna shows that it was returned and filed on the 26th day of January, or the day before it was issued. The plaintiff in the action makes a so-called affidavit on the back of the subpœna that he had served the same. This is signed on the 27th day of January, 1894, but there is no venue to this affidavit. The record leads us to the conclusion not only that this justice of the peace issued an order of attachment against a citizen of the state without an undertaking in attachment having been executed, but that he issued such

order of attachment without an affidavit therefor having been filed, and that after the defendant in the action made application for a change of venue the justice of the peace conspired with the plaintiff in the action and issued a subpœna for the three witnesses,—not one of whom is shown to have known anything about the pending case,—who were in a saloon near by, for the express purpose of increasing the costs which Head would have to pay in order to obtain a change of venue. This was an act of malfeasance for which this justice of the peace ought to be impeached if not prosecuted criminally.

One other thing in this record requires attention at our hands. Head supported his application for a change of venue on the ground of the bias and prejudice against him of the justice of the peace, Levy; but in this same affidavit he swore that he could not have a fair and impartial trial before either one of twenty-seven named justices of the peace in said Douglas county. In making this affidavit Head committed perjury. It is not usual for this court to indulge in strictures such as the foregoing, but this record discloses a practice that would put to shame the administration of justice among savages. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

HERMAN KOUNTZE ET AL. V. GEORGE R. SCOTT ET AL.

FILED OCTOBER 20, 1897. No. 6792.

1. **Attachment:** MOTION TO DISSOLVE. One made defendant to an attachment proceeding may move to discharge the same from the whole or any part of the property, notwithstanding the fact that he had disposed of his entire interest in such property prior to its seizure.

2. ———: ———: ESTOPPEL. An attaching plaintiff is estopped to assert that the defendant has not sufficient interest to defend against the attachment. *McCord v. Bowen*, 51 Neb., 247, followed.

3. ——: ——: ORAL EVIDENCE. Section 236, Code of Civil Procedure, does not confer on an attaching plaintiff the right to resist a motion to discharge the attachment by oral evidence. NORVAL, J., dissents.

4. ——: ——: ——. Whether oral evidence shall be used on the hearing of a motion to discharge an attachment is a matter resting in the discretion of the court trying such proceeding. NORVAL, J., dissents.

5. ——: ——: ——. Evidence examined and *held* to support the order of the district court discharging the attachment.

REHEARING of case reported in 49 Neb., 258. *Former decision reversed and judgment below affirmed.*

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

Samuel Rinaker, *R. S. Bibb*, and *G. M. Johnston*, *contra.*

RAGAN, C.

This is a proceeding in error to review a judgment of the district court of Gage county dissolving an order of attachment issued at the instance of plaintiffs in the case of Herman Kountze and others against George R. Scott and others, brought in said district court. On the former hearing of this case the judgment of the district court was reversed. (See *Kountze v. Scott*, 49 Neb., 258.) Subsequently a rehearing was granted and the case has been again argued and submitted.

1. Scott and others, while indebted to Kountze and others, transferred part of their property to a man named Bates and part to a man named Cook. Kountze and others then caused this property to be attached upon the ground that such transfer was made for the purpose of defrauding the creditors of Scott and others. The first argument of the plaintiffs in error is that Scott, having transferred his title to the attached property, has no standing in court to be heard to dissolve the attachment. This precise question was presented to this court in *McCord v. Bowen*, 51 Neb., 247., and it was there held: "Un-

der section 235 of the Code of Civil Procedure, a defendant may, at any time before judgment, upon reasonable notice to plaintiff, move to dissolve an attachment, and the fact that the attached property does not belong to the defendant, or is encumbered for its full value, does not bar or estop him from filing a motion to discharge." It was further held in said case: "An attaching plaintiff is estopped to assert that the defendant has not sufficient interest to defend against the attachment." To the same effect see *South Park Improvement Co. v. Baker*, 51 Neb., 392. These cases are decisive against the contention of the plaintiffs in error, and expressly rule that one made a defendant in an attachment proceeding may move to discharge such attachment from the whole or any part of the property attached notwithstanding the fact that he had disposed of his entire interest in such property prior to its seizure.

2. On the hearing of the motion to discharge the attachment the plaintiffs in error sought to call and examine witnesses in support of the attachment. The district court refused to permit this to be done, and this is the second assignment of error argued here. Counsel for plaintiffs in error in support of their contention cite us to *Tyler v. Safford*, 24 Kan., 580. In that case the district court on hearing of the motion to discharge the attachment permitted witnesses to be called and examined. Its action in this respect was assigned for error, but the supreme court overruled the exception and held that, whether the district court should have heard oral evidence on the motion to discharge the attachment was a matter discretionary with it. The usual practice in this state is to use affidavits upon the hearing of a motion to discharge an attachment where the motion is not based upon the record or some defect therein. Section 236 of the Code of Civil Procedure provides that where the motion of a defendant to discharge the attachment is supported by affidavits the plaintiff in the attachment may oppose the motion by affidavits or other evidence. But

we do not construe this section as conferring upon an attachment plaintiff the absolute right to resist the motion to discharge by oral evidence. It was a matter for the discretion of the district court whether, on the hearing of this motion to discharge, it would hear oral evidence.

3. The third assignment of error is that the order discharging the attachment is not supported by sufficient evidence. To restate this evidence here would subserve no useful purpose. We have carefully examined it and concur with the district court that the transfer complained of made by Scott and others was not made with a fraudulent purpose. The judgment of the district court is

AFFIRMED.

NORVAL, J., dissenting.

I do not agree to the conclusion reached, and state the grounds for my dissent: The trial court declined to receive oral testimony in resistance of the motion to discharge the attachment. The practice in the different states is not uniform as to the trial of issues raised by a motion for the dissolution of an attachment. In some of the states the evidence is confined to affidavits and counter affidavits; in some, the motion is determined upon oral evidence; and in other states either affidavits or oral testimony may be received. The manner of proof is generally regulated by the statutes, and this is true in this state. By section 236 of the Code of Civil Procedure it is provided: "If the motion be made upon affidavits on the part of the defendant, or papers or evidence in the case, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to that on which the order of attachment was made." The contention is that it is discretionary with the trial court whether it will permit oral evidence to be used in resistance of a motion to vacate an order of attachment. It is competent on the hearing of such motion for the plain-

tiff to introduce affidavits or any other proper evidence. There is nothing in the statute which makes it discretionary with the court whether it will receive oral evidence or exclude it, and we have no right to confer such discretion by judicial interpretation. The language of the statute is, "the plaintiff may oppose the same by affidavits or other evidence," and not "by affidavits or other evidence, in the discretion of the court." The statute gives the litigant the right to determine for himself whether he will use affidavits on the hearing, or take the testimony of witnesses before the court. (*Robinson v. Morrison*, 2 App. D. C., 105; *Hale v. Richardson*, 89 N. Car., 62.)

Tyler v. Safford, 24 Kan., 580, does not decide that it is discretionary with the court whether it will allow witnesses to be examined orally on the hearing of a motion to dissolve an attachment. In that case plaintiff presented his own affidavit in support of the attachment, and it was held not erroneous to permit the defendant to cross-examine orally the plaintiff upon the subject-matter of said affidavit. Moreover, that case is based entirely upon *State v. Stackhouse*, 24 Kan., 445, which was a criminal prosecution, and involved the right of the court, independent of any statute, on the hearing of a motion in such case, to permit a witness to be called before it, and examined orally. It was ruled that it was discretionary with the court whether it would allow proofs to be made in that manner or not.

If it be true, as contended, that our statute does not give to a plaintiff in attachment the absolute right to introduce oral testimony upon the hearing of a motion to discharge, but that the mode of proof is confided to the discretion of the trial court, then this cause should be reversed for an abuse of discretion, as will be presently disclosed. The affidavit on which the attachment was issued charged that the defendants transferred their property for the purpose of defrauding their creditors. The motion to discharge put in issue the truthfulness of said

averment, and the testimony relating thereto was very conflicting. There was read, in support of the motion, the affidavit of Walter W. Scott, one of the defendants, which tended to establish the *bona fides* of the sale of the property, and yet the court below refused to allow counsel for plaintiffs to examine orally before the court, the said Walter W. Scott, upon the subject covered by his affidavit. This ruling could not have been otherwise than prejudicial to the rights of plaintiffs, and was diametrically opposed to the practice sanctioned in *Tyler v. Safford*, 24 Kan., 580. The use of affidavits is a very unsatisfactory method of trying an issue of fact, and more especially is this true when the question of fraud is involved, since affidavits frequently are couched in the language of counsel, instead of that of witness, and do not always contain all the facts. An oral examination, in the presence of the court, of Walter W. Scott might have disclosed that the property was transferred with the intent of defrauding creditors. The order vacating the attachment should be reversed.

D. M. OSBORN COMPANY V. T. JORDAN.

FILED OCTOBER 20, 1897. No. 7515.

1. **Principal and Agent:** RATIFICATION OF UNAUTHORIZED ACTS. One is not permitted to ratify an unauthorized act in so far as it operates to one's advantage and repudiate it in so far as it imposes burdens. If one avail oneself of the fruits of an act one thereby charges himself with the burden of all the instrumentalities employed by the agent to effect his purpose.

2. ——: ——: ESTOPPEL. Rule applied where plaintiff sued on a note given for a machine, the defense being breach of warranty, and the plaintiff seeking to avoid the warranty by showing that the agent who took the note and gave the warranty as an inducement to its execution was without authority so to do.

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

T. T. Bell and *J. R. Hanna,* for plaintiff in error.

T. J. Doyle, contra.

IRVINE, C.

The D. M. Osborn Company sued Jordan on a promissory note. Jordan admitted its execution and pleaded that it was given in consideration of a sale of a harvesting machine, which the plaintiff at the time warranted to be good and perfect and to do as good work as any machine made; that the plaintiff further agreed to send an expert to put the machine in order before the next ensuing harvest, and to furnish all needed repairs; that the note was made relying on such warranty and agreement; that the machine was not good and would not do good work and was without value, and that the plaintiff failed to perform its agreement with regard to repairing the machine. In the district court there was a verdict and judgment favorable to the defendant, and plaintiff prosecutes error.

The first complaint made is that the verdict is contrary to law and is not sustained by the evidence. The defendant's theory was that the machine had been first sold to defendant's son, and certain overdue notes given by him in payment therefor being in the hands of one W. L. Thompson for collection, the defendant agreed with Thompson to himself take the machine on Thompson's making the warranty and agreement pleaded. He thereupon gave the note, and the machine was delivered to him. The evidence on his part fairly tends to support this theory. The plaintiff's theory was that Thompson, as its collecting agent, took the note by way of security and extension of time of payment of the son's debt; that no sale was made to defendant, and that Thompson was without authority to make either the warranty or the

contract relied on, and did not, in fact, make either. The evidence on plaintiff's part fairly tends to support this theory. The particular in which it is claimed that the evidence is insufficient to support the verdict is in regard to Thompson's authority. It is true that the evidence without contradiction shows that Thompson was merely the attorney of the plaintiff employed to collect the debt, and had no authority except that implied from such relationship. But from this same evidence it follows that Thompson was equally without authority to resell the machine, or to extend the time of payment and accept the defendant's note. The plaintiff is here retaining the note and seeking to enforce it. One is not permitted to ratify an unauthorized act in so far as it operates to one's advantage, and repudiate it otherwise. If one avail himself of the fruits of an agent's acts, he likewise charges himself with the burden of all the instrumentalities employed by the agent to effect the purpose. (*Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb., 210; *Joslin v. Miller*, 14 Neb., 91; *McKeighan v. Hopkins*, 19 Neb., 33; *Esterly v. Van Slyke*, 21 Neb., 611; *Rogers v. Empkie Hardware Co.*, 24 Neb., 653; *Kansas Mfg. Co. v. Wagoner*, 25 Neb., 439; *Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb., 110; *Leavitt v. Sizer*, 35 Neb., 80; *Morrow v. Jones*, 41 Neb., 867; *Farmers and Merchants Bank of Elk Creek v. Farmers and Merchants Nat. Bank of Auburn*, 49 Neb., 379; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb., 68.) It follows that the plaintiff while suing to enforce the note, cannot be heard to say that the inducements held out to procure it were unauthorized.

It is claimed that the court erred in excluding portions of the deposition of Thompson. The objection and ruling are both somewhat vague, and it is impossible to determine just what portion of the deposition was excluded. We cannot see, however, that any evidence which could possibly have been deemed to fall within the objection was material to the only essential controverted issue,—the fact of the warranty and contract to repair.

Complaint is also made of the refusal of an instruction relating to Thompson's authority. Its substance was, we think, covered by instructions given. But as the real principle to be applied was, as we have seen, one of ratification and estoppel, rather than original authority, it was not error to withhold instructions on the latter question.

AFFIRMED.

WILLIAM H. H. DUNN ET AL. V. NICHOLAS EBERLY.

FILED OCTOBER 20, 1897. No. 7497.

Bill of Exceptions: OMISSION OF EVIDENCE: REVIEW. Where it appears from an inspection of the bill of exceptions that material evidence has been omitted therefrom, the bill of exceptions will not be considered for the purpose of determining whether the verdict is sustained by the evidence.

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

J. E. Philpott and *Cornish & Lamb*, for plaintiffs in error.

Bane & Altschuler, *contra.*

IRVINE, C.

The only assignments of error referred to in the briefs relate to the sufficiency of the evidence to sustain the findings involved in the verdict on the issues submitted by the instructions. An examination of the bill of exceptions discloses that there were offered and received in evidence, with especial reference to the issue to which the argument here is almost entirely directed, three books of account. Neither the books themselves nor copies thereof appear in the record before us. In view of this palpable omission from the bill of exceptions of a portion of the evidence, we cannot say that the verdict was not sustained by sufficient evidence, or that it was

contrary to law because disregarding the court's instructions as to the issues to be determined. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Oberfelder v. Kavanaugh*, 29 Neb., 430; *Schneider v. Tombling*, 34 Neb., 661; *Dawson v. Williams*, 37 Neb., 1; *Nelson v. Jenkins*, 42 Neb., 133; *Conger v. Dodd*, 45 Neb., 36; *Storz v. Finklestein*, 48 Neb., 27; *Warner v. Hutchins*, 48 Neb., 672; *Greene v. Greene*, 49 Neb., 546.)

AFFIRMED.

WINSIDE STATE BANK V. TOM LOUND.

FILED OCTOBER 20, 1897. No. 7481.

1. **Breach of Contract to Sell Notes:** DAMAGES: EVIDENCE. In an action for damages for breach by the vendor of a contract to sell promissory notes of a third person, it is not permissible to prove declarations of a stranger as to what he would be willing to give for the notes, such evidence not tending to prove value.

2. **Action for Breach of Contract:** CONSIDERATION: REMEDIES. In an action against the vendor for breach of contract to deliver, there is no distinction in principle as to whether or not the consideration has been paid. The vendee may, at his election, recover back the purchase price as for money had and received; but, if he sue for breach of contract, he is restricted in his recovery to the value of the thing bought at the time when and the place where it should have been delivered.

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

Carter & Brown, for plaintiff in error.

References as to measure of damages: 1 Sutherland, Damages, [1st ed.], p. 173; *Aultman v. Stout*, 15 Neb., 586; *Everton v. Estgate*, 24 Neb., 235; *Robbins v. Packard*, 31 Vt., 570; *Potter v. Merchants Bank of Albany*, 28 N. Y., 641; *Sickles v. Dallas Centre Bank*, 81 Ia., 408; *Sadler v. Bean*, 37 Ia., 439; *Callanan v. Brown*, 31 Ia., 333; *Griffith v. Burden*, 35 Ia., 138; *Cropsey v. Averill*, 8 Neb., 151.

Frank Fuller, contra.

Citations: *Rose v. Lewis*, 10 Mich., 483; *Bickell v. Colton*, 41 Miss., 368; *Dimock v. United States Nat. Bank*, 25 Atl. Rep. [N. J.], 926.

IRVINE, C.

This action was brought by Lound against the Winside State Bank to recover for the refusal of the bank to transfer to Lound certain promissory notes amounting to $3,044.85, and made by William McKinsey, the plaintiff alleging that the bank had by contract in writing agreed to sell said notes to plaintiff in consideration of $1,000, which the plaintiff had paid. The bank, by its answer, denied the contract sued upon, and alleged that the money had been paid in pursuance of a contract different in character and not embracing the notes. The plaintiff, as the result of a jury trial, had judgment, which the defendant by these proceedings seeks to review.

Several assignments of error relate to the admission of a certain class of evidence affecting the amount of damages. While these assignments are not so specific as they should be, they nevertheless leave no doubt as to what group of rulings is attacked, and while they are directed to a group, all the rulings within that group are alike in character, so that if one is bad they all are. We think, therefore, that the admissibility of the evidence complained of is fairly presented by the assignments.

The plaintiff was permitted to testify that he had heard a man say that he would give fifty cents on the dollar for the notes in question. He further testified that he heard this statement several days before he bought the notes, and in cross-examination it developed that the statement was made by McKinsey's brother at a time when McKinsey was under arrest upon a charge growing out of the transaction of which the notes formed a part. The brother had further stated that his object was to secure McKinsey's liberation. All this evidence was received

over defendant's objection, and after the cross-examination the court refused to strike it out. It will be noted that it was not shown, or sought to be shown, that the notes had a market value of fifty cents on the dollar, or even that plaintiff had contracted to sell them at that price. It was not shown that he had been offered that price. The proof was merely that of a random statement by a third person to the effect that for a special purpose, wholly unconnected with any commercial use, he would be willing to pay so much. We realize that where the subject-matter of a sale has no definite and readily ascertainable market price, resort must often be had to evidence quite indirect in its nature to establish value. But the evidence here received was not merely indirect, it was immaterial to the issue, if not incompetent as being hearsay. Generally in such cases a contract actually made for a resale cannot be shown to prove general damages, and to recover special damages for the loss of such a contract, notice thereof must be brought home to the vendor. If such proof would have here been inadmissible, much more objectionable must be evidence of mere declarations of a stranger of what, for a special purpose, he would be willing to give, there being neither the opportunity nor the intention of then contracting. The value of the notes being an important element in fixing the damages the prejudicial character of this evidence is apparent.

As the case must be remanded to the district court for a new trial it is not inappropriate to now indicate our views upon another question presented by the record but not properly preserved for review because of a grouping in the motion for a new trial of certain correct instructions with that relating to the question referred to. The court told the jury, in effect, that in case it found for the plaintiff his measure of damages would be the value of the notes, but not less than the amount plaintiff had paid therefor, with interest from the time of payment. We think the latter part of this instruction was erroneous,

The general rule is that the measure of damages for the refusal of the vendor to deliver is the difference between the contract price and the market price at the time when, and the place where, delivery should have been made. While efforts have been made to distinguish cases where the consideration has been paid, and establish for them a different rule, we cannot see that any distinction exists in principle, and in either case the vendee should be placed where he would have been if performance had taken place. The failure of courts drawing the distinction to agree upon the new rule to be established, and the logical frailty of rules announced for that purpose, sufficiently suggest the want of actual ground for the distinction, and the best considered cases deny its existence. Had the plaintiff not paid the purchase money its amount would figure only by way of a species of recoupment against the loss of the notes. He would recover only any excess of value over the unpaid purchase money, and this because the object of the law would be to give him just what he would have had if the bargain had been performed. Where the money has been paid this object is accomplished by giving him the value of the thing sold, be that value greater or less than the purchase price. If the notes had been delivered and they were worth less than the contract price, plaintiff would have to suffer the loss; and this court has held that a rule of damages should not be announced whereby the plaintiff would receive greater compensation for the breach of a contract than he would have received through its performance. (*Bates v. Diamond Crystal Salt Co.*, 36 Neb., 900.) This must be sound law wherever as here the compensatory theory of damages prevails. In answer to this argument it is said that it is inequitable to permit the vendor to receive the purchase money and escape performance by paying a less amount by way of damages. The reply is that if such be inequitable the vendee may, if he choose, prevent such a result by suing for money had and received instead of counting upon the contract as one in

continued existence. In other words, he may at his election sue for damages for the breach, or he may rescind and recover back his money. (*Seaver v. Hall*, 50 Neb., 878.) The case cited concerned real estate, but we conceive the reason and the law to be the same with regard to personalty, and so it has been distinctly ruled. (*Wells v. Abernethy*, 5 Conn., 222.) In that case it was further said: "The consideration of the contract is never the rule for estimating the damages for the breach of an express agreement. When, by reason of a failure on the part of one of the contracting parties, or other legal cause, the contract is rescinded, either absolutely, or at the election of the party injured, he may bring his suit for the consideration, and then it will be the measure of damages. But so long as the contract is open, and the action, as it necessarily must be, and as in this case it is, is brought upon it, the sum recoverable is the value of the thing stipulated, at the time when and the place where it should have been performed." To the same effect see *Smethurst v. Wolston*, 5 W. & S. [Pa.], 106; *Rose's Executors v. Bozeman*, 41 Ala., 678; *Humphreysville Copper Co. v. Vermont Copper Mining Co.*, 33 Vt., 92. The election referred to above is one for the plaintiff to make at or before the time he sues, and not for the jury to make for him after the evidence has developed what is the more to his advantage.

REVERSED AND REMANDED.

JACOB PFUND V. VALLEY LOAN & TRUST COMPANY.

FILED OCTOBER 20, 1897. No. 7468.

1. **Public Lands:** CANCELLATION OF ENTRY. The commissioner of the general land office has power, after the issue to an entryman of a final receipt and before patent, to order an investigation and, if it be thereupon found that the entry or proof was fraudulent, to cancel the entry. *Orchard v. Alexander*, 157 U. S., 372, followed.

2. ———: ———: BURDEN OF PROOF. While such power is not unlimited or to be exercised arbitrarily, and is in some cases, at least, subject to judicial review,—as where the opportunity to be heard was not accorded the claimant,—still, even in such cases, the claimant seeking relief in the courts assumes the burden of showing that he has in fact earned a patent. *Parsons v. Venzke*, 61 N. W. Rep. [N. Dak.], 1036, followed.

3. ———: ———. The act of congress of March 3, 1891, protecting certain innocent purchasers and incumbrancers against cancellations of entries, refers only to entries in force when the act was passed, and not to those which had been previously canceled. *Parsons v. Venzke*, 164 U. S., 89, followed.

4. **Vendor and Vendee:** BONA FIDE PURCHASERS. Where a claim to real estate can be sustained only upon the ground that the person asserting it is a subsequent purchaser in good faith, such person is required to show affirmatively that he purchased without notice of the equities of another, and relying upon the apparent ownership of his grantor. *Bowman v. Griffith*, 35 Neb., 361, followed.

ERROR from the district court of Holt county. Tried below before BARTOW, J. *Reversed.*

R. R. Dickson, for plaintiff in error.

H. M. Uttley, *contra.*

IRVINE, C.

In 1880 one Frank Kokojan made application and entered upon the southeast quarter of section 30, township 28, range 11 west, in Holt county, under the federal homestead laws. In November, 1885, he made final proof, and December 12, 1885, the local land officers issued to him a final receipt. January 11, 1886, he executed a mortgage on the land, and the Valley Loan & Trust Company, plaintiff below and the defendant in error, claims as purchaser at a foreclosure sale under this mortgage. January 3, 1887, the United States filed a complaint in the local land office charging that Kokojan had obtained his final receipt through fraud and perjury. A hearing was had at which Kokojan appeared. The local office found against him and an appeal was taken to the commissioner of the

general land office, which resulted, November 19, 1888, in an affirmance of the action of the local office and a final cancellation of Kokojan's entry. Lina Girard afterwards entered upon the land under the homestead laws, and November 11, 1890, received a patent therefor. Pfund claims as her grantee. This action was brought by the Valley Loan & Trust Company, claiming as we have said, under Kokojan, to have Pfund decreed a trustee of the legal title for plaintiff's benefit, and to compel a conveyance. There was no effort made by pleadings or proof to show that Kokojan's entry was in fact lawful or that he was entitled to a patent. On this the plaintiff relied solely upon the issuing to him of the final receipt. Neither did the plaintiff, by pleading nor proof, endeavor to establish that Kokojan's mortgagee or the plaintiff had expended money or other thing of value for the land relying upon the receipt and without notice of the fraud or perjury by which it is charged the receipt was obtained. The plaintiff's theory was that by the issue of the receipt, Kokojan obtained a vested interest in the land, which the land office had no authority or power to divest by the subsequent proceedings. The broad question raised was that formerly much mooted one of the power of the land officers to cancel an entry after the issuing of a final receipt, for fraud in obtaining it. The district court entered a decree for the plaintiff in accordance with the prayer of the petition, and the defendant brings the case here by petition in error. At the time of trial in the district court the main question presented was an open one, the state courts having reached different conclusions, the inferior federal courts being almost equally divergent in their decisions, and there being then no decision of the supreme court of the United States which threw anything more than a side-light upon the situation.

In *Orchard v. Alexander*, 157 U. S., 372, the supreme court of the United States, in a case much like this, distinctly held that the commissioner of the general land

office has power to proceed as was here done, and if the entry be shown to be fraudulent, to cancel the same. This was in the case of a pre-emption entry, but there has not been suggested to us any principle which would differentiate that case from one of a homestead entry.

In *Parsons v. Venzke*, 61 N. W. Rep. [N. Dak.], 1036, the supreme court of North Dakota had before it a case in all respects similar to the case at bar, except again that the entry was a pre-emption, and that the mortgagee, while not a party to the cancellation proceedings, had appeared and defended. The conclusion there reached and expressed in an opinion which evinces the learning and painstaking research distinguishing so much of the work of that court, was that the commissioner has general authority to cancel fraudulent entries; that such power is not one to be exercised arbitrarily, but is limited in its scope; that the findings of fact in such case are binding upon the courts, provided parties have been accorded an opportunity to be heard, but that where no such opportunity has been accorded, the finding is not absolutely a nullity,—the entry having been in fact canceled,—a party seeking equitable relief must assume the burden of proving the facts showing he had earned the patent. This case was taken by writ of error to the supreme court of the United States, where the judgment of the state court has been recently affirmed. (*Parsons v. Venzke*, 164 U. S., 89.) While the opinion is not so elaborate as in the state court, it clearly establishes the authority of the commissioner in the premises. The question being one of a federal character we must be governed by the decisions referred to.

Plaintiff contends that if it be determined that authority exists to cancel an entry as against the entryman himself, plaintiff is nevertheless protected by the provisions of the act of congress of March 3, 1891 (26 United States Statutes at Large, p. 1098, ch. 561, sec. 7), whereby it is enacted that "all entries made under the pre-emption, homestead, desert-land, or timber culture laws, in which

final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to *bona fide* purchasers, or incumbrancers for a valuable consideration, shall unless upon an investigation by a Government Agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance." This statute cannot avail the plaintiff. Without suggesting other reasons it is sufficient to say that in *Parsons v. Venzke, supra*, the same claim was made and the supreme court of the United States there held that the statute referred only to entries existing at the time of its enactment and not to those which had theretofore been canceled.

Plaintiff in argument further insists that it is in any event entitled to relief as one claiming under a *bona fide* purchaser without notice of the facts invalidating the entry and in reliance upon the receipt. Whether one occupying such a position and not a party to the cancellation proceedings would be entitled to relief in the courts we need not decide, because, as already noticed, the plaintiff did not present this issue by the pleadings or attempt to establish such facts by the proof. Where a claim to real estate can be sustained only upon the ground that the person asserting it is a subsequent purchaser in good faith, such person is required to show affirmatively that he purchased without notice of the equities of another, and relying upon the apparent ownership of his grantor. (*Bowman v. Griffith*, 35 Neb., 361; *Dailey v. Kinsler*, 35 Neb., 835; *Phœnix Mutual Life Ins. Co. v. Brown*, 37 Neb., 705; *Baldwin v. Burt*, 43 Neb., 245.) It follows that the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

J. C. CUMMINS ET AL., APPELLEES, V. HATTIE VANDEVENTER ET AL., IMPLEADED WITH PETER J. HANSEN, APPELLANT.

FILED NOVEMBER 4, 1897. No. 7549.

1. **Mechanics' Liens:** FORECLOSURE: EVIDENCE. In an action to foreclose a mechanic's lien, it must appear in evidence that the statement of the claim therefor has been filed with the proper officer in the county within the time prescribed by statute; if not, there is a failure of proof of the existence of the lien.

2. ———: ———: ———. The evidence herein *held* insufficient to prove that the statement of a claim of lien had been filed.

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J. *Reversed.*

Beeson & Root, for appellant.

Robert B. Windham and *George M. Spurlock, contra.*

HARRISON, J.

In this action, instituted in the district court of Cass county, the appellees, partners conducting a lumber yard, sought and obtained a decree of foreclosure of a mechanic's lien, which, it was alleged in the petition filed, had accrued in favor of the partnership, and had been duly perfected as prescribed by statute. With reference to the matters to which we have just alluded, the pleading set forth the facts; we have but stated the conclusions. Peter J. Hansen, one of the defendants in the trial court, has prosecuted an appeal to this court. The facts of the existence of the account, prepared and verified in the manner required by law to entitle it to be filed and entered in the proper office as a lien, also the allegation that it had been filed, were put in issue by the pleadings; hence it was for the appellees to prove the controverted facts, and it is asserted that there was no proof that what was styled the lien had ever been filed.

During the trial, one of the partners, being on the witness stand, was interrogated and answered as follows: "Q. I will now ask you to state if you have in your possession the original lien filed on the premises? A. Yes, sir; I think that I have." For the appellees there was then made this offer: "The lien is here offered in evidence by the plaintiff," and over the objection of the appellant the document offered was received in evidence. If it be conceded that the paper had been sufficiently identified by the witness and was properly allowed in evidence, the offer did not include the indorsement made by the register of deeds which recited the fact of filing, etc., nor was there any attempt to establish that the paper had been filed in the proper office. There was no proof on this point. The introduction of the claim of lien did not carry with it the indorsement of the officer and its recitals.

In the decision in the case of *Noll v. Kenneally*, 37 Neb., 879, wherein a similar question arose, it was stated: "It is said that there is no proof that a claim for lien was filed with the register of deeds. The petition alleges that on the 31st day of December, 1888, and within four months from the time of the furnishing of the materials, R. A. Handy & Co. made, under oath, an account in writing of the materials, and filed the same in the office of the register of deeds of Lancaster county, claiming a mechanic's lien therefor upon said premises, which lien was recorded in book D of mechanics' liens, at page 349. The above allegation being put in issue by the general denial in the answer of appellees, it devolved upon the plaintiff to establish upon the trial, by competent evidence, the filing of the claim for lien. This he failed to do. The mechanic's lien records of Lancaster county were neither produced at the trial nor offered in evidence. Plaintiff, over objection of defendants, introduced in evidence the lien attached to his petition as an exhibit. While it contained an indorsement purporting to have been made by the register of deeds, showing the filing and recording of the paper, yet the indorsement was not of-

fered in evidence. Plaintiff should have made his offer sufficiently broad to have included the introduction of the indorsement of the filing of the statement of lien. In this state one who seeks to enforce a mechanic's lien is required to file a verified account of the materials furnished or labor performed, for which a lien is claimed, in the office of the register of deeds, within four months after the furnishing of the last item of materials, or the performance of the labor. The filing operates as a creation of a lien, and unless this is done, his right to a lien is lost. As there is a total failure of proof that any claim for lien was filed by plaintiffs' assignors with the register of deeds, plaintiff was not entitled to have a lien established on the premises in controversy." This is entirely applicable and decisive of the point under consideration in the case at bar.

The appellant, Peter J. Hansen, was a purchaser of the property after the occurrences or business transactions on which appellees based their claim of lien, and it follows from the conclusion which we have reached that there was a failure in the proof that any lien was ever perfected against the property; that to the extent the decree affected the rights of the appellant, it must be reversed and the action as to him dismissed.

There were some other questions presented in the briefs but we deem a discussion of them unnecessary. A judgment will be entered as hereinbefore indicated.

REVERSED.

S. C. BURLINGIM V. EQUITABLE TRUST COMPANY.

FILED NOVEMBER 4, 1897. No. 7466.

Review: CONFLICTING EVIDENCE. A finding of fact by a district court on conflicting evidence will not be disturbed by this court unless manifestly wrong.

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

Norval Bros. and *George W. Lowley,* for plaintiff in error.

Morris, Beckman & Marple, and *D. C. McKillip, contra.*

HARRISON, J.

It appears herein that the plaintiff in error, during a number of years, commencing probably in the year 1885, was local agent for defendant in error at Seward, engaged in making loans on lands or farms. During the first months of the year 1892, applications were made to him for two loans,—one in the sum of $800 and one in the sum of $2,000. The applications were approved. The coupon notes, or bonds and mortgages, were prepared, and under the supervision of the plaintiff in error were executed, and one of the mortgages was filed for record February 13, 1892; the other, March 16, 1892. At or about these dates, the notes or bonds and abstracts of titles of the mortgaged lands were forwarded to the defendant in error. On April 2, 1892, evidently in answer to a letter of inquiry and demand from defendant in error, the plaintiff wrote and sent a letter to the Trust Company in which he stated:

"S. C. Burlingim, Mortgage Loan Broker,
"First and Second Mortgage Loans.

"SEWARD, NEB., April 2, 1892.

"*E. M. Fairfield, Secy., Omaha, Nebr.*—DEAR SIR: Yours of Apl. first received, asking me to send statement of settlement duly executed of Delos P. O'Neal, and also recorded mortgage of O'Neal and Franz, and you say my commission is not payable until papers in these loans are completed. I wrote you on the 30th in regard to sending in these recorded mortgages and I wrote you that when you sent me my commission in the O'Neal loan I would send you mortgages above stated. Now I will keep these mortgages until you send me my com. Yours truly."

On June 8, 1892, C. M. Cowan, located at York, Neb., an examiner of lands for the trust company, by request or order of the company, went to Seward, called on plaintiff in error, and demanded of him the two mortgages in question. To the demand the plaintiff in error replied that he would deliver or send the mortgages to the company when paid his commission for making the loans. He had received the commission on the loan of $800, but had forgotten this fact, hence was claiming it. On the same day of the interview with Cowan the plaintiff in error mailed the mortgages to the company and they were received by it two days later, or on the 10th of the month. Immediately after mailing the mortgages to the company, the plaintiff in error instituted this suit, procuring the summons to be served on C. M. Cowan. This action was brought in the county court. From the judgment an appeal was taken to the district court, where a jury was waived and a trial had to the court which resulted in a judgment favorable to defendant in error. The plaintiff has brought the case to this court for review.

When the company received the mortgages, it sent the plaintiff in error a draft, in amount $24.90, to pay the commission for effecting the $2,000 loan. The total of this commission was $30. The company claimed it had been forced by the plaintiff's retention of the mortgage to incur the expense of sending C. M. Cowan from York to Seward, $2.85, and also to procure certified copies of the mortgages. This last was done by Cowan when in Seward on June 8, 1892, and cost $2.25,—total expense, $5.10, which deducted from the whole commission, $30, there remained $24.90, the amount sent to plaintiff by draft after the company received the mortgages. The main issuable fact, and placed in litigation by the pleadings, was whether or not the plaintiff's commission on a loan became due before the recorded mortgage in each instance was forwarded to and received by the company. The company contended that it did not; the plaintiff, to

the contrary, or that when the note or bond and abstract of title in any loan had been executed and returned to the company, the commission for making the loan was due. On the determination of this fact depended the other questions in the case. The evidence on this point was conflicting, and, to reach the conclusion it did, the trial court must have decided it in favor of the defendant in error; and after a careful review of the evidence, we cannot say the finding was manifestly wrong, hence it will not be disturbed. (*Scroggin v. Johnston*, 45 Neb., 714.)

This action was commenced on the 8th day of June, and the mortgages were not received by the company until the 10th, and as the commission was not due, according to the finding of the trial court, until the reception of the mortgages by the company, the plaintiff had no cause of action when this suit was instituted. This being true, the judgment of the district court was right and must be

AFFIRMED.

NORVAL, J., not sitting.

WHITFIELD SANFORD V. KATE C. CRAIG ET AL.

FILED NOVEMBER 4, 1897. No. 7544.

1. **Instructions:** PROCEDURE: REVIEW. It is of the duties of the trial court, of its own motion, to instruct the jury what the issues are in any case on trial. If it does not do so, such instruction must be prepared and a request be preferred that it be given, and if the request is refused or ignored, an exception noted. If there is no exception and the matter is not made the subject of assignment of error in the motion for a new trial, it will be taken as waived.

2. **Action on Note:** EVIDENCE OF REWARD FOR PAYEE'S ARREST. The admission of certain evidence herein examined and *held* prejudicially erroneous.

ERROR from the district court of Chase county. Tried below before WELTY, J. *Reversed.*

M. B. Reese, Clark & Allen, and *C. W. Meeker,* for plaintiff in error.

W. S. Morlan, contra.

HARRISON, J.

The plaintiff commenced an action in the district court of Chase county, Nebraska, against the defendants, on a promissory note in the sum of $565, alleging, in regard to his title to the note, that he was the owner of such note by virtue of its purchase for a valuable consideration before its maturity. The answer to the petition was a general denial. The main issue in the evidence introduced was, did the defendants execute the note in suit? They sought to prove that they did not, and the plaintiff the contrary. The defendants were successful in securing a favorable verdict and the plaintiff has prosecuted error proceedings to this court. An examination of the record before us discloses that the verdict of the jury was in form a general finding favorable to the plaintiff, without, however, assessing the amount of his recovery. The judgment is for the defendants.

It is stated in the brief filed in behalf of the plaintiff, that the case was tried to a jury and a verdict returned for defendants; and, since it is thus conceded for the plaintiff that the verdict was in favor of defendants, we will proceed with the examination of the questions presented without further attention to the condition of the record.

The first assignment argued is that the trial court erred in failing to instruct on the issues in the case. It is true that the court did fail to so instruct, but no request was made that he should state the issues in the instructions, and no objection was made or exception taken to the non-action of the court; neither is it of the subjects of assignment and complaint in the motion for a new trial, and must be deemed waived. "It is the duty of the court on its own motion to state the issues as presented by the pleadings to the jury. If, however, it fails to do so, a

request to that effect must be made, and upon the failure an exception taken. If no exceptions are taken and the objection not assigned in the motion for a new trial, it will be deemed waived." (*Barney v. Pinkham*, 37 Neb., 664.)

In the record appears the following:

"Paper marked Exhibit 'F,' for identification.

"Q. State what that is and where you got it.

"A. I guess that is the man I sold the house and lot to,—Frank Scoville.

"Q. Where did you get it?

"A. After he run off and left me in the suds, my friends sent it to me.

"Exhibit 'F' offered in evidence.

"(The following is the copy of Exhibit 'F' except the photograph which appears at the top of the page of Frank A. Scoville:)

"$500 reward. The creditors of the State Bank of Valparaiso offer the above reward for the arrest of F. A. Scoville and Geo. A. Crafts. Valparaiso, Neb., November 22, 1888. F. A. Scoville and Geo. A. Crafts have obtained from the State Bank of Valparaiso about $100 in currency. Description of Scoville: 35 years of age; 5 ft. 8 in. high; weight, about 170 lbs.; dark complexion, full features, grey eyes, dark hair, and brown mustache; has mole on cheek; also large mole or tumor back of ear nearly ¾ of an inch in length; front teeth crowded together and badly discolored; rather plain-appearing gentleman, and dresses plain. The cut above is a fair picture of Scoville. Description of Crafts: About twenty-three years of age; small build; about five feet six inches high; weight, about 140 pounds; dark hair and eyes; small black mustache; stylish-appearing gentleman; usually wears dark clothes; rather a distinct, rapid talker. The above reward will be paid for the arrest and delivery to authorities in Saunders county, Nebraska, of the above named parties. Send all information to Chas. Crow, General Superintendent of the Peoples Detective Associa-

tion, Lincoln, Nebraska." This exhibit was admitted over the objection of counsel for plaintiff and its admission is assigned and presented as an error. The evidence bearing on the litigated issues was conflicting, hence we cannot say that the verdict was the only one which might or should have been rendered.

F. A. Scoville, or Frank A. Scoville, was the payee of the note in suit, the party from whom the plaintiff had purchased it, so alleged in the petition. Exhibit "F," of which we have given a copy, referred to Scoville as being subject of search by a detective association, with a reward offered for his arrest and delivery to the authorities of the county named in the exhibit. This piece of evidence had no possible connection or relevancy to any phase or portion of the cause on trial; was utterly foreign to the issues, and could have but one effect,—that of prejudicing and misleading the minds of the jurors,—hence its admission was an error and one which we cannot say was not harmful to the rights of the complaining party.

There are other errors assigned but we do not deem a discussion of them necessary at this time. The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

STEPHEN S. SOUTHARD, JR., APPELLANT, V. JOHN BEHRNS ET AL., APPELLEES.

FILED NOVEMBER 4, 1897. No. 7554.

Review: SUFFICIENCY OF EVIDENCE. A finding of a trial court which is unsupported by the evidence is manifestly wrong, and a judgment based thereon will be reversed.

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J. *Reversed.*

Byron Clark, for appellant.

E. H. Wooley, contra.

HARRISON, J.

The appellant, on October 27, 1892, instituted this action in the district court of Cass county, alleging in his petition that he was the owner of the undivided one-half of the west half of the northwest quarter section 23, township 10, north of range 12, in Cass county, Nebraska; that he derived his title to the land by or through a warranty deed executed and delivered to him and one G. Frank Gauley, on August 20, 1858, by William Anderson and wife, pursuant to a purchase of said land then made by the grantees in the deed of the grantors therein; that the defendants claimed to have purchased and to own all the interest of the said G. Frank Gauley in and to the property and were, and had been, in possession of the same and had received the rents, issues, and profits thereof since February 1, 1893. Judgment was asked confirming the interests or titles of the parties, for partition of the property, and an accounting by the defendants of and for the said rents and profits. The defendants in answer denied that plaintiff ever had any interest or title in or to the land, and alleged that, at the time of its purchase from the Andersons pleaded in the petition, the purchase was wholly by G. Frank Gauley, the consideration was wholly paid by him, and plaintiff's name was inserted in the deed by mistake; that possession of the land was taken by G. Frank Gauley on or about August, 1858, and he was in the "open, notorious, exclusive, and adverse possession" thereof from such date until his death; that some years thereafter, at his death, he left heirs, certain persons whose names are specifically stated in the answer, who had like possession of the land up to the date they sold and conveyed it to the defendants, November 23, 1882, since which time John Behrns, of defendants herein, had been in the "open, notorious, exclusive,

and adverse possession" of the property. It was also stated in the answer that defendants had placed certain improvements on the land and had paid the taxes thereon relative to both of which it was prayed, if partition was accorded the plaintiff, there should be an accounting and adjustment decreed. No values of the improvements or amounts of taxes paid were pleaded. The reply was in effect a general denial. Of the issues there was a trial to the court resulting in the following finding and decree:

"Now on this 4th day of September, A. D. 1894, this cause having heretofore been submitted upon the pleadings and testimony of the respective parties, and the court, being fully and well advised in the premises, doth find that the defendant John Behrns has been in the peaceable, open, notorious, and adverse possession of the real estate described in plaintiff's petition, viz., the west half of the northwest quarter of section twenty-three (23) in township ten (10) north, of range twelve (12), in Cass county, Nebraska, for more than ten years immediately preceding the commencement of this action; and that during said time he has placed valuable improvements thereon.

"Wherefore, it is ordered, adjudged, and decreed that the title to said lands be and the same are forever confirmed in the defendant John Behrns, and that the plaintiff be and is hereby enjoined from having or claiming any right, title, or interest in and to the same, or any part thereof; and the plaintiff is not entitled to partition by reason of said possession, and plaintiff's petition is therefore dismissed with costs; * * *."

The plaintiff has appealed to this court. Whether the court could, in an action of partition, try and adjudicate questions in regard to the titles to the land is not presented by the present record, hence we will not discuss or decide it. The main point for consideration is whether there was evidence sufficient to support the finding of the court in regard to the defendant's possession of the land.

The evidence in relation to the defendant and his own-

ership and possession of the land in dispute disclosed that he had purchased it on February 1, 1883, the date of the conveyances to him. In his testimony he stated that he took possession of the land during the following spring, "before the 12th of May." The petition in the present action was filed October 27, 1892, and from the record it appears that on November 21, 1892, the defendant filed a motion to require the plaintiff to give security for costs, from which it is apparent that the possession of the defendant had continued for less than ten years,—the statutory period. No witness placed it before the year 1883, during the spring months; hence some months short of the necessary time.

The only other issue relative to adverse possession raised by defendant's answer was that defendants, the heirs of G. Frank Gauley, and G. Frank Gauley, had been in the "open, notorious, exclusive, and adverse possession" of the land for more than the statutory period necessary to bar an action by the plaintiff to assert any right or title in or to it. On August 20, 1858, according to the evidence, pursuant to a purchase made by the grantees named in the deed, the title to the land was conveyed by the then owners to G. Frank Gauley and the plaintiff, and it does not appear that either of the grantees ever occupied the land or was in actual physical possession of it or had any other possession thereof than is presumed to be in any owner of wild, uncultivated, unoccupied land. Clearly no such possession of either G. Frank Gauley or the parties who made quitclaim deeds conveying the property to defendants as heirs of G. Frank Gauley was shown admissible or competent under the pleadings, which can be claimed to have been open, notorious, and adverse to the plaintiff. There was a tax deed introduced in evidence by which it appeared that the land in litigation herein had been sold to one Daniel Foust and a tax deed executed and delivered by the treasurer of Cass county to the purchaser; and it also appeared that the land had been conveyed by Daniel Foust

to Geo. F. Gauley, but this had no relevancy or competency in any issue presented by the pleadings, hence any claims which might have been asserted under this evidence need not be discussed here. The finding of the trial court was unsupported by the evidence,—was manifestly wrong. The judgment based thereon must therefore be set aside and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN A. ORR V. CHARLES A. BROAD ET AL.

FILED NOVEMBER 4, 1897. No. 7525.

1. **Mortgages:** TITLE: LIEN. A mortgage of real property in this state does not convey any title or vest any estate before or after conditions broken, but merely creates a lien on the property. (*Hoagland v. Lowe*, 39 Neb., 397; Compiled Statutes, ch. 73, sec. 55.)

2. ———: RIGHT OF POSSESSION: RENTS. A mortgagor of real property retains the legal title and is ordinarily entitled to the possession thereof until confirmation of a sale under decree of foreclosure of the mortgage and such right of possession carries with it the proprietary interest in the rents and profits of the real estate.

3. ———: SALE OF MORTGAGOR'S INTEREST UNDER EXECUTION: TITLE. Such title and interest of the mortgagor may be sold under execution, and the purchaser at the execution sale by its confirmation and execution of a deed pursuant thereto is vested with such title and right as were in the judgment debtor at the time the lien of the judgment attached to the land.

4. **Ejectment:** TERMINATION OF PLAINTIFF'S RIGHT: JUDGMENT. "In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property." (Code of Civil Procedure, sec. 629.)

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

The opinion contains a statement of the case.

H. W. Orr and *Lamb, Adams & Scott*, for plaintiff in error:

Under the execution sale all the title of mortgagors was conveyed to plaintiff in error. (Code, secs. 499, 500; *Reynolds v. Cobb*, 15 Neb., 381; *Lamb v. Sherman*, 19 Neb., 684.)

Mortgagors could not assign any better right than they possessed. (*Courtnay v. Parker*, 16 Neb., 311, 21 Neb., 582; *Johnson v. Sherman*, 15 Cal., 293.)

Rights to rents and profits passed to plaintiff in error as an incident to the legal title when it was conveyed by the sheriff under his deed. (*Bank of Pennsylvania v. Wise*, 3 Watts [Pa.], 394; *Latta v. Pierce*, 11 Lea [Tenn.], 267; *Butt v. Ellett*, 19 Wall. [U. S.], 544; *English v. Key*, 39 Ala., 113; *Tubb v. Ford*, 58 Ala., 277.)

In absence of stipulations to the contrary, the mortgagor of realty retains the legal title and right of possession. (*Kyger v. Ryley*, 2 Neb., 20; *Webb v. Hoselton*, 4 Neb., 318; *Union Mutual Life Ins. Co. v. Levitt*, 10 Neb., 301; *Higginbottom v. Benton*, 24 Neb., 463; *Johnson v. Sherman*, 15 Cal., 293; *Kidd v. Teeple*, 22 Cal., 255.)

Neither the legal title nor the right to rent passes to mortgagee. (*Kountze v. Omaha Hotel Co.*, 107 U. S., 392; *Trimm v. Marsh*, 54 N. Y., 599; *Sellwood v. Gray*, 11 Ore., 534; *Seckler v. Delfs*, 25 Kan., 159; *Sexton v. Breese*, 32 N. E. Rep. [N. Y.], 133; *Vason v. Ball*, 56 Ga., 268; *Taliaferro v. Gay*, 78 Ky., 496; *Wooley v. Holt*, 14 Bush [Ky.], 789; *Caruthers v. Humphrey*, 12 Mich., 270; *Humphrey v. Hurd*, 29 Mich., 44; *Mills v. Heaton*, 52 Ia., 215; *Mills v. Hamilton*, 49 Ia., 105; *Morrow v. Morgan*, 48 Tex., 304; *Newton v. McKay*, 30 Mich., 380; *Ferris v. Wilcox*, 51 Mich., 105; *Butman v. James*, 34 Minn., 547; *Dutton v. Warschauer*, 21 Cal., 610.)

The only method by which a mortgagee can obtain a lien upon rents and profits is by having a receiver appointed in a foreclosure proceeding. Until that time the

rents may be collected by the holder of the legal title or reached by his creditors. (*Howell v. Ripley*, 10 Paige [N. Y.], 43; *Astor v. Turner*, 11 Paige [N. Y.], 436; *Wooley v. Holt*, 14 Bush [Ky.], 789; *Teal v. Walker*, 111 U. S., 242; *Post v. Dorr*, 4 Edn. Ch. [N. Y.], 412; *Gilman v. Illinois & Mississippi Telephone Co.*, 91 U. S., 603; *Kountze v. Omaha Hotel Co.*, 107 U. S., 392; *American Bridge Co. v. Heidelbach*, 94 U. S., 798; *Taliaferro v. Gay*, 78 Ky., 498; *Reed v. Ward*, 51 Ind., 215; *Sellwood v. Gray*, 11 Ore., 535.)

The amount of rent received is the measure of recovery, and a landlord who puts another in possession as his tenant renders himself liable to the true owner for the rental value of the premises. (*Chirac v. Reinicker*, 11 Wheat. [U. S.], 280; *Storch v. Carr*, 28 Pa. St., 135; *Williamson v. Heyser*, 74 Ga., 271; *Winings v. Wood*, 53 Ind., 187.)

Where the right to maintain ejectment terminates during suit, plaintiff may recover *mesne* profits. (*Hairston v. Dobbs*, 2 So. Rep. [Ala.], 148.)

Defendants were not entitled to the appointment of a receiver. (*Nash v. Meggett*, 61 N. W. Rep. [Wis.], 283; *Adair v. Wright*, 16 Ia., 386.)

John H. Ames and *E. F. Pettis*, *contra*.

References: Code, secs. 85, 853; *Harrington v. Latta*, 23 Neb., 84; Wiltsie, Mortgage Foreclosures, secs. 576, 577.

HARRISON, J.

The plaintiff instituted this action in the district court of Lancaster county, asserting in the petition that on a certain stated date he was the owner in fee, and entitled to the possession, of lot 12 in block 41, in the city of Lincoln, and that the defendant Charles A. Broad wrongfully and unlawfully entered into, and held possession of, the property, received the rents, issues, and profits thereof and appropriated them to his own use, whereby he became indebted to the plaintiff in the amount of such

rents, etc. The prayer of the petition was for judgment in the pleaded sum of the rents. Emma H. Holmes, who also claimed the rents of the property, was on motion of the defendant Charles A. Broad made a party defendant. Issues were joined, and after a partial trial before a jury, a trial by jury was waived, that body was discharged, the trial completed, and the cause submitted to the court. The result was a judgment for defendants. The plaintiff presents the case to this court for review.

The trial court made special findings, and it is claimed as error that the judgment rendered is contrary to the findings. The findings were as follows:

"This cause having been tried at a former term of the district court, and the same having been submitted upon the evidence adduced, and now comes on for final hearing and determination upon the petition of the plaintiff and the answers of the defendants, and the replies thereto, and on the evidence adduced, and the court being fully advised in the premises, doth find:

"1. That on the 31st day of October, 1890, in an action in the justice court of Lancaster county, Nebraska, in which Hooker & Orr were plaintiffs, the said plaintiffs recovered a judgment against C. H. Hutchins and Jane G. Hutchins for the sum of $169.29 and costs of action taxed at $3.45; and on the 3d day of November, 1890, a transcript of said judgment was duly filed in the office of the clerk of the district court of Lancaster county, state of Nebraska, and from and after the date of said filing was an existing and valid lien upon all the real estate of the said defendants Hutchins, situated in said county.

"2. That at the time of the filing of said lien the said defendants Hutchins were the owners of lot twelve (12) in block forty-one (41) in the city of Lincoln, Lancaster county, state of Nebraska, in fee simple; and from and after the filing of said lien the said judgment was an existing and valid lien upon the said real estate.

"3. That prior to the filing of said lien there existed a mortgage lien upon said premises in favor of the Clark

& Leonard Investment Company for the sum of $15,000 and accrued interest, and a mortgage in favor of W. W. Holmes on the same and other property for the sum of $16,500 and accrued interest; that the conditions in each of these mortgages were broken and the mortgagees had acquired the right to foreclose the mortgage liens.

"4. That prior to the filing of said judgment lien, to-wit, on the 19th day of September, 1890, an action of foreclosure had been commenced in a case in the district court of Lancaster county, Nebraska, in which Leonidas K. Holmes and others were plaintiffs and the said C. H. Hutchins and Jane G. Hutchins and others were defendants, and in the said action the said Clark & Leonard Investment Company and W. W. Holmes had filed cross-petitions seeking the foreclosure of their mortgage liens, and the said action was at all times pending in said court from the time of the commencement of the same until the 19th day of February, 1894. That a notice of *lis pendens* of such action was filed in the office of the register of deeds of Lancaster county prior to the filing of the transcript in the office of the clerk of the district court in the above named cause of Hooker & Orr *versus* Jane G. Hutchins et al., but that said notice of *lis pendens* did not describe the property above named, to-wit, lot twelve (12) in block forty-one (41), city of Lincoln.

"5. That on the 10th day of August, 1891, the plaintiff herein caused execution to issue upon his judgment heretofore recited, and levy to be made upon the said real estate, and on the 15th day of September, 1891, the said real estate was sold at sheriff's sale under said execution, and was purchased by the plaintiff herein; and that at the September term of court, 1891, the said sale was duly confirmed in the district court of Lancaster county, state of Nebraska, and a deed ordered to issue; and that on the 19th day of November, 1891, a sheriff's deed to said property was issued to the plaintiff herein, which deed was never filed in the office of the register of deeds of Lancaster county, Nebraska.

"6. That on the 19th day of November, 1892, the plaintiff herein made due and formal demand upon the defendant herein, Charles A. Broad, for the possession of the premises upon said real estate occupied by him, and the said Charles A. Broad at said time refused to deliver the said premises to plaintiff.

"7. That on the 11th day of August, 1891, the said C. H. Hutchins and Jane G. Hutchins delivered the said real estate above described, including the premises occupied by the defendant Charles A. Broad, to the possession of the defendant Emma H. Holmes, and the said Emma H. Holmes upon said date took actual and manual possession of the said premises, and at all times since said date the said Emma H. Holmes, by herself and tenants, has held possession and control of the said premises, and the defendant Charles A. Broad has at such times been the tenant of the defendant Holmes.

"8. That on the said 11th day of August, 1891, the said C. H. and Jane G. Hutchins executed and delivered to Emma H. Holmes an assignment in writing to the said Emma H. Holmes of all the rents and profits of the real estate above described to accrue in the future.

"9. That on the said 11th day of August, 1891, the said defendant, Emma H. Holmes, was administratrix of the estate of W. W. Holmes, the mortgagee above named, and in all matters touching the said assignment of the taking possession and subsequent holding of possession of the said real estate, the said Emma H. Holmes, defendant, acted for and in behalf of the estate of W. W. Holmes, deceased.

"10. That the said Emma H. Holmes, while so acting, received as rents from the defendant Charles A. Broad, the sum of $3,450 and applied the same in the payment of interest then due upon the before named mortgages described as given to the Clark & Leonard Investment Company and W. W. Holmes, and in the payment of the principal of said mortgages, and in the payment of expenses in the care and reparation of the building located upon said real estate.

"11. That final judgment was rendered in the district court of Lancaster county, Nebraska, in the said case of L. K. Holmes et al., plaintiffs, and C. H. and Jane G. Hutchins et al., defendants, on the 27th day of November, 1891; that order of sale issued upon the decree entered therein, and on the 27th day of December, 1892, the said premises were sold and purchased by the defendant Emma H. Holmes for the sum of $11,370, and thereafter the said sale was duly confirmed by the said court and a deed issued to the said Emma H. Holmes on the 19th day of February, 1894, which was subsequently recorded in the office of the register of deeds of Lancaster county, state of Nebraska.

"12. The court further finds that all the rents and profits of the premises occupied by the defendant Charles A. Broad have been by him paid to Mrs. Emma H. Holmes, and by her applied to the satisfaction of the liens above described that are prior to the interest of the plaintiff herein, and that in equity and good conscience the plaintiff ought not to recover the same. And the court therefore finds in favor of the defendants and against the plaintiff.

"It is therefore considered, ordered, adjudged, and decreed that the defendants go hence without day, and the plaintiff take nothing by his writ, and that the action of the plaintiff be and the same hereby is dismissed, and that the defendants herein recover of and from the plaintiff John A. Orr their costs herein expended, taxed at $50.78.

"To all of which, and to each and every finding heretofore made, the plaintiff duly excepts, and forty days from the rising of court allowed to reduce exceptions to writing.

"To the first, second, fifth, and sixth findings of the court the defendants duly and severally except."

By the findings it is established that at the time the plaintiff obtained his judgment and filed the transcript thereof in the office of the clerk of the district court, there

were mortgages existing against the real estate drawn into question in this action which were in process of foreclosure by action in the proper court. It is of our statutory law that "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." (Compiled Statutes, ch. 73, sec. 55.) A mortgage "is a mere pledge for the payment of the debt or performance of an obligation." "The mortgagor retains the right of possession up to the confirmation of sale had upon the decree of the court." (*Kyger v. Ryley*, 2 Neb., 20.) "But in this state the mortgagee is not seized of the freehold, either at law or in equity, even after condition broken. The mortgagor retains the legal title and is entitled to the possession which he may retain until the sale is confirmed." (*Webb v. Hoselton*, 4 Neb., 318.) In *Renard v. Brown*, 7 Neb., 453, in referring to a mortgagor, it is stated: "He is the owner of the land and the mortgage is a mere security for the debt. The land thus mortgaged descends to his heirs as real estate and may be devised as such. And it may be sold on execution against the mortgagor." (See, also, *Hurley v. Estes*, 6 Neb., 386; *Union Mutual Life Ins. Co. v. Lovitt*, 10 Neb., 301.) "A mortgage on real property in this state does not convey any title or vest any estate before or after conditions broken, but merely creates a lien upon the mortgaged property." (*Hoagland v. Lowe*, 39 Neb., 397; *Davidson v. Cox*, 11 Neb., 250; *McHugh v. Smiley*, 17 Neb., 626.)

The plaintiff who purchased at the execution sale, by the confirmation thereof and the deed made pursuant thereto, was vested with such title and right as were in the judgment debtor at the time the lien of the judgment attached to the land. (Code of Civil Procedure, secs. 499, 500; *Reynolds v. Cobb*, 15 Neb., 381; *Courtnay v. Parker*, 16 Neb., 311, 21 Neb., 582; *Lamb v. Sherman*, 19 Neb., 681; *Yeazel v. White*, 40 Neb., 432.) These were the legal title and right to possession. His title and right thus acquired were liable to extinguishment by the foreclosure of the mort-

gages, a sale under the decree, and confirmation thereof (*Harrington v. Latta*, 23 Neb., 84; *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb., 559); but until the occurrence of the last mentioned event he had the legal title and right to possession. Accompanying the legal title and right to possession, the right to the rents and profits passed to the plaintiff; hence, from the date, November 19, 1891, the date of the confirmation of the execution sale and deed of the sheriff to the plaintiff, the legal title was in him, he had the right of possession and to collect the rents and profits of the real estate. (In support of the last proposition see *Butt v. Ellett*, 19 Wall. [U. S.], 544; *Latta v. Pierce*, 11 Lea [Tenn.], 267; *Bank of Pennsylvania v. Wise*, 3 Watts [Pa.], 394; *Yeazel v. White*, 40 Neb., 432.) From the last mentioned date, the plaintiff could maintain an action of ejectment against parties who without right were withholding and occupying the real estate. Whether the action of ejectment would lie in his favor against either of the defendants herein is a question not presented, hence we need not discuss it. The parties joined issues and submitted them to the trial court for adjudication and would be held bound by the judgment after its rendition (*Gregory v. Lancaster County Bank*, 16 Neb., 411); hence it was not error to determine the issue in regard to rents and profits in the present suit. If the plaintiff had the right to maintain an action of ejectment against the defendants, it terminated during the pendency of this action or on the date of the confirmation of the sale made pursuant to the decree of foreclosure of the mortgages, but he could recover in the action for withholding the property. (Code of Civil Procedure, sec. 629.)

It is urged for defendants that there is no finding of the rental value of the property, and none that the rents collected by and during the time one of the defendants claimed to be in possession accrued during the time which was contemporaneous with the time the plaintiff asserts he was entitled to the possession and the rents. The

findings are to the effect that Emma H. Holmes, of defendants, took actual possession of the premises August 11, 1891, and continued such possession with the other defendant, Charles A. Broad, as her tenant, and collected between three and four thousand dollars rent moneys; in short there is sufficient in the findings to show that the property had a rental value during the time plaintiff had the right to its possession, and that during such time, or a portion of it, one of the defendants occupied it as the tenant of the other, paying rent therefor to his now co-defendant. This is sufficient on this branch of the case to establish the plaintiff's right to recover.

It follows from the conclusions herein reached that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

RYAN, C., not sitting.

MARTIN KAZDA V. STATE OF NEBRASKA.

FILED NOVEMBER 4, 1897. No. 9379.

Recognizance: APPEAL FROM POLICE COURT. A recognizance on an appeal from a police magistrate is invalid where the court before which the prisoner is to appear is not designated, and its giving confers upon the appellate court no jurisdiction to try the cause.

ERROR from the district court for Johnson county. Tried below before STULL, J. *Reversed.*

M. B. C. True, for plaintiff in error.

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

NORVAL, J.

The defendant below, Martin Kazda, was convicted in the police court of the city of Tecumseh for the selling

of liquors without a license, and was sentenced to pay a fine of $25. He appealed therefrom to the district court, giving for that purpose the following bond:

"STATE OF NEBRASKA, COUNTY OF JOHNSON.	Before me, J. S. Dinsmore, Police Judge, City of Tecumseh, Johnson County, Nebraska.
"CITY OF TECUMSEH, Plaintiff, v. MARTIN KAZDA, Defendant.	

"Whereas, on the 14th day of January, 1897, the state of Nebraska, city of Tecumseh, recovered a judgment against Martin Kazda for the unlawful selling of liquor, before me, J. S. Dinsmore, police judge of the city of Tecumseh, Johnson county, Nebraska, for the sum of twenty-five ($25) dollars and costs of suit taxed at six and 65-100 dollars, and the said defendant intends to take an appeal of said case to the district court of Johnson county. Now, therefore, I, Thomas Kazda, do promise and undertake to the said state of Nebraska and city of Tecumseh, in the sum of one hundred and twenty-five (125) dollars, that the said Martin Kazda will prosecute his appeal to effect and without unnecessary delay, and that said appellant, if judgment be adjudged against him on appeal, will satisfy such judgment and costs.

"MARTIN KAZDA.
"THOMAS KAZDA.

"Executed in my presence and security approved by me this 16th day of January, 1897. J. S. DINSMORE,
"Police Judge."

A transcript of the proceedings before the police judge was lodged in the district court, and subsequently the defendant moved that the cause be dismissed upon the ground the court had no jurisdiction, as disclosed by the records and papers in the case, which motion was denied. Upon a trial to a jury he was again found guilty and sentenced to pay a fine of $50 and costs. From this conviction he prosecutes error to this court.

A reversal is sought upon three grounds, of which one

alone will be considered, namely, that the district court acquired no jurisdiction of the subject-matter by the attempted appeal. It cannot escape notice that the instrument copied above is the usual form of a bond given for an appeal in civil actions as required by section 1007 of the Code of Civil Procedure. The important inquiry is whether said undertaking was sufficient in substance to effect an appeal in this, a criminal case.

Section 324 of the Criminal Code relating to appeals from judgments of magistrates imposing fines and imprisonments, or both, provides: "No appeal shall be granted or proceedings stayed unless the appellant shall, within twenty-four hours after the rendition of such judgment, enter into a recognizance * * * conditioned for his appearance at the district court of the county at the next term thereof, to answer the complaint against him." The undertaking in question does not meet the requirement of the said section of the Criminal Code, since it contains no provision making it the duty of the defendant to appear in the district court of Johnson county, at any time or for any purpose whatever. Giving the language of the statute its plain and ordinary meaning, it is evident that the attempted appeal from the judgment of conviction rendered by the police magistrate was ineffectual to confer jurisdiction of the cause upon the district court. The identical question was passed upon in *Pill v. State*, 43 Neb., 23, in which it was decided that a bond, substantially like the one before us, was absolutely void, in that it did not designate the court before which the prisoner was to appear, and conferred no jurisdiction upon the district court to try the cause.

It is contended by the attorney general that the defendant having presented the bond to the police judge and procured its approval, and thereby attained his liberty, he cannot be heard to question its sufficiency. If this were an action upon the bond, perhaps the rule of estoppel might be important, but it certainly cannot be invoked here. The question is one of jurisdiction of the subject-

matter, and the principle is as old as the law that it cannot be conferred by consent of parties. It may be raised at any time. The district court could acquire jurisdiction of the cause only in the mode pointed out by statute. Said section 324 is imperative that "no appeal shall be granted or proceeding stayed" unless the appellant shall give a recognizance conditioned in substantial compliance with the provision of the section. This bond having failed to specify the court where the accused was to appear, was invalid, and the district court should have entered a dismissal. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

JENNIE S. MORSCH V. REBECCA S. BESACK ET AL.

FILED NOVEMBER 4, 1897. No. 7480.

1. **Review:** CONFLICTING EVIDENCE. A verdict on conflicting evidence will not be disturbed.

2. ———: RULINGS ON EVIDENCE. Alleged errors in the admission or rejection of testimony are not reviewable where the particular rulings are not pointed out in the petition in error.

3. ———: ———: OFFER OF PROOF. The sustaining of an objection to a question put by a party to his own witness will not be considered unless the party made an offer indicating what he expected to prove by such witness.

4. **Instructions:** EXCEPTIONS. In order to obtain a review of an instruction an exception must have been taken thereto in the trial court.

5. ———: ASSIGNMENTS OF ERROR. Instructions will be disregarded which are not pointed out in the motion for a new trial and petition in error.

6. **New Trial:** AFFIDAVITS: BILL OF EXCEPTIONS. Affidavits used on the hearing of a motion in the trial court, to be available on review, must be included in a bill of exceptions,

7. Judgment: VERDICT: PARTIES. A judgment must conform to the verdict, not only as to the amount, but as to the parties against whom the finding is made.

8. Costs: JUSTICE OF THE PEACE. Where a justice of the peace has jurisdiction of a cause, and the same has been brought in any other court, plaintiff cannot recover costs. Each party, in such case, is liable for his own costs.

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

J. S. Hoagland, for plaintiff in error.

H. M. Grimes and *Wilcox & Halligan, contra.*

NORVAL, J.

This was an action upon a promissory note. There was a verdict against both defendants for $1, and from the judgment rendered thereon against one of them alone, plaintiff prosecutes error.

The first assignment argued is that the verdict is contrary to the evidence. The note in suit represents a portion of the purchase price for a certain meat market, fixtures, outbuildings, corrals, etc., sold by plaintiff to the defendant Rebecca S. Besack. Defendants admit the execution and delivery of the note, and that there remains unpaid thereon $347.10, the sum for which suit was brought. The defense is a partial failure of consideration. The testimony introduced on behalf of defendants tends to prove that a corral, one cow, one cooling room, and a smokehouse were included in the property for which the note was given; that plaintiff was not the owner thereof; that the vendee never obtained title thereto, and that the value of said property equaled the balance remaining unpaid on the note. There was also testimony to the effect that prior to the purchase the defendant D. W. Besack examined the property, the same having been pointed out to him, at plaintiff's request, by one Otto Richter, who was in the employ of plaintiff as manager of the meat market, and who represented that

the property in controversy pertained to the market and would pass to the purchaser. At the time of the sale all the property was in possession of the plaintiff and was being used in connection with the market.

The testimony adduced by her tended to establish that she did not sell any portion of the property in question to plaintiff, never authorized Richter to show the same to defendant, or to act in any manner for her in making the deal. There was a sharp conflict in the evidence. This being the case it is too firmly established to require the citation of authorities that this court will not weigh the same, or go further than to ascertain that the verdict is established by sufficient legal evidence. The question was largely one of veracity of the witnesses. The jury believed those who testified for the defense and the finding is not without support in the evidence.

The next assignment argued in the brief is: "The court erred in sustaining defendants' objection to certain questions to defendant D. W. Besack on cross-examination. (See pages 22, 24, and 34.)" This assignment is too general and indefinite to require attention. It has been often asserted by this court that alleged errors must be specifically pointed out in the petition in error to be available here. (*Grand Island & W. C. R. Co. v. Swinbank*, 51 Neb., 521.) For the reasons just stated the assignment relating to the sustaining of objections to certain questions to witness Besack will not be considered.

Complaint is made in the brief of the refusal of the trial court to permit plaintiff's witnesses, Hoagland and Heck, to answer certain questions put to them upon direct examination. These rulings are not available since no tender of proof was made in the court below. (*Barr v. City of Omaha*, 42 Neb., 341.)

Another assignment in the petition in error and motion for a new trial is that "the court erred in giving to the jury the fourth, fifth, and seventh instructions." The only criticism especially made in the brief is directed against the fourth instruction. The fifth was not unfavorable to

the defendant. It merely directed the jury that if they found from the evidence the defendant received from plaintiff all the property conveyed and all that she, or any one authorized to act in her behalf, represented as being included in the sale, the verdict should be for plaintiff for the amount unpaid on the note. This was good law and was applicable to the evidence. The conclusion reached as to the fifth paragraph of the charge renders unnecessary an examination of the fourth and seventh, since they are all grouped in a single assignment. This course is sanctioned by the repeated holdings of this court.

The eighth instruction given by the court on its own motion is assailed, but it cannot be reviewed for the obvious reasons that no exception was taken thereto in the trial court and its giving is not assigned for error, either in the petition in error or motion for a new trial.

It is argued that there was misconduct on the part of one of the jurors in going into the meat market in question during the trial, without leave of the court, and examining the fixtures therein. We are unable to verify the correctness of this charge inasmuch as the affidavits setting up that matter, which are included in the transcript, are not preserved by a bill of exceptions. The assignment is, therefore, not available. (*Wright v. State*, 45 Neb., 44; *Korth v. State*, 46 Neb., 631; *First Nat. Bank of Madison v. Carson*, 48 Neb., 763.)

For the reason just indicated the alleged misconduct of the defendant D. W. Besack cannot be reviewed.

The assignment that the judgment is not in accord with the verdict is well taken. The verdict was against both defendants while judgment was entered against Rebecca Besack alone. This reversible error is available in this court, notwithstanding no motion was made in the lower court to correct the judgment. It was the duty of the court of its own accord, without its attention being especially challenged thereto, to have rendered a judgment against both defendants.

Lastly, it is urged that the court erred in entering

judgment against the plaintiff for the costs in the case, amounting to $111.78. Section 621 of the Code of Civil Procedure provides: "If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, the plaintiff shall not recover costs." This action originated in the county court proper, the plaintiff claiming an amount in excess of the jurisdiction of a justice of the peace. Judgment there went against the plaintiff, and on appeal she recovered $1, which sum being within the jurisdiction of a justice of the peace, under said section 621, plaintiff was not entitled to her costs. (*Ray v. Mason*, 6 Neb., 101; *Moore v. Darrow*, 11 Neb., 462; *Goodman v. Pence*, 21 Neb., 459; *Pickens v. Polk*, 42 Neb., 267; *City of Hastings v. Mills*, 50 Neb., 842.) Neither was there any authority for recovering costs against her. Each party is liable for her own costs. The judgment is reversed and the cause remanded to the district court with directions to render judgment upon the verdict against both defendants, but without costs to either party.

REVERSED AND REMANDED.

P. BROCKMAN COMMISSION COMPANY V. CHARLES SANG.

FILED NOVEMBER 4, 1897. No. 7535.

Review: UNAUTHENTICATED TRANSCRIPT: DISMISSAL. This court does not acquire jurisdiction of a cause brought here on appeal or error, where the transcript of the judgment, or final order sought to be reviewed, has not been properly authenticated by the clerk of the district court.

ERROR from the district court of Butler county. Tried below before WHEELER, J. *Proceeding in error dismissed.*

Batty & Dungan, for plaintiff in error.

Matt Miller, *contra*.

NORVAL, J.

This petition in error must be dismissed for the reason the same is predicated upon a transcript which is not properly authenticated by the clerk of the trial court. The certificate of that officer appended to the transcript merely authenticates the pleadings included therein, as being true copies of the originals filed in the case. The proceedings in the court below and the judgment sought to be reviewed are in no manner mentioned in said certificate or otherwise authenticated. Section 586 of the Code of Civil Procedure requires the plaintiff in error to file with his petition "a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified." This transcript must be properly authenticated else the appellate court will not acquire jurisdiction of the cause. (*McDonald v. Penniston*, 1 Neb., 324; *Moore v. Waterman*, 40 Neb., 498; *McDonald v. Grabow*, 46 Neb., 406; *Otis v. Butters*, 46 Neb., 492; *Einspahr v. Exchange Nat. Bank*, 49 Neb., 557.) The petition in error is

DISMISSED.

FIRST NATIONAL BANK OF PIERCE V. C. O. NOBLE.

FILED NOVEMBER 4, 1897. No. 7543.

Review: UNAUTHENTICATED TRANSCRIPT: DISMISSAL. The judgment sought to be reversed not having been authenticated by the certificate of the clerk of the district court, the proceeding in error is dismissed.

ERROR from the district court of Pierce county. Tried below before ROBINSON, J. *Proceeding in error dismissed.*

Douglas Cones, for plaintiff in error.

H. F. Barnhart and *W. W. Quivey*, *contra*.

NORVAL, J.

There is no authentication by the clerk of the district court of the judgment sought to be reviewed. The disposition of the case is ruled by the decision in *Brockman Commission Co. v. Sang*, 52 Neb., 506, decided herewith. The proceeding in error is

DISMISSED.

STATE OF NEBRASKA, EX REL. CONSTANTINE J. SMYTH, ATTORNEY GENERAL, V. GEORGE A. MAGNEY, JOHN D. WARE, HARRY E. BURNAM, AND FREDERICK H. COSGROVE.

FILED NOVEMBER 4, 1897. No. 9284.

1. **Courts:** JURISDICTION. Section 19, article 6, of the constitution requires that the jurisdiction, powers, proceedings, and practice of the several district courts should be uniform, and so of the county courts and of the justices of the peace. Per NORVAL, J.

2. ———: ———. The words "jurisdiction and powers," in the sense they are employed in the said section 19 of the constitution, embrace not only the subject-matter of the cause, but as well the territory within which a court may act or send process for service, so that the territorial jurisdiction of all courts of the same grade or class must be uniform. Per NORVAL, J.

3. ———: ———: JUSTICES OF THE PEACE. The constitution does not require that the territory within the limits of which the jurisdiction of justices of the peace is restricted shall be of uniform size, but that every such territory shall consist of like political division. Thus, when counties are chosen as a basis of territorial jurisdiction, no other political division can be adopted in part, and when any political division other than counties is made the criterion, to be uniform it must be of all such divisions throughout the state. Per NORVAL, J.

4. ———: ———. It is essential that the territorial jurisdiction of the district and county courts, respectively, shall be uniform. Per NORVAL, J.

5. **Statutes:** MUNICIPAL COURTS: CONSTITUTIONAL LAW. Section 8, chapter 25, Session Laws of 1897, violates the constitutional rule of uniformity of jurisdiction and powers, as regards the district, county, and justices' courts of the state. Per NORVAL, J.

6. **Municipal Courts:** UNCONSTITUTIONALITY OF ACT. Chapter 25, Session Laws of 1897, an act establishing a municipal court in cities of the metropolitan class, violates section 19, article 6, of the constitution and is void. Per RAGAN, C.

7. **Courts:** CLASSIFICATION. The constitution classifies or grades all courts which exist or may exist in the state and the legislature has no authority to alter such classification. Per RAGAN, C.

8. ———: JURISDICTION. Within the limits of the constitution the legislature may enact laws defining the jurisdiction and powers of all courts in the state, but such a law, to be valid, must be uniform as to all courts of the same grade, wherever situate. Per RAGAN, C.

9. ———: ———. The constitution prohibits the legislature from vesting in the county courts or justices of the peace of one county a jurisdiction or power that is not vested in the county courts and justices of the peace of every other county of the state. Per RAGAN, C.

10. **Statutes:** CONSTRUCTION. When it is apparent that an unconstitutional section of a legislative act was the sole inducement to the enactment, the whole law will be held void. Per RAGAN, C.

11. ———: ———. A legislative act, valid and complete in itself, which contains a provision repugnant to some other existing law, repeals such law by implication. Per RAGAN, C.

ORIGINAL action in the nature of *quo warranto* by the state on relation of the attorney general to oust respondents from offices to which they were appointed under the provisions of chapter 25, Session Laws of 1897, entitled "An act to create a municipal court in cities of the metropolitan class, and to fix and define the organization, powers, and jurisdiction of the same." *Act held unconstitutional and writ of ouster awarded.*

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

J. J. Boucher, also for relator:

The act is unconstitutional because it contains two subjects, only one of which is expressed in the title. (Constitution, sec. 11, art. 3; *Ives v. Norris,* 13 Neb., 252; *State v. County Commissioners,* 6 Neb., 474.)

The statute violates the constitutional requirement that

all courts therein enumerated shall be in existence at all times in every part of the state. (Constitution, secs. 1, 18, art. 6; *Bull v. Conroe*, 13 Wis., 233; *State v. Goldstucker*, 40 Wis., 124; *Commonwealth v. Green*, 58 Pa. St., 226; *State v. Leonard*, 86 Tenn., 485.)

The act is void in attempting to take away the civil jurisdiction of justices of the peace, of the county court, and part of the jurisdiction of the district court, in metropolitan cities only. (Constitution, sec. 19, art. 6; *State v. Shropshire*, 4 Neb., 411; *Board of Commissioners v. First Nat. Bank*, 40 Pac. Rep. [Colo.], 894; *Tissier v. Rhein*, 130 Ill., 110; *State v. Berka*, 20 Neb., 375; *Frantz v. Fleitz*, 85 Ill., 367; *State v. Stark*, 18 Fla., 255; *Myers v. People*, 67 Ill., 503; *Foxworthy v. City of Hastings*, 23 Neb., 772.)

The act is void in attempting to make the judges of the municipal court justices of the peace. (*State v. Brunst*, 26 Wis., 412; *Hoke v. Henderson*, 4 Dev. Law [N. Car.], 1; *State v. Wrightson*, 32 Atl. Rep. [N. J.], 820; *People v. Raymond*, 37 N. Y., 428; *Warner v. People*, 2 Denio [N. Y.], 272; *Atkins v. Fraker*, 32 Wis., 510; *Waters v. Langdon*, 40 Barb. [N. Y.], 408; *Commonwealth v. Conyngham*, 65 Pa. St., 76; *Wenzler v. People*, 58 N. Y., 516.)

The act is void in making the term of the judges three years instead of two. (Constitution, sec. 20, art. 6; *State v. Thoman*, 10 Kan., 192.)

The act is void in providing for the election of judges in the spring. All judicial officers must be elected in November. (Constitution, sec. 13, art. 16; *State v. Glenn*, 54 Tenn., 472; *People v. Hurlbut*, 24 Mich., 44; *Speed v. Crawford*, 3 Met. [Ky.], 207; *Geraty v. Reid*, 78 N. Y., 64; *People v. Schiellein*, 95 N. Y., 124; *State v. Wrightson*, 32 Atl. [N. J.], 820; *People v. Raymond*, 37 N. Y., 428; *Warner v. People*, 2 Denio [N. Y.], 272; *Opinion of Judges*, 117 Mass., 603; *People v. Albertson*, 55 N. Y., 57.)

The act is void in attempting to confer territorial jurisdiction coextensive with the county limits. (Constitution, sec. 1, art. 6; *Rockwell v. Raymond*, 5 N. Y. Supp., 642; *Brandon v. Avery*, 22 N. Y., 469; *Waters v. Langdon*, 40

Barb. [N. Y.], 408; *Sinkler v. Terry*, 108 N. Y., 1; *Curtin v. Barton*, 139 N. Y., 505; *People v. Upson*, 79 Hun [N. Y.], 87.)

The act is void in providing that the governor shall appoint the first judges, one for nine years, one for six years, and one for three years. (Constitution, sec. 21, art. 6; *People v. Hurlbut*, 24 Mich., 113; *Evansville v. State*, 118 Ind., 426; *State v. Lansing*, 46 Neb., 514.)

The act is void in providing that the city shall furnish offices, furniture, and supplies for the court. This imposes a tax on the municipality. (Constitution, secs. 1, 6, 7, art. 9; *Dorgan v. Boston*, 12 Allen [Mass.], 223; *Hammett v. City of Philadelphia*, 65 Pa. St., 146; *State v. Wheeler*, 33 Neb., 563; *City of San Francisco v. Liverpool Ins. Co.*, 74 Cal., 113.)

George A. Day, *Will H. Thompson*, and *W. H. Herdman*, for respondents:

The bill contains but one subject which is expressed in the title. (*Van Horn v. State*, 46 Neb., 62; *State v. Page*, 12 Neb., 386; *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*, 45 Neb., 884; *State v. Bemis*, 45 Neb., 724; *Bonorden v. Kriz*, 13 Neb., 121; *Poffenbarger v. Smith*, 27 Neb., 788; *Hopkins v. Scott*, 38 Neb., 661; *In re Greer*, 48 Pac. Rep. [Kan.], 950; *Gran v. Houston*, 45 Neb., 813.)

References in reply to relator's second point: *Burke v. St. Paul R. Co.*, 28 N. W. Rep. [Minn.], 190; *McDermont v. Dinnie*, 69 N. W. Rep. [N. Dak.], 294; *Commonwealth v. Green*, 58 Pa. St., 226.

The act is not void as destroying the uniformity of practice of the courts. (*State v. Berka*, 20 Neb., 375; *Wales v. Belcher*, 3 Pick [Mass.], 508; *Gilowsky v. Connolly*, 55 Wis., 445; *Wales v. Belcher*, 3 Pick. [Mass.], 508; *Ex parte McCollum*, 1 Cow. [N. Y.], 567; *People v. Garey*, 6 Cow. [N. Y.], 650; *Board of Commissioners v. First Nat. Bank*, 40 Pac. Rep. [Colo.], 894; *City of Lincoln v. Grant*, 38 Neb., 372; *Smith v. Judge*, 17 Cal., 548.)

References in reply to the contention that the act is void in attempting to make municipal judges justices of the peace: *Gran v. Houston*, 45 Neb., 813; *State v. Moore*, 45 Neb., 12; *State v. Bartley*, 39 Neb., 353.

The statute is not void in making the term of office of the municipal judges three years instead of two. (*County of Douglas v. Timme*, 32 Neb., 272; *Mathews v. Commissioners*, 34 Kan., 606.)

The test as to whether an officer is a state, county or city official seems to be determined by the territory in which the functions of the office are performed, as well as the territory in which the officer is elected. (*In re Carpenter*, 7 Barb. [N. Y.], 30; *People v. Bennett*, 54 Barb. [N. Y.], 480; *Gertum v. Supervisors*, 109 N. Y., 174; *People v. Morrell*, 21 Wend. [N. Y.], 563; *People v. Henry*, 62 Cal., 557; *People v. Garey*, 6 Cow. [N. Y.], 647.)

The argument that the act is void in attempting to confer territorial jurisdiction coextensive with the county cannot be sustained. (*Magneau v. City of Fremont*, 30 Neb., 852; *Bair v. People's Bank*, 27 Neb., 577; *Gertum v. Board of Supervisors*, 109 N. Y., 174; *Glade v. White*, 42 Neb., 338.)

The act should not be held void because it provides that the governor shall appoint the first judges. (*County of Douglas v. Timme*, 32 Neb., 272; *State v. Lansing*, 46 Neb., 530.)

An entire statute should not be declared unconstitutional because a separable portion thereof is invalid. (*State v. Van Duyn*, 24 Neb., 586; *Messenger v. State*, 25 Neb., 674; *In re Groff*, 21 Neb., 647; *State v. Hardy*, 7 Neb., 377.)

NORVAL, J.

The validity of chapter 25, Session Laws, 1897, an act creating a municipal court in each city of the metropolitan class, is assailed by the relator upon nine distinct grounds, of which one alone will be noticed, namely, that section 8 of said act contravenes section 19, article 6, of the constitution of the state, since said section 8, in its

scope, purpose, and effect, attempts to curtail or abridge the jurisdiction and powers of justices of the peace, county and district courts in each county in which a metropolitan city is located. The section of the constitution invoked by relator requires: "All laws relating to courts shall be general, and of uniform operation, and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law and the force and effect of the proceedings, judgments, and decrees of such courts, severally, shall be uniform." (Constitution, art. 6, sec. 19.)

The writer fully concurs in the interpretation given the foregoing provision by RAGAN, C., in his separate opinion herein (*post*, p. 527), namely, that the fundamental law classifies the courts of the state, which classification the legislature is powerless to alter or change, and that any enactment which defines or regulates the jurisdiction and powers of the courts infringes the constitution if such law is not uniform as to all courts of the same grade or class; in other words, that the jurisdiction and powers conferred upon a justice, county, or district court of one county can be neither more nor less than that given the court of the same class in any other county of the state. The term "class," or "grade," as employed in the constitution, evidently refers to the different kinds of courts established in the state,—that is, all justice courts constitute one class or grade with the same jurisdiction, and that the county and district courts, respectively, belong to a separate class or grade, possessing uniform jurisdiction and powers. Indeed, the section of the constitution already quoted is too plain to admit of any other or different construction being placed upon it. The provisions thereof are mandatory and peremptory in their requirements, binding alike upon the legislature and the courts. Counsel for respondents insist with much earnestness and ability that said section of the constitution has not been violated by the enactment of section 8 of the municipal court law, the argument advanced in support thereof

being founded upon the proposition that there is no constitutional inhibition or limitation upon the law-making body from excluding the residents of a certain prescribed district from the jurisdiction of the district, county, and justice courts in civil cases; and that neither the jurisdiction, powers, nor organization of any of said courts has been disturbed, or in the least affected, by the act under review. Consideration will now be given to this contention.

What is meant by the "jurisdiction" as employed in section 19, article 6, of the constitution? The Standard dictionary defines the word thus: "1. Lawful power or right to exercise official authority, whether executive, legislative, or judicial. 2. The territory within, or the matter over, which such official authority may be lawfully exercised." Ordinarily the power to hear and determine a matter or cause is jurisdiction. (*Smiley v. Sampson*, 1 Neb., 56; *Johnson v. Jones*, 2 Neb., 126.) It includes not only the power or authority of the courts over the parties and the subject-matter of the action, but the territory within which the power is exercised. It is argued that the term "jurisdiction" should not be given its general accepted signification, but that it was intended to refer to the subject-matter alone. The soundness of this proposition we do not concede. It is a familiar rule that in the interpretation of constitutions, as well as statutes, words are to be given their usual meaning, unless it is manifest that a different sense was intended. There is absolutely nothing in the phraseology of this section of the constitution, standing alone, or when read in connection with the remainder of that instrument, which indicates that the framers employed the word in any limited or restricted sense, and it should not be so construed.

Section 8 of the act under consideration declares:

"The municipal court shall have exclusive original jurisdiction in all civil cases, when the amount in controversy does not exceed one thousand dollars ($1,000) ex-

clusive of interest and costs; in actions of replevin when the appraised value of the property does not exceed one thousand dollars ($1,000), and to recover the possession of real property situated in said city, where the plaintiff or the defendant, or any one of them, is a resident of the city for which such court is established, and service of summons may be had upon all or any one of the defendants in the county in which such court is situated; and concurrent jurisdiction with the district court of the county over all other civil actions involving a sum not exceeding one thousand ($1,000) dollars exclusive of interest and costs. *Provided, however*, the municipal court shall not have jurisdiction: 1. In any action against a public officer for misconduct in office. 2. In actions for malicious prosecution. 3. In actions for slander and libel. 4. In any matter where the title or boundaries to land may be disputed, nor to order or decree the partition, conveyance, or sale of real estate. *Provided, however*, that nothing herein shall be construed to deny or abridge the power of the municipal court to order the sale of land seized in attachment and to confirm the sale so made. *Provided, further*, that nothing contained in this act shall be construed to take away from the county courts any power now possessed by said county courts relative to election contests, the condemnation of real estate, adoption matters, assignments, *habeas corpus*, any powers possessed under chapter 16 or chapter 27*a* of the Compiled Statutes of Nebraska for the year 1895, nor shall anything contained in this act be construed to confer upon any municipal court created by this act any jurisdiction in any of aforesaid matters." (Session Laws, 1897, ch. 25, sec. 8, p. 195.)

The intention of the legislature is not very aptly expressed in the foregoing. The language employed is so confusing that, to use a trite expression, it would puzzle a Philadelphia lawyer to determine the meaning of some of the provisions, more particularly whether the last sentence of the section took away the jurisdiction attempted

to be conferred upon the municipal court by other portions of the section, or if the prohibited jurisdiction "in any matters where the title or boundaries to land may be disputed," is a limitation upon the power given such court to hear actions to recover real property, or if "the concurrent jurisdiction with the district court of the county over all other civil actions," etc., embraces appeals from county and justice courts where the sum involved does not exceed $1,000, or whether the provision relating to the residence of the parties applies to actions for the recovery of real estate alone, or refers to all causes cognizable in such municipal court. Accepting as the true legislative intent,—which is conceded by defendants' counsel,—that the restrictions as to the residence of parties is applicable to all actions over which the municipal court has exclusive jurisdiction, the section violates the constitutional requirements of uniformity of jurisdiction and powers of all courts belonging to the same grade or class.

In pursuance of section 18, article 6, of the constitution, there had been conferred, by general law, upon justices of the peace, jurisdiction in certain civil actions coextensive with their respective counties. (Code of Civil Procedure, secs. 904-907.) Likewise, in accordance with section 16, article 6, of the constitution, the county courts in the several counties of the state had been given jurisdiction in all civil cases, with certain exceptions, in any sum not exceeding $1,000 exclusive of costs. (Compiled Statutes, ch. 20.) The jurisdiction and powers of all said courts belonging to the same class were precisely alike. If section 8 of the act in hand is upheld, then neither every county court nor justice court in the state has the same jurisdiction. The municipal act seeks to deprive justices of the peace in counties having metropolitan cities of jurisdiction of the subject-matter in certain class of actions where either or both of the parties thereto reside in such city. It does not merely attempt to take away a part of their former territorial jurisdiction, as

counsel contend. Justice courts in such counties are deprived of jurisdiction over the subject-matter of all civil cases wherein either the plaintiff or defendant is a resident of such city.. If nonresidents thereof voluntarily appear, yet the justice would be without power to hear and decide the cause, since parties cannot confer jurisdiction of the subject-matter by consent. (*Stenberg v. State*, 48 Neb., 299.) If justices of the peace in a county wherein is located a metropolitan city cannot lawfully render judgment in the class of causes wherein power to try and determine is conferred upon the municipal court, it is evident said justices have not the same jurisdiction as is confided to all the justices of the peace in the other counties of the state. The act in like manner violates the constitutional requirement of uniformity of jurisdiction in attempting to take away a portion of the then existing jurisdiction of the county courts of the county in which is situated a metropolitan city. The writer is unable to yield assent to the proposition that the jurisdiction of the municipal court is concurrent with that of the district court as to all classes of the cases mentioned in the act. The jurisdiction of the former is concurrent with the latter as to some of the classes, and exclusive as to others. It is exclusive as to the class of cases mentioned in the law where either or both of the parties to the cause reside in such metropolitan city, thus infringing the rule of uniformity to which reference has been made. By section 9 of article 6 of the constitution, district courts have both chancery and common-law jurisdiction, in addition to such other jurisdiction as may be provided by the legislature. And section 24, chapter 19, Compiled Statutes, has conferred upon such courts "general, original, and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided." Under the constitution and statute in force at the time the act in hand was adopted, the district court of the county wherein a metropolitan city was situated had the same power and

jurisdiction as possessed by every other district court of the state. That this act, if effect is given to its provisions, takes away a portion of the existing jurisdiction of the district court of the county of Douglas, there is no room for doubt. If this act is valid no civil action could be maintained in said court to recover a sum less than $1,000 exclusive of costs and interest, or to recover personal property when the appraised value does not exceed that sum, where either the plaintiff or defendant is a resident of a metropolitan city, while like actions could be successfully prosecuted in the district court of any county in which no such city is situated. This want of uniformity of jurisdiction as to courts of the same class, the constitution prohibits in clear and unmistakable terms. This conclusion finds support in the decisions of the courts of other states.

Section 28, article 6, of the constitution of Colorado, is identical with section 19, article 6, of the constitution of Nebraska. The legislature of Colorado, in 1891, passed a law, of which section 9 thereof provides that in actions pending before the county court of any county of the state belonging to a certain class, litigants must advance jury fees, while in the same courts of other counties having another and different classification no jury fee was required to be advanced. The validity of this law was assailed in *Board of Commissioners v. First Nat. Bank of Aspen*, 40 Pac. Rep., 894, wherein it was held that the act was in conflict with section 28 of article 6 of the constitution of that state. Thompson, J., speaking for the court in said case, after quoting said section of the constitution, observed: "The meaning of this constitutional provision is apparent upon its face. Every law affecting the manner in which justice shall be administered in courts of a given class must apply equally to all of such courts, and their powers shall be the same. All county courts in the state belong to the same class. By the terms of section 9, conditions are imposed in some of these courts, upon the right of a litigant to have his cause

tried by a jury, which are not imposed in others. In counties of the first class the court is given the power to order a jury in a civil action without the advancement of their fees. In all other counties such power is withheld. The language of the constitution upon the subject is unequivocal and mandatory, and section 9 is in direct conflict with its provisions." There the law was declared invalid because it did not provide a uniform practice in the courts of the same class in all the counties. The act we are considering also destroys the uniformity of proceedings and practice required by the constitution as to the courts of the same grade or class.

The supreme court of Illinois frequently has held that the provisions of the constitution of that state in respect to uniformity of jurisdiction of courts of the same grade are mandatory and peremptory in their requirements; that there cannot exist in that state two classes of police magistrates or justices of the peace, two grades of circuit courts, nor two grades of any other court; and that any court of a county must belong to the same class as like courts throughout the state, and that the courts of the same grade must possess the same powers and jurisdiction. (*Phillips v. Quick*, 63 Ill., 445; *People v. Rumsey*, 64 Ill., 44; *O'Connor v. Leddy*, 64 Ill., 299; *Blake v. Peckham*, 64 Ill., 362; *People v. Mead*, 66 Ill., 135.)

The charter of the town of Lewiston passed by the legislature of Illinois gave exclusive jurisdiction to the police magistrate of all cases arising under ordinance of the corporation, and restricted the right of appeal to the circuit court, while the general law of the state conferred jurisdiction upon justices of the peace over all causes for the violation of town ordinances and gave an appeal in all cases to either the circuit or county court. The validity of the provision of the charter adverted to was considered in *Campbell v. Town of Lewiston*, 6 Brad. [Ill. App.], 530, and such provision was held to be in conflict with section 29 of article 6 of the constitution of Illinois, which declares: "All laws relating to courts shall be

general and of uniform operation, and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments, and decrees of such courts, severally, shall be uniform." Higbee, J., speaking for the court, in the course of his opinion, uses this language: "The object of this provision was to establish absolute uniformity in the proceedings of courts of the same class throughout the state. * * * To give the police magistrate of Lewiston exclusive jurisdiction to hear and determine all complaints for violations of the ordinances of the town, while by general law in all other parts of the state, all justices of the peace have jurisdiction over the same class of cases, would be to destroy the uniformity intended to be secured by the constitution; and this objection applies with equal force to the provision of the charter restricting an appeal to the circuit court, when in all other parts of the state an appeal in such cases could be taken either to that or the county court as the suitor might elect."

A similar construction was given to section 29, article 6, of the constitution of Illinois, in *Markham v. Heffner*, 67 Ill., 101. One John Hart was convicted in the circuit court of Jo Daviess county, Illinois, of a criminal offense committed within the limits of the city of Galena, the exclusive jurisdiction over which class of offenses by the charter thereof, was in the city, while by general law it was conferred upon the circuit court. A reversal was asked upon the ground that the circuit court had no jurisdiction over the subject-matter of the offense. The supreme court, in the case of *Hart v. People*, 89 Ill., 407, affirmed the sentence, saying, after quoting section 29, article 6, of the constitution of that state, that "It is inconsistent with this section of the constitution that after the adoption thereof, exclusive jurisdiction over this offense should be in the city of Galena, and the circuit court of Jo Daviess county not have cognizance thereof. All other circuit courts of the state have jurisdiction of

this offense, when committed in the respective counties of such courts, they having cognizance thereof by indictment in such courts; and if the circuit court of Jo Daviess county be held an exception in this respect, and not to have cognizance of the offense, then its jurisdiction in this respect will be anomalous, and not uniform with that of the other circuit courts of the state. This would be inconsistent with the constitutional provision that the jurisdiction of all courts of the same class or grade shall be uniform."

In discussing the same constitutional provision, Mr. Justice Dickey, in his opinion in *Frantz v. Fleitz*, 85 Ill., 367, observed: "We think the intent of the framers of the constitution is plainly manifested that the powers and jurisdiction of circuit courts, mentioned in article 6, section 1, should be uniform, and so of the county courts (and of the city courts), of the police magistrates, and of the justices of the peace, * * * and that it was never intended that there should be city courts of different powers and jurisdiction any more than it was that there should in the case of circuit courts, county courts, justices of the peace," etc.

In 1881 the legislature of Illinois passed an act extending the jurisdiction of county courts in counties in which probate courts are, or may be, established by conferring upon the county courts in such counties concurrent jurisdiction with the circuit court in all cases at law and in equity, except certain criminal causes. In *Klokke v. Dodge*, 103 Ill., 125, the act was held to be repugnant to that clause of section 29, article 6, of the constitution of Illinois, which declares the jurisdiction "of all courts of the same class or grade" shall be uniform. Mr. Justice Scott, in the course of his opinion, repudiated the proposition that county courts in counties having probate courts are a different class of courts from county courts in counties having no probate courts, and used the following significant and pertinent language: "It is apparent, then, that the county courts in all of the coun-

ties in the state have, and must have, under the constitution, the same powers and jurisdiction, whether probate courts are established in some of them or not, and hence constitute a 'class of courts,' within the meaning of that instrument, concerning which all laws must be general, and of uniform operation. This section of the statute cited, in terms, applies only to county courts in counties in which probate courts are or may be established, giving to such courts concurrent jurisdiction with circuit courts in certain matters in law and in equity. Judicial notice will be taken of the fact but few counties in the state have a population of over fifty thousand inhabitants, and by reason of that fact may have a probate court. It is plain, therefore, that the law that purports to confer increased or extended jurisdiction on county courts in counties where probate courts are or may hereafter be established, applies only to a part of a class or grade of courts, and falls within the inhibition of that clause of section 29, article 6, of the constitution," which declares that the jurisdiction "of all courts of the same class or grade" shall be uniform. To the same effect are the cases of *Meyers v. People*, 67 Ill., 503, and *Weatherford v. People*, 67 Ill., 521.

The contention of respondents is untenable that the uniformity of jurisdiction for which section 19, article 6, of our constitution provides does not embrace territorial jurisdiction. The framers of that instrument intended that the territorial limits of all the courts of the same grade or class should be alike, and restricted the power of the legislature to otherwise enact. Under the constitution the territorial jurisdiction of all justices of the peace must be the same; and so of the county and district courts respectively. If one court is given the authority to issue process to any place and for any person within the county where such court is established, the rule of uniformity of jurisdiction requires that every other court in the state belonging to this same class must possess a like power. By the law in force when the act un-

der consideration was passed, the territorial jurisdiction of a justice of the peace was coextensive with the limits of his county. He could issue a summons which could be lawfully served in any part of the county, and actions might be brought before him by or against persons, wherever might be their residence. The territorial jurisdiction of the district, county, and justices courts, by this act of 1897, in counties in which a metropolitan city was located, is circumscribed, since a summons cannot issue from any of such courts to all parts of the county, in any cause of which the municipal court was given exclusive cognizance. This lack of uniformity of jurisdiction is repugnant to the constitution.

The identical question has been decided by the supreme court of the state of Illinois. The legislature of that state, in 1881, passed an act, which created each county of the state, except Cook county, a district for the election of the justices of the peace, and made two districts of Cook county and limited the jurisdiction of such officers within such districts. The constitutionality of said act was assailed in *People v. Meech*, 101 Ill., 200, upon the ground, among others, that it contravened section 21 of article 6 of the constitution of that state, which provides "that justices of the peace, police magistrates, and constables shall be elected in and for such districts as are or may be provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform." Mr. Justice Walker, in delivering the opinion of the court, used the following apposite language, which the writer adopts as his own: "Of what does the jurisdiction of justices of the peace and police magistrates consist? Manifestly of the persons of the parties litigant, of the subject or thing in dispute, and the territory into which the process of the officer may run and be enforced. We apprehend this is so elementary that it will not be questioned. The justice must have power or jurisdiction to send process into some territory, by the service of which process he may acquire jurisdiction of the

defendant, or the other elements of his jurisdiction would be barren, unless the defendant should voluntarily submit to the jurisdiction for trial. And so of final process, which is absolutely necessary to execute the judgment. His territorial jurisdiction is as essential to the complete administration of justice as either of the others, and the general assembly fully recognizes the power to send process into a district, and to have it enforced therein, as constituting jurisdiction. After prescribing the districts, the act provides, that 'to the limits of which the jurisdiction of all justices of the peace is hereby limited.' It then incontestably follows that the territory in which a justice of the peace may act is essential, and constitutes jurisdiction, and is referred to and embraced in both provisions of the constitution cited above. This, then, being the sense of these provisions, the territorial districts must be uniform. Then what constitutes uniformity, in the constitutional sense? Not literally of one and the same shape or size. That could not have been the purpose; and this is made manifest from the constitution itself. It refers to districts as then existing, or that might thereafter be provided by law. The districts then existing were not of the same form or size, and yet they were adopted by those who framed the constitution. We must, therefore, conclude that such was not the purpose, and for the further reason that if not impracticable, it would have served no useful purpose. Uniformity of territory, then, must refer to some other division of territory. At the time the constitution was adopted the territorial jurisdiction of justices of the peace was coextensive with their counties throughout the state, and has ever been since the organization of the government, and the constitution adopts that division until a change shall be made, which it authorizes, with the limitation that when made the jurisdictional districts shall be uniform. And to be uniform, what does that instrument require? Manifestly, when counties are adopted as a basis of districting, that no other political division but counties can be adopted in

part; or, when townships are adopted as the basis, it must all be by townships, and no other political division can be in part adopted. And so, when any other political division is adopted, to be uniform it must all be of such divisions. This is, we think, the true interpretation of the clause requiring uniformity of jurisdiction, and it follows that the formation of Cook county into two districts, whilst every other county in the state constitutes but one district, is a violation of the constitutional requirement of uniformity."

Section 19, article 6, of our constitution was construed in *State v. Berka*, 20 Neb., 375, but the decision therein does not conflict with the views expressed herein. There was before the court in that case an act of the legislature of 1885, which limited the number of the justices of the peace in cities of the first class to three. It was held that the act did not violate section 19, article 6, of the constitution, since it did not change the organization of justices' courts nor their jurisdiction, powers, proceedings, or practice. That such courts in said cities possessed the same jurisdiction and power as every other justice court in the state is very evident. The act then before the court changed the number of justice courts in certain cities, but did not in any manner affect the jurisdiction of that class of courts, and the law being general and uniform throughout the state, operating the same upon all persons and localities of a class, was upheld. The decision is, therefore, distinguishable from the case before us. The same suggestion is applicable to *Van Horn v. State*, 46 Neb., 62, wherein it was ruled that a provision in a law providing for but one justice of the peace in each township in counties under township organization did not contravene said section 19, article 6, of the constitution.

A mere reference to the cases cited by the respondents will disclose that they do not sustain their contention. In *Burke v. St. Paul, M. & M. R. Co.*, 28 N. W. Rep. [Minn.], 190, involving an act of the legislature of Minnesota creat-

ing a municipal court for the city of Minneapolis with "exclusive jurisdiction * * * of all civil actions and proceedings heretofore cognizable before a justice of the peace, the defendant or garnishee in which resides within the limits of the city of Minneapolis," and which act further provided "that no justice of the peace shall have jurisdiction to issue any summons or process in any civil action (excepting executions), to be served within said city of Minneapolis, and any service of any such summons or process from a justice of the peace made within said city shall be void," the court sustained the law, notwithstanding it reduced the number of justices of the peace in a county and curtailed their powers. The decision would be in point had it been based upon a constitutional provision like section 19, article 6, of our constitution, which was not the case. But two sections of the constitution of Minnesota were before the court, one which declares that "the legislature shall provide for the election of a sufficient number of justices of the peace in each county * * * whose duties * * * shall be prescribed by law," and the other which provides that "judicial powers of this state shall be vested in a supreme court, district courts, courts of probate, justices of the peace, and such other courts inferior to the supreme court as the legislature may from time to time establish by a two-third vote." A mere quoting of those constitutional provisions is enough to indicate that the Minnesota case relied upon is not in point. Similar to the decision just referred to is *In re Greer*, 48 Pac. Rep. [Kan.], 950.

In *Gilowsky v. Connolly*, 55 Wis., 445, it was decided that under the constitution of Wisconsin the legislature could take away from justices of the peace in cities and villages jurisdiction in criminal cases and vest that jurisdiction in other courts. To establish that this decision was rendered under a constitution materially different from that of this state it is sufficient to quote from the opinion of Cole, C. J., wherein the author says: "It would

be difficult to establish the position that the constitution, either expressly or by direct implication, requires that justices of the peace in every town and city in the state should exercise the same measure of jurisdiction." While uniformity of jurisdiction of courts is not demanded by the constitution of that state, nevertheless the learned chief justice expressed a doubt whether the rule of uniformity should not be observed by the legislature, and sustained the enactment principally upon the ground that the legislature from the organization of the state has enacted laws which have ignored the rule of uniformity of jurisdiction of courts. Equally wide of the mark as the last case are the following authorities cited by the respondents: *Wales v. Belcher*, 20 Mass., 508; *Ex parte M'Collum*, 1 Cow. [N. Y.], 567; *Miller v. Plumb*, 6 Cow. [N. Y.], 665; *People v. Judge of the Twelfth District*, 17 Cal., 547. In not one of those cases was there considered a constitutional provision like section 19, article 6, of our constitution, or of similar import. So that these decisions shed no light upon the question involved herein.

Upon principle, as well as authority, the conclusion is irresistible that section 8 of the municipal court act contravenes the constitution, and the entire act is thereby invalidated. WRIT AWARDED.

RAGAN, C.

The legislature of 1897 passed an act entitled "An act to create a municipal court in cities of the metropolitan class and to fix and define the organization, powers, and jurisdiction of the same." (See Session Laws, 1897, ch. 25, p. 193.) The judges and clerk of the court provided for by the act have been appointed, qualified, and entered upon the performance of their duties. This is a *quo warranto* proceeding brought in this court to test the right of said judges and clerk to the offices which they hold. The question presented is the constitutionality of the act. We have reached the conclusion that the entire act is unconstitutional and void and will now briefly state our reasons for such conclusion.

1. Section 1 of the act creates in each city of the metropolitan class a municipal court. Section 2 provides for the appointment and election of the judges of said court, and section 6, for the appointment of the clerk of the court. Section 8 of the act, so far as material here, is as follows: "The municipal court shall have exclusive original jurisdiction in all civil cases when the amount in controversy does not exceed one thousand ($1,000) dollars exclusive of interest and costs; in actions of replevin when the appraised value of the property does not exceed one thousand dollars ($1,000), and to recover the possession of real property situated in said city, where the plaintiff or the defendant, or any one of them, is a resident of the city for which such court is established; * * * and concurrent jurisdiction with the district court of the county over all other civil actions involving a sum not exceeding one thousand ($1,000) dollars exclusive of interest and costs." By this last section the jurisdiction of the municipal court is limited as follows: To civil cases; to cases in which some party thereto is a resident of the metropolitan city in which is established said court, and in which case the amount in controversy does not exceed one thousand ($1,000) dollars exclusive of interest and costs. But the jurisdiction of the municipal court over the class of cases mentioned in the act is made concurrent with that of the district court of the county, in which is situate the metropolitan city, and exclusive as regards the jurisdiction of all other courts in said county. In other words, the effect of the act is, if valid, to take away the jurisdiction of the county courts and justices of the peace of the county in which is situate a metropolitan city, in the class of civil cases referred to in the act, and vest that jurisdiction exclusively in the municipal court. The act under consideration is not an amendatory one but a complete act in itself; and, if valid, the effect of the act is to repeal the statutes in force at the time of its passage which vested the county court of each county with jurisdiction in civil cases where the

amount in controversy did not exceed one thousand dollars ($1,000); and justices of the peace of each county with jurisdiction in civil cases where the amount in controversy did not exceed $200. (*State v. Moore*, 48 Neb., 870, and cases there cited.) Now section 19, article 6, of the constitution, declares: "All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, * * * shall be uniform." At and prior to the passage of the act under consideration, the legislature had provided for the election in each county of the state of a county judge and certain justices of the peace, and these officers were by law given jurisdiction, in a certain class of civil cases, coextensive with the limits of the county in which they were elected. These laws are still in force, and by virtue thereof the jurisdiction of each county judge in the state is the same and the jurisdiction of each justice of the peace is the same. But the effect of the act under consideration is to take away from the county court and the justices of the peace, of counties in which is situate a metropolitan city, jurisdiction over the class of civil cases provided for by the act and vest that jurisdiction exclusively in the municipal court, thus destroying the uniformity of the jurisdiction of the justices of the peace and county courts of the state. True, the constitutional requirement that all laws relating to courts,—their jurisdiction, powers, etc.,—shall be uniform, limits the uniformity required to the same class or grade of courts. But it is to be observed, also, that the constitution itself (section 1, article 6), has classified or graded the courts which exist, or may exist, in the state. They are the supreme court, district courts, county courts, justices of the peace, police magistrates, and courts inferior to district courts for cities and incorporated towns. The supreme court is one grade; the district court is another class or grade; the county courts a third class; justices of the peace a fourth; police magis-

trates a fifth, and courts inferior to the district court created for cities and incorporated towns, a sixth class of courts. Where the constitution itself does not fix the jurisdiction of any class or grade of courts, then the jurisdiction and powers of any such class may be regulated by the legislature. But when the legislature attempts to regulate the jurisdiction and powers of the courts of any class or grade, the constitution requires that the jurisdiction conferred upon the class or grade shall be a uniform one; that it shall apply alike throughout the state, —that is to say, the legislature may prescribe, within the limits of the constitution, the jurisdiction of the justices of the peace; but, when it does so, the jurisdiction of one justice must be the same as that of every other justice of the state. Within the limits of the constitution, the legislature may confer certain jurisdiction upon the county courts and upon the district courts, but it cannot confer a different jurisdiction upon the district or county courts of one county from that conferred upon the district courts and county courts of every other county of the state. The legislature has no authority to change the classification of courts made by the constitution. It cannot divide district courts into two or more classes any more than it can say that the district courts west of a certain meridian in the state shall have certain jurisdiction and the district courts east of that meridian shall have a different jurisdiction.

This section 19, article 6, of our constitution, was copied literally from section 29, article 26, Constitution of 1870, state of Illinois. In 1872 the legislature of the state of Illinois passed an act increasing the jurisdiction of the county courts of that state, but the act declared that the provisions thereof should not apply to counties having 100,000 population. The supreme court of Illinois, in *Myers v. People*, 67 Ill., 503, held that the division of the county courts of the state into the two classes attempted by the act was void. The act under consideration here attempts to divide the county courts of the state

into two classes with different jurisdiction. It attempts to divide the justice courts of the state into two classes, with different jurisdiction. This cannot be done. It only remains to be said that it is obvious the deprivation of justices of the peace and county courts, of counties in which are situate metropolitan cities, of jurisdiction in the class of civil cases mentioned in section 8 of the act was the inducement, if not the sole inducement, which led to its passage; and since the validity of the whole act depends upon the validity of said section 8, that being void, the entire act must fall. (*State v. Board of Commissioners of Lancaster County*, 17 Neb., 85; *Bailey v. State*, 30 Neb., 855; *State v. Hurds*, 19 Neb., 317; *State v. Hardy*, 7 Neb., 377.)

A judgment of ouster against the respondents will be entered as prayed.

IRVINE, C., concurs in the result.

RYMAN FISHER V. STATE OF NEBRASKA.

FILED NOVEMBER 4, 1897. No. 9438.

Larceny: VALUE OF PROPERTY. A verdict of guilty in a prosecution for larceny is fatally defective, which omits to find the value of the property alleged to have been stolen. *McCoy v. State*, 22 Neb., 418, followed.

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

W. W. Wood and *R. C. Noleman*, for plaintiff in error.

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

NORVAL, J.

An information was filed in the district court of Sheridan county in which the defendant, Ryman Fisher, was

charged with the larceny of two yearling heifers and one yearling steer, the property of I. T. Richardson. The accused, on being arraigned, pleaded not guilty. Upon the trial the jury returned a verdict as follows:

"We, the jury in this case, being duly impaneled and sworn, do find the defendant, Ryman Fisher, guilty as charged in the information herein filed.

"B. F. CARTER, *Foreman.*"

A number of errors are assigned and argued, but one of which it is deemed necessary to notice, and that is, the verdict returned is insufficient, in substance, to authorize the entry of the judgment and sentence. The jury omitted to find the value of the property stolen, which is a fatal defect, since section 488 of the Criminal Code requires, in a prosecution for larceny: "The jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen." Said provision was under consideration in *McCoy v. State*, 22 Neb., 418, and the same was held mandatory, and that a verdict of guilty for the offense of larceny, which fails to ascertain the value of the stolen property, is insufficient to sustain a sentence of imprisonment. In *McCormick v. State*, 42 Neb., 866, it was determined that a verdict, on a conviction for larceny, was insufficient, which merely estimated the value of the stolen goods. The case at bar is ruled by those decisions. The judgment is

REVERSED.

SILAS L. STICHTER V. A. W. COX, ADMINISTRATOR.

FILED NOVEMBER 4, 1897. No. 7503.

1. **Executors and Administrators:** CLAIMS: LACHES. Provable claims against an estate of a deceased person are barred unless presented to the county court for allowance within the time provided by law.

2. ———: CONTINGENT CLAIMS. A contingent claim, within the meaning of section 258 *et seq.* of chapter 23, Compiled Statutes, is a

claim against a decedent not absolute or certain, but depending upon some event after the death of the testator or intestate, which may or may not happen.

3. ———: ———. A subsisting demand against an estate of a deceased person which had matured and was capable of being enforced at law during the lifetime of the decedent, is not a contingent claim.

4. **Mortgages:** SALE OF REALTY: ASSUMPTION OF DEBT: ACTION BY GRANTOR. When a grantee of real estate, as part of the consideration for the purchase, assumes and agrees in the deed to pay a certain mortgage on the premises, he is liable for the mortgage debt, and the grantor, immediately upon the maturity of the mortgage, may recover from the grantee the amount due thereon, though the grantor may have paid no part of it.

5. **Change of Issues on Appeal:** EXCEPTIONS: REVIEW. An objection that a cause was tried in the district court on appeal upon different issues from those involved in the court whence the appeal was taken, is unavailing in the supreme court, unless seasonably raised in the court below, a ruling obtained thereon, and an exception thereto preserved in the record.

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

Tibbets, Morey & Ferris, for plaintiff in error.

Batty, Dungan & Burton, contra.

NORVAL, J.

Silas L. Stichter presented to the county court of Adams county a claim against the estate of Abraham Yeazel, deceased. The administrator filed objections against the allowance thereof, and upon the trial the county court allowed the claim in full. The administrator prosecuted an appeal to the district court, where there was a trial without a jury, which resulted in the rejection and disallowance of the entire claim.

The facts may be summarized thus: On the 30th day of September, 1887, Silas L. Stichter executed a mortgage to one William M. Wilson upon certain real estate in Adams county to secure the payment of $3,750 due October 1, 1890, and drawing six per cent interest per annum from date; and on the 18th day of November, 1889, Stich-

ter and wife conveyed the land to Abraham Yeazel by deed of general warranty, subject to said mortgage. In the deed of conveyance the grantee assumed and agreed to pay the mortgage. On the 18th day of November, 1890, which was subsequent to the maturity of the debt secured by the mortgage, Abraham Yeazel died. Letters of administration were afterwards granted upon his estate, and August 28, 1891, was fixed by the county court for the presentation of claims, and notice thereof was published as required by law. On August 5, 1891, Wilson instituted an action to foreclose the mortgage. A decree of foreclosure was subsequently rendered, the mortgaged premises were sold, and on November 14, 1892, Wilson obtained a deficiency judgment against said Silas L. Stichter in the sum of $2,456.83. Thereupon the latter, in satisfaction of said judgment, executed and delivered to Wilson his promissory note for the amount of said deficiency judgment, and on November 16, 1892, Stichter filed his claim against the estate of Yeazel for said sum of $2,456.83. The contention of counsel for the administrator is that this claim was not filed in the county court in the time prescribed by law, and accordingly is barred. This proposition is assailed by opposing counsel, and the court is called upon to decide whether the claim was presented to the county court in time. The determination of the question necessitates an examination of certain provisions of chapter 23 of the Compiled Statutes.

Section 217 of said chapter provides: "The probate court shall allow such time as the circumstance of the case shall require for the creditors to present their claims to the commissioners for examination and allowance, which time shall not, in the first instance, exceed eighteen months, nor be less than six months, and the time allowed shall be stated in the commission.

"Section 226. Every person having a claim against a deceased person proper to be allowed by the judge or commissioners who shall not, after the giving of notice as required in the two hundred and fourteenth section of

this chapter, exhibit his claim to the judge or commissioners within the time limited by the court for that purpose, shall be forever barred from recovering such demand or from setting off the same in any action whatever."

As already disclosed, the county court of Adams county, in accordance with the statute, fixed a date for the presenting of claims against the estate of Abraham Yeazel, deceased; and the claim here in dispute was not presented to, nor filed with, the county judge within the period so designated for that purpose. If the provisions of said chapter 23 already quoted govern and control claims like the one under consideration, it is patent that said claim is barred by virtue of said section 226. It is insisted by counsel for the claimant that the claim was a contingent one against the estate, and afterwards became absolute; therefore sections 258 *et seq.* of said chapter 23 are applicable thereto.

Section 258 declares: "If any person shall be liable as security for the deceased, or have any other contingent claim against his estate which cannot be proved as a debt before the commissioners, or allowed by them, the same may be presented, with the proper proof, to the probate court or to the commissioners, who shall state the same in their report if such claim was presented to them."

Section 259 makes provision for the retaining of funds by the executor or administrator to pay such contingent claim when the same shall have become absolute.

Sections 260 and 262 are in the following language:

"Sec. 260. If such contingent claim shall become absolute, and shall be presented to the probate court, or to the executor or administrator, at any time within two years from the time limited for other creditors to present their claims to the commissioners, it may be allowed by the probate court upon due proof, or it may be proved before the commissioners already appointed or before others to be appointed for that purpose, in the same manner as if presented for allowance before the commission-

ers had made their report; and the persons interested shall have the same right of appeal as in other cases.

"Sec. 262. If the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present their claims, the person having such claim may present it to the probate court and prove the same at any time within one year after it shall accrue or become absolute." * * *

The legislature by these last two sections has made provision for filing of claims against the estate of a deceased person which were once contingent, but have become absolute, and also fixed the time in which the same shall be presented for allowance. These sections can properly be invoked in case this claim was ever a contingent liability against the estate of Yeazel, otherwise the debt is barred by virtue of section 226, quoted above.

We adopt as a correct definition of a contingent claim the following language of Chief Justice Poland, in his opinion in *Sargent v. Kimball*, 37 Vt., 321: "A contingent claim is where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability." A contingent claim within the meaning of section 258 *et seq.* of chapter 23 of the Compiled Statutes is evidently a demand or debt against the estate of a deceased person which is not then absolute or certain, but depending upon the occurrence or non-occurrence of some event after the death of the testator or intestate, as the case may be.

In the light of the foregoing, it is perfectly manifest that this claim was at no time a contingent debt or liability against Yeazel's estate. No demand could have been more absolute than the one under consideration. Yeazel, in the deed to himself, assumed and agreed to pay the mortgage given by Stichter to Wilson upon the premises described in the conveyance to Yeazel. The obligation thus assumed by the latter was to pay the debt, and not merely to indemnify Stichter against any loss or dam-

age by reason of the mortgage. When was the grantee to make such payment? Immediately upon the maturity of the debt which the mortgage secured. (*Furnas v. Durgin*, 119 Mass., 500; *Gage v. Lewis*, 68 Ill., 604; *Rawson's Administratrix v. Copland*, 2 Sandf. Ch. [N. Y.], 278.) If the claim of Stichter against Yeazel was ever a contingent claim, it ceased to be such upon the maturity of the mortgage debt; thereafter the claim was clearly absolute, and not contingent. After the mortgage matured the liability of Yeazel to pay Stichter did not depend upon the happening of any future event, not even the payment of the mortgage by Stichter.

In *Gregory v. Hartley*, 6 Neb., 361, it is said: "The rule is well settled that if a condition or promise be only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damage has been sustained by the plaintiff. But if the promise is to perform some act for the plaintiff's benefit, the neglect to perform the act is a breach of the contract, and will give an immediate right of action. * * * The rule of law will not be questioned that when a purchaser of real estate agrees to assume and pay certain outstanding indebtedness against the vendor, and save him harmless from the same, if he fail to do so, it is not necessary, in order to give the vendor a right of action against him, he should himself have first paid the debt the purchaser assumed and agreed to pay." Had the contract entered into by Yeazel been to indemnify the grantor merely, then the latter must have shown damages to entitle him to recover; but such was not the undertaking of Yeazel. He promised to pay the mortgage debt and it was not necessary for Stichter to prove damages to entitle him to recover, and the measure of damage is the amount agreed to be paid. Yeazel, by not paying off the mortgage, has broken his contract, and to the amount of the mortgage debt the grantor has not received the stipulated consideration for the land. He is entitled to recover the same himself by reason of the failure of the grantee to perform his promise.

The doctrine that, by virtue of the clause in the deed whereby Yeazel assumed the mortgage to Wilson, a right of action accrued in favor of the grantor and against Yeazel for the amount unpaid on the mortgage debt at its maturity, although the grantor had not himself paid any part of the debt which Yeazel assumed and agreed to pay, is abundantly sustained by the authorities. (See *Stout v. Folger*, 34 Ia., 71; *Rubens v. Prindle*, 44 Barb. [N. Y.], 336; *Wilson v. Stilwell*, 9 O. St., 467; *Rawson v. Copland*, 2 Sandf. Ch. [N. Y.], 278; *Furnas v. Durgin*, 119 Mass., 500; *Locke v. Homer*, 131 Mass., 93; *Farnsworth v. Boardman*, 131 Mass., 115; *Reed v. Paul*, 131 Mass., 129; *Gage v. Lewis*, 68 Ill., 604; *Churchill v. Hunt*, 3 Denio [N. Y.], 321; *Thomas v. Allen*, 1 Hill [N. Y.], 145; *Jones v. Parks*, 78 Ind., 537.) We are not aware of any case which holds a contrary doctrine.

In a sense it is doubtless true that the relation of principal and surety existed between Yeazel and Stichter by reason of the former assuming the payment of the mortgage. Thus, had Stichter paid the mortgage debt he would have been subrogated to the rights of the mortgagee and could have held the lands for reimbursement. But it does not follow that Stichter could not maintain an action for a breach of Yeazel's absolute and positive covenant to pay the mortgage at a time certain. The grantee, having failed to make the payment as agreed, at once became liable to his grantor for the full amount due on the mortgage as the unpaid portion of the consideration for the land. (See authorities cited above.)

It is undisputed that the mortgage debt which Yeazel assumed and promised to pay matured more than a month prior to his death, and that it remained unpaid; therefore Stichter could have maintained an action against Yeazel on this claim in the lifetime of the intestate. It follows that the claim should have been presented for allowance to the county court within the period fixed by the judge thereof for the filing of claims. This not having been done, the claim is barred.

Another ground urged for a reversal of the judgment is that, the administrator having filed no answer in the county court and adduced no testimony therein, the district court erred in permitting him to interpose as a defense the bar of the statute. More than one answer can be properly made to this contention. There is no provision of statute requiring an administrator to plead in the county court to a claim presented therein against his intestate, except section 221, chapter 23, Compiled Statutes, makes it his duty to exhibit any claim of the decedent in offset to that of the creditor. In this case, however, the administrator did file in the county court formal objections to the allowance of this claim, and in the district court, in his answer, he specially pleaded the statute of limitations. The claimant did not move to strike this defense from the answer, nor did he in any other manner present the question to the trial court that the issues raised by the answer were different from those in the county court, obtain a ruling thereon, and preserve an exception thereto in the record. This was indispensable to make available here the objection that there was a variance in the issues. (*Robertson v. Buffalo County Nat. Bank*, 40 Neb., 239.) The judgment is

AFFIRMED.

RAGAN, C., not sitting.

JAMES AITKEN V. FRANK RAWLINGS.

FILED NOVEMBER 4, 1897. No. 7533.

Review Without Bill of Exceptions: INSTRUCTIONS: EVIDENCE. The want of a bill of exceptions and of proper assignments of error precludes a consideration of several matters urged in argument in this case.

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

Field & Brown, for plaintiff in error.

Billingsley & Greene, contra.

RYAN, C.

Plaintiff brought his action in the district court of Lancaster county for the recovery of damages in the sum of $5,000. He averred that the defendant was the proprietor of a livery stable in the year 1892, and that on the 21st of June in that year said defendant had furnished to plaintiff, for hire as a perfectly safe and reliable team, one which he knew to be unsafe for the purposes of the plaintiff; that said team ran away, and by throwing plaintiff from the vehicle in which he was riding inflicted upon him damages to the amount for which judgment was prayed. There was a verdict in favor of the plaintiff by which his damages were assessed at $30, and for the reversal of the judgment thereon rendered he prosecutes this error proceeding.

There is no bill of exceptions in the record, and we therefore cannot consider whether or not the verdict was sustained by sufficient evidence. For the same reason we cannot determine whether or not there was error in the rejection of evidence, some of which is alleged to have been offered on the trial and the remainder by affidavits presumably in support of the motion for a new trial. The same consideration disposes of the assignment of errors of law occurring at the trial duly excepted to. The twelve instructions given by the court which are criticised, were grouped in a single assignment of error both in the motion for a new trial and in the petition in error. Eight instructions asked by plaintiff and refused were likewise grouped in a single assignment. As there was no error in the ruling of the court in respect to at least a portion of the instructions in each of these groups, these assignments present no question for review.

There was no error assigned aside from those already noted, and the judgment of the district court is

AFFIRMED.

NEBRASKA MOLINE PLOW COMPANY V. FRED FUEHRING.

FILED NOVEMBER 4, 1897. No. 7514.

1. **Attachment:** DISSOLUTION: EVIDENCE: ATTORNEYS. In view of the fact that the names of certain attorneys at law do not appear in the record as attorneys for either party, and of the further fact that there was direct, positive testimony by one of the attorneys that neither of them was an attorney for the plaintiff until long after the commencement of the action in which an attachment issued, no presumption founded upon unsatisfactory circumstantial evidence will be entertained to avoid the effect of such testimony in order that there may be justified the dissolution of the attachment issued at the commencement of the suit by virtue of which such alleged attorneys were garnished as debtors of the attachment defendant.

2. ———: AMBIGUOUS AFFIDAVITS: CONSTRUCTION. In affidavits drawn by counsel for one of the parties litigant, language which is ambiguous in its nature will be construed most strongly against the party in whose behalf such affidavits were prepared.

3. ———: FRAUDULENT CONVEYANCES: EVIDENCE. Where an attachment was issued on the ground, among others, that the defendant had disposed of his property in whole or in part with intent to defraud his creditors, and, in resistance of a motion to discharge the attachment there was undisputed proof of admissions by the attachment defendant that he had made such a transfer of the nature charged that no execution against him could be collected, *held*, that there exists no reason for assuming that the transfer must have been made subsequent to the commencement of the attachment suit in view of the fact that the attachment defendant himself placed no such limitation on his own admissions of the fraudulent transfer in question.

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

George W. Lowley and *D. C. McKillip*, for plaintiff in error.

Biggs & Thomas, contra.

RYAN, C.

On March 9, 1894, plaintiff began this action in the district court of Seward county for the recovery of a judgment against the defendant in error in the sum of $1,226.15, with interest. There was filed on the date above mentioned an affidavit for an attachment, in which some of the grounds stated were that the defendant "has property and rights which he fraudulently conceals; has assigned, removed, or disposed of his property, or is about to assign, remove, or dispose of his property, or a part thereof, with intent to defraud his creditors." In this affidavit it was stated that the affiant believed that R. S. Norval and B. S. Norval had property or money of the defendant in their possession, and were indebted to him in the sum of more than $1,500. On the same day the parties last named were garnished and required to answer on May 7, 1894. The money which the answer of the garnishees showed that they had in their possession came into their possession in another matter, in which the garnishees acted as attorneys at law in making a collection for Fuehring. On April 17, 1894, there was filed a motion to discharge the attachment in this case, for the reason that "the statement of facts in the affidavit for attachment therein set forth is untrue." On September 7, 1895, there was filed another motion for the discharge of the attachment, for the alleged reason that the garnishees, at the time of the filing of the motion, and when they obtained the money from defendant which was sought to be garnished, were the attorneys for the defendant. On the hearing of this last motion there were attempts to prove that the garnishees had made inquiries into matters which might tend to show that some of the alleged grounds for an attachment existed, and that some of the affidavits to sustain the attachment had been corrected by one of the garnishees at the suggestion of the affiants therein, respectively, to express the intention of such affiant, and before such person acting as notary

public had been sworn to. R. S. Norval was sworn on behalf of the defendant and testified that neither of the garnishees had been an attorney in this case until January 23, 1895, and the record fails to show that they acted in that capacity at any time. As there was no sufficient evidence to sustain the contention that they were attorneys in this case when they were garnished, we feel bound to assume that in that capacity they were not then connected with or concerned in it.

By his motion the defendant put in issue the averment that he had property and rights which he fraudulently concealed, and had assigned, removed, and disposed of his property, or had been about to assign, remove, and dispose of his property to defraud his creditors. To disprove the defendant's fraudulent disposition of his property, consummated or contemplated, there were filed by him the affidavits of ten persons, in all respects alike in the particulars now to be considered. In each affidavit the affiant stated: "That to affiant's personal knowledge the defendant, Fred Fuehring, is not removing his property, or any part thereof, out of the jurisdiction of this court, and especially that he is not removing any property with the intent of defrauding his creditors, or any of them. * * * Affiant further states that to his knowledge the defendant, Fuehring, has no property or rights in action which he conceals, and that he has not assigned, removed, or disposed of, nor is he about to assign, remove, or dispose of, his property, or any part thereof, with the intent to defraud his creditors." The ambiguity of the above quoted language, in so far as it relates to personal knowledge, is apparent when the first few words of the sentence are rearranged, thus: "Affiant further states that defendant Fuehring has no property or rights which he conceals, to affiant's personal knowledge," etc. As this language occurs in each of the several affidavits, this language might mean that affiant knew that the defendant had not concealed any of his property or credits, or it may be understood to mean that if the defendant had so disposed of his rights or credits, that fact was unknown

to the affiant, in each instance. As these affidavits were sworn to before one of the attorneys of the defendant, acting as a notary public, and as so many were in the same language, it is not unfair to assume that the language criticised was chosen by counsel rather than by numerous affiants making distinct affidavits. There is, therefore, no good reason why this language should not be used most strongly against the person in whose behalf it was employed, and so construed it is very inconclusive in its effect. There are some portions of these affidavits, as well as some other entire affidavits, which contain statements contradictory of the allegations of the affidavit for an attachment; but as these relate to matters as to which the admissions of the defendant, rather than the conclusions of third parties in respect thereto, must in their nature be most satisfactory, we shall resort to the latter rather than the former in the determination of this vital question.

The defendant and plaintiff, by a contract in writing dated February 7, 1893, entered into an arrangement whereby the former became the agent of the latter for the sale of agricultural implements at Goehner. It was under this arrangement that the defendant became indebted to the plaintiff in the sum for the recovery of which this action was instituted. To induce the plaintiff to employ defendant as its said agent, the latter made to the former a written statement of his assets and liabilities, as follows:

"ASSETS.

Amount of book accounts considered good...		$500 00
Amount of notes considered good.....		1,000 00
Cash on hand and in bank.....		200 00
160 acres of improved land in Seward Co., Neb., all in my name.....		6,400 00
Grain: Corn.....	$1,000 00	
Wheat	400 00	
Live stock: Horses and hogs.....	500 00	
		1,900 00
Total assets.....		$10,000 00

LIABILITIES.

For mortgage or deed of trust on houses, land:		
Land	$1,800 00	
For money borrowed, not secured:		
I'll settle to-morrow	1,000 00	
For exemption under the state law	2,000 00	
Total liabilities		$4,800 00
Total assets		$10,000 00
Worth above all indebtedness and exemption		$5,200 00"

It was shown that, without question, the land of Fuehring had been sold before the commencement of this action for $7,050, and that the proceeds of this sale, except the amount in the hands of the garnishees, had been used to pay debts owing by Fuehring. By the affidavit of W. H. De Bolt it was shown that on November 11, 1893, De Bolt, as agent of the Badger Lumber Company, had sold to Fuehring a lumber yard of that company for $2,503.28. This yard was at Goehner. H. N. Coleman, B. F. Norval, and H. W. Harvey, in their respective affidavits introduced on the hearing of the motion to discharge the attachment, stated that on December 13, 1894, Fuehring said in their presence that it would not do any good for Pelky, a client of the Norvals, who held a judgment against Fuehring, to take out an execution thereon, as he (Fuehring) had fixed his property in such a way that nothing could be collected from him; that upon being asked who owned the property at Goehner, defendant Fuehring answered, "That's all right; I've got it fixed so that nobody can get a hold of it;" and that Fuehring furthermore said that he was merely running the business. In each of the affidavits just referred to, and also in one made by R. S. Norval, it was stated that on January 2, 1895, the defendant Fuehring had said that the sheriff had been down to Goehner with an execution on the Pelky judgment; that the stock of lumber and machinery of which

the defendant was in charge at that place had been mortgaged by the defendant to the S. K. Martin Lumber Company for either $2,000 or $2,500, and that defendant had nothing with which to pay said execution, and was not worth anything; that upon being told that there was no chattel mortgage such as he had described on record, defendant said he would go and see Mr. De Bolt, the manager of the S. K. Martin Lumber Company at Seward, and have him put the chattel mortgage on record. In respect to the execution on the judgment in favor of Pelky against Fuehring, the sheriff of Seward county made affidavit that about January 2, 1895, having learned that Fuehring claimed to have made a chattel mortgage on his farm machinery and lumber to the S. K. Martin Lumber Company, he, the said sheriff, called on W. H. De Bolt, manager of said company at Seward, and asked said De Bolt if the lumber company had such a mortgage, and that De Bolt answered that they had no chattel mortgage against the lumber or machinery of the defendant. The sheriff closed this affidavit with the following language: "And affiant further states that defendant Fred Fuehring said he had no property and was not worth a dollar, in a conversation Fuehring had with R. S. Norval in his office on the 2d day of January, 1895, and I have been unable to find any property whereon to levy said execution." In view of the denial of the existence of a chattel mortgage of Fuehring to the lumber company, it is somewhat strange that we find in the record a copy of a chattel mortgage on the lumber and machinery of Fuehring to the lumber company, dated April 11, 1894. This mortgage was witnessed by E. C. Biggs, one of the defendant's attorneys, and was filed for record at 5:30 o'clock P. M. of January 7, 1895, the day on which were filed the last above described affidavits of R. S. Norval, B. F. Norval, H. W. Harvey, and H. N. Coleman. There is also found in the record another copy of a mortgage of Fuehring to the S. K. Martin Lumber Company, dated January 8, 1895, the execution of which was wit-

nessed by W. H. De Bolt. This describes paints, painters' material, and a certain mare. Neither the mortgagor nor Mr. De Bolt, the manager of the lumber company, nor Mr. Biggs, the witness of the mortgage of date April 11, 1894, made any explanation or statement as to the circumstances surrounding the execution of that mortgage. Under ordinary circumstances this might not have been required; but we think, in view of the denial of the existence of the mortgage dated April 11, 1894, it would have been highly proper to have shown by direct evidence, as an independent fact, when that mortgage was made and the circumstances surrounding the execution of it. This omission, however, we do not regard as being important in the same degree as the circumstances which we shall now refer to.

In December, 1894, and in January, 1895, it has been shown that Fuehring said that he had nothing, and that nothing could be collected on an execution against him. In addition to this, the affidavit of the sheriff discloses that in fact in January, 1895, Fuehring had no property on which the sheriff could levy an execution. It is, to say the least, a little singular that on May 24, 1894, Fuehring's affidavit was filed in this case, in which affidavit there was the following language: "Affiant avers that he was considerably enraged at plaintiff's conduct in bringing this suit and attaching, and especially when the plaintiff already held notes of the affiant at least nearly, if not entirely, equal to the amount of the affiant's indebtedness to plaintiff; and the affiant says that while so enraged he may have made some remarks from which the plaintiff could construe an intent to make them trouble in the collection of their claim, but affiant avers that he has never wronged any one nor defrauded them out of a cent, and never at any time intended to defraud plaintiff out of anything rightfully due them, and never said he would do so." * * By Fuehring's own statement he was shown on February 7, 1893, to have been the owner of property to the value of $5,200 in excess of all his indebtedness and

the exemptions allowed by law. In December, 1894, and January, 1895, without contradiction on his part, he is shown to have said that he had nothing; that nothing could be collected on an execution against him; and these statements are supplemented by the testimony of the sheriff that as a matter of fact he had been unable to find any of defendant's property whereon to levy an execution. It might seem quite plausible to argue that these statements of Fuehring were made long after the attachment had issued, and therefore could not have induced plaintiff to cause it to issue. But the language of Fuehring did not disclose when the disposition of his property had taken place. His statement was, in effect, that he had, at some indefinite time in the past, made a fraudulent transfer of his property, and that as a consequence of this transfer nothing could be collected of him on execution. The language which has been quoted from the affidavit of Mr. Fuehring filed May 24, 1894, discloses, moreover, that at some time previous to that date Fuehring, under provocation, "may have made remarks from which plaintiff could construe an intent to make them trouble in the collection of their claim." With this admission in evidence, the probability that the admitted transfer to hinder creditors in the collection of their debts from Fuehring was made anterior to the commencement of this attachment became much stronger than it would be considered solely on the statements made on and just previous to January 2, 1895. The inquiry on the motion to discharge the attachment was as to whether or not the grounds upon which the attachment had issued in fact existed when the affidavit for the attachment was filed. To entitle Fuehring to the benefit of a presumption that his admittedly fraudulent transfer had been subsequent to the date of the issue of the attachment, we must supplement his statement with the assumption that these statements referred to acts which must have been done between March 9, 1894, and May 24, immediately thereafter. If this was true it lay within the power of the de-

fendant to show it affirmatively, and this at his peril he was required to do. A principle akin to this was applied in *Comstock v. State*, 14 Neb., 205, and in *Heldt v. State*, 20 Neb., 492. In view of the failure of Fuehring to show affirmatively that his confessedly fraudulent transfer had no existence anterior to the suing out of the attachment in this case, we think that the assumption must be that, consistently with the truth, such a limitation upon his admissions was impossible. The order by which the attachment in this case was vacated is therefore reversed and the attachment is reinstated, and this cause is remanded to the district court for further proceedings in conformity with the views hereinbefore expressed.

REVERSED AND REMANDED.

NORVAL, J., not sitting.

PETER B. NELSON V. EDSON KEITH ET AL.

FILED NOVEMBER 4, 1897. No. 7548.

Appeal to District Court: IMPEACHING JURISDICTION OF COUNTY COURT: SERVICE OF SUMMONS. Where there was no evidence of the want of a proper date on a summons issued by a county court and served on a defendant, except his affidavit identifying a purported copy of such summons which was attached as an exhibit to a paper filed by the defendant in said county court, *held*, in error proceedings in the district court questioning the sufficiency of the service of summons in the county court, that such affidavit with its accompanying purported copy of summons served was not competent evidence for the purpose of impeaching the jurisdiction of the county court.

ERROR from the district court of Dawes county. Tried below before KINKAID, J. *Affirmed.*

C. H. Bane and *D. B. Jenckes*, for plaintiff in error.

George A. Eckles and *Allen G. Fisher*, *contra.*

RYAN, C.

This action was commenced in the county court of Dawes county by the defendants in error for the recovery of a judgment on two promissory notes executed by the plaintiff in error. On May 1, 1893, the party last named filed in said county court in this cause a paper described as a special appearance, which, omitting the caption, was in the following language: "The defendant, Peter B. Nelson, appearing specially and for the purpose of objecting to the jurisdiction of the court in this case, and for no other purpose, moves the court to quash the pretended summons in this case and the officer's return thereof for the following reasons: First, no copy of summons has been served upon the defendant, Peter B. Nelson, as required by law, as appears by the pretended copy of summons served upon the defendant hereto attached, marked Exhibit A. Second, that said copy of pretended summons does not show the date on which the same was issued, and does not bear any date of the issuance of the summons. Third, that the pretended copy of summons served upon defendant, Peter B. Nelson, bears no date of the time of which it was issued." This was overruled. Attached to the above described paper there was an affidavit to which was appended what, in the affidavit, was described as the only copy of the summons served on the affiant, Peter B. Nelson. This copy was defective in its attestation clause, which was in this language: "Witness my hand and seal of said court this 21st day of April, A. D. 188—." After the rendition of judgment October 22, 1891, as prayed, Peter B. Nelson filed in the district court of said county his petition in error, in which there was presented but one objection, and that was, that the figures 188 represented an impossible date and that, therefore, the service by a copy bearing that impossible date was a nullity. With the petition in error in the district court there was filed the above "special appearance," with its accompanying affidavit and copy of sum-

mons attached as an exhibit. This exhibit was the only showing by which it was sought to impeach the finding of the county court that due and legal service of the pendency of the action had been made on Nelson.

In *Tessier v. Crowley*, 16 Neb., 369, it was said by COBB, C. J., in the delivery of the opinion of this court, that: "In the case of *Republican Valley R. Co. v. Boyse*, 14 Neb., 130, there is a dictum to the effect that affidavits might be made a part of a motion in such a way as to supersede the necessity of a bill of exceptions. I do not so understand the law. I do not think that anything can be said to belong to the record except the process, pleadings, and journal entries, including, of course, motions, the rulings thereon, references, reports of referees, instructions, verdict, and judgment. Any matter of evidence, including affidavits, can only go upon the record by order of the court, and that is the office of a bill of exceptions." This language was quoted with approval in *Graves v. Scoville*, 17 Neb., 593. In the case last cited it was said: "It does not seem to the writer to be consistent with reason to say that the necessity of a bill of exceptions can be obviated by simply saying in the motion or paper to be supported by affidavits that they are attached and made a part of the motion." As there was before the district court no evidence that the copy of the summons contained the impossible date of 188, except the affidavit which was attached to the paper designated as "a special appearance," the ruling of the district court affirming the ruling of the county court was right, and is therefore

AFFIRMED.

W. H. LOWE ET AL. V. GEORGE H. BISHOP.

FILED NOVEMBER 4, 1897. No. 7556.

1. **Bill of Exceptions:** ALLOWANCE BY COUNTY JUDGE: REVIEW. In 1894 a county judge had no jurisdiction to settle a bill of exceptions preserving the evidence adduced on the hearing of an objection to

the regularity of an appointment by a board of county commissioners of a person to act specially as a county judge.

2. ———: ———: APPOINTMENT OF COUNTY JUDGE: REVIEW. Where the sole question presented in the district court was the regularity of the appointment above indicated, the affirmance of the judgment of the county court by such district court must be approved in this court as being the only judgment which the district court could have rendered in view of the impossibility of perpetuating the evidence adduced in the county court upon the question therein presented.

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

Beels & Schoregge, for plaintiffs in error.

H. D. Kelly, contra.

RYAN, C.

On a trial of this case in the county court of Madison county, George H. Bishop recovered judgment in the sum of $766.75 against W. H. Lane, Robert McKibbon, William Gerecke, and George N. Beals. The trial of this case was had in the county court before W. E. Reed, acting county judge, who had thereto been appointed by the board of county commissioners of said county. During the pendency of the action in the county court, and after issues had been duly joined, there were the following proceedings: "Now come the defendants, Robert McKibbon, W. Gerecke, and George N. Beals, and object to the jurisdiction of W. E. Reed, pretending to act as a court in the above entitled action, upon the ground that said W. E. Reed is not a court, nor properly or by any authority established as such." The objection was overruled, the defendants excepted, and on March 9, 1894, the above described judgment was rendered. By proceedings in error to the district court there was presented the same question that was raised by the above objection. This was decided adversely to the plaintiffs in error in that court, and the sole question discussed in this is the correctness of the ruling of the district court.

Whether or not W. E. Reed was regularly appointed to hear and determine the case in the county court depended upon the record of the board of county commissioners of Madison county relating to the appointment in question. The county court at that time had no power to settle a bill of exceptions. (*Moline v. Curtis*, 38 Neb., 520; *Real v. Honey*, 39 Neb., 516; *Michigan Stove Co. v. Miller*, 43 Neb., 332; *Sedgwick v. Durham*, 45 Neb., 86.) There could therefore be presented to the district court no competent proof of the evidence which had been introduced upon the hearing of the objection urged in the county court. The district court, for this reason, very properly affirmed the judgment of the county court, and in turn the judgment of the district court is by this court

AFFIRMED.

STATE OF NEBRASKA, EX REL. CHARLES OGDEN ET AL., V. ALBYN L. FRANK, CLERK OF DISTRICT COURT.

FILED NOVEMBER 4, 1897. No. 9516.

Mandamus to Clerk of District Court: OTHER REMEDY. Section 889 of the Code of Civil Procedure confers authority upon the district court to direct its clerk in the performance of his official duties, and the supreme court will not issue a *mandamus* to compel such clerk to issue an execution upon a judgment when there has been no application to, and refusal by, the district court to direct its clerk to issue such execution. Following *State v. Moores*, 29 Neb., 122.

ORIGINAL application for *mandamus* to require the clerk of the district court of Douglas county to issue an execution on a judgment. *Writ denied.*

J. W. West, Charles Ogden, and *J. C. Cowin,* for relators.

Warren Switzler, contra.

RYAN, C.

The application for a *mandamus* in this court recited that on May 3, 1897, the relators had obtained a judgment in the district court of Douglas county against Benjamin and Maurice Rosenthal in the sum of $3,258.40, and that thereafter, on June 25, 1897, the said district court had entered an order conditionally granting a new trial. It was further alleged that the district court adjourned *sine die* on June 30, 1897, and that the compliance with the condition precedent required was not until July 3, immediately following the date last above named. The respondent is the clerk of the aforesaid court, and, as it was alleged, refuses to issue an execution for the enforcement of payment of the above described judgment because of compliance by the Rosenthals with the condition precedent to their right to a new trial. The object of this proceeding is to compel the clerk of the district court of Douglas county to issue an execution on the judgment above described, as though no order had been made by said district court subsequent to its rendition thereof. For our purposes it is not required that there should be quoted from the order sought to be ignored anything more than the following language: "And the court, exercising its discretion in the premises, under the general control which it has over said judgment during the term that same was rendered, and desiring to give the defendants further opportunity to make defense, it is ordered and adjudged that, upon the defendants paying into court the amount of said costs and the amount of said attorney's fee for and in behalf of said plaintiffs, within ten days from this date, then that said judgment to be, and the same is hereby, set aside and a new trial awarded to the defendants herein, and that, upon failure of said defendants to make said payments that said judgment as rendered stand in full force and effect in all respects to the same effect as if the order had not been made." It is possible by the use of the words, "And the same is hereby

set aside and a new trial awarded to the defendants herein," that the district court may have intended to make an order which, upon the performance by the defendants of the prescribed condition precedent, would become self-executing. The language last quoted is, however preceded by the conditions that upon performance of the condition precedent the said judgment would be set aside. The order granting a new trial is followed by the following alternative provision: "Upon failure of said defendants to make said payments (of attorneys' fees and costs), that said judgment as rendered stand in full force and effect in all respects to the same extent as if this order had not been made." The grant of a new trial *in præsenti* is thus seen to be qualified to some extent by the language with which it was preceded, and more directly by that with which it was followed. Construing the order as an entirety, it seems to us to amount to no more than a declaration of a purpose of the district court to grant a new trial, provided that, within the period of ten days, certain payments should be made; otherwise that, at the expiration of the limit named, a new trial would be denied. Whether or not, under the circumstances, the clerk of the district court should by this court be required to issue an execution is the question presented by the application under consideration.

Section 889, Code of Civil Procedure, is in this language: "The clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him by other provisions of this Code, by other statutes, and by the common law. In the performance of his duties he shall be under the direction of his court." In *State v. Moores*, 29 Neb., 122, there was in this court asked a *mandamus* to compel the clerk of the district court of Douglas county to issue an order of sale. In the delivery of the opinion of this court, NORVAL, J., quoted the above section, italicizing, by way of emphasis, its closing line as authority for the proposition that without such application to the district court this court would not re-

quire such clerk to comply with the demand of the relator. The ruling was followed in *State v. Laflin*, 40 Neb., 441. In view of the section of the statute quoted, and of the above cited cases, the application for a *mandamus* in this case must be, and accordingly is, denied.

WRIT DENIED.

ALBERT W. JANSEN, APPELLANT, V. JOHN LEWIS ET AL., APPELLEES.

FILED NOVEMBER 4, 1897. No. 7524.

1. **Husband and Wife:** FRAUDULENT CONVEYANCES: PRESUMPTIONS. The doctrine of this court is that, when a conveyance from a husband to a wife is attacked by his creditor, the presumption will be indulged that such a conveyance is fraudulent. (*Carson v. Stevens*, 40 Neb., 112; *Kirchman v. Corcoran*, 51 Neb., 191, and cases there cited.)
2. ———: ———: ———. Such a presumption is not one of law, but a rule of evidence as to the burden of proof, and is applicable only to creditors whose debts existed at the time the conveyance was made.
3. ———: ———: RIGHTS OF CREDITORS: EVIDENCE. Where a conveyance from a husband to a wife is attacked as fraudulent by a subsequent creditor of the former, the burden is upon the creditor of showing by a preponderance of the evidence that such conveyance was made and accepted with a fraudulent purpose.

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

Tibbets Bros., Morey & Ferris, and *Daniel F. Osgood*, for appellant.

R. B. Windham, George M. Spurlock, C. S. Polk, Mockett & Polk, and *Talbot & Allen, contra.*

RAGAN, C.

This is an appeal from a decree of the district court of Cass county. There is little, if any, dispute as to the

material facts of the case and the history of this litigation is briefly as follows: On April 29, 1890, John Lewis was the owner in fee of a tract of land in Cass county. This land was of the value of about $8,000 and incumbered by mortgages to the extent of $3,000. Lewis and his family occupied this land as a homestead. At this date Lewis owned another tract of land which was mortgaged to a man by the name of McClintic for $4,000; and about this time Lewis and his wife conveyed this land to McClintic in satisfaction of the mortgage debt. After the discharge of the debt to McClintic, besides the debt secured by mortgages upon the homestead tract, Lewis was indebted in small sums to various persons in an aggregate amount of about $600. With his affairs in this condition Lewis and his wife on said date conveyed by general warranty deed the land upon which they lived to one Joseph Barrett, who was their son-in-law. The consideration expressed in this deed is $5,000, and the assumption by Barrett of the mortgage liens existing against the real estate. This deed was duly filed for record soon after its execution. On May 3, 1890, Barrett and his wife conveyed this real estate to Gilley S. Lewis, the wife of John Lewis, the consideration expressed in the deed being $5,000 and the assumption by Gilley S. Lewis of the mortgage liens against the real estate. There is no evidence in the record,—further than the relationship existing between the parties, the financial condition of John Lewis, and the transactions between the parties,—which shows, or tends to show, for what purpose or for what actual consideration these conveyances were made. After these conveyances Mrs. Lewis and her husband continued to reside upon this real estate until October, 1892. At this time Mrs. Lewis and her husband conveyed this real estate to James M. Patterson for a consideration of $7,000 which was paid by Patterson as follows: He deducted from the consideration the mortgage liens upon the real estate; executed to Mrs. Lewis his two non-negotiable notes aggregating $3,800, and

paid off and discharged a mechanic's lien against the real estate, and some judgments existing against John Lewis. From the date of Patterson's purchase of this land until this suit was brought, Mrs. Lewis and her husband occupied it as tenants of Patterson, paying him rent therefor. All the indebtedness of John Lewis existing on April 29, 1890, appears to have been paid either by himself or by Patterson about the time of the conveyance of the land to the latter, or soon afterwards, except a balance of some $90 and interest due on a note of Elzy Lewis, a son of John Lewis, and which note John Lewis had signed as surety for his son. It is not clear from the record whether this balance remained unpaid or not at the date of the bringing of this suit. In November, 1890, the said Elzy Lewis became indebted to Albert W. Jansen, and as an evidence of this debt he gave to Jansen his promissory note for $564.67. This note John Lewis signed as surety for his son. On July 7, 1893, a judgment was rendered in the county court of Lancaster county against John and Elzy Lewis on this last-mentioned note. An execution seems to have been issued out of said county court on said judgment and returned wholly unsatisfied. On September 11, 1893, Albert W. Jansen filed his petition in the district court of Cass county against the said John Lewis, Gilley S. Lewis, his wife, and the said James M. Patterson, alleging his recovery of the judgment against John Lewis in the county court of Lancaster county; that the transcript of such judgment had been duly filed and docketed in the office of the clerk of the district court of Cass county; an execution issued out of said court on said judgment and returned by the sheriff wholly unsatisfied; that the said John Lewis was insolvent and that said judgment was wholly unsatisfied. The bill then recited the conveyances of the real estate hereinbefore mentioned; alleged that said conveyances were made voluntarily without consideration, and for the fraudulent purpose of hindering and delaying the creditors of John Lewis, and prayed that such convey-

ances might be set aside and said real estate sold and the proceeds applied to the payment of Jansen's judgment. The parties made defendants to this action filed answers which traversed every material allegation of Jansen's petition. The district court found the issues for the defendants and dismissed Jansen's case and he has appealed.

The decree of the district court must be affirmed for the reason that the evidence in the record justified the district court in finding that the conveyance of April 29, 1890, from John Lewis and wife to Joseph Barrett, and the conveyance from Barrett and wife on May 3, 1890, to Gilley S. Lewis, were not fraudulent. Since Patterson claims title under Barrett, if the conveyance from Lewis and wife to Barrett and from Barrett and wife to the wife of Lewis were valid, we need not discuss Patterson's title. The contention of Jansen is that the conduct of Lewis and wife in conveying their real estate to their son-in-law Barrett, and he and his wife conveying it back to John Lewis' wife, authorizes the inference that both these conveyances were voluntarily made without consideration, and for the purpose of vesting the title to this real estate in the wife of John Lewis. For the purposes of this case only we assume that this contention is correct. Another contention of Jansen is that because of the relationship existing between John Lewis and his wife and Barrett, their son-in-law, a presumption exists that these conveyances were made for the purpose of defrauding the creditors of John Lewis; and the burden was upon the defendants of showing that these conveyances of April 29, 1890, and May 3, 1890, were made in good faith; and as there is no evidence upon that subject further than the relationship of the parties and the conveyances, it stands proved that the conveyances made by Lewis and wife and by Barrett were fraudulent.

By an unbroken line of decisions the doctrine is established in this state that when a conveyance from a husband to a wife or a wife to a husband is attacked by his

or her creditor the presumption will be indulged that such conveyance is fraudulent, and the burden rests upon the husband or wife, as the case may be, of showing the good faith of the transaction. (See *Carson v. Stevens*, 40 Neb., 112; *Kirchman v. Kratky*, 51 Neb., 191, and cases there cited.) But this presumption is not one of law, for the statute makes the question of fraudulent intent one of fact. (See Compiled Statutes, ch. 32, sec. 20.) It is merely a rule of evidence as to the burden of proof. But when the cases just cited speak of a conveyance from a husband to a wife or a wife to a husband being *prima facie* fraudulent as against creditors, what creditors are referred to? Certainly existing creditors. We know of no case in which this court has ever held that a conveyance from a husband to a wife was *prima facie* fraudulent as against a subsequent creditor of one of the parties to such conveyance, nor do we think any well-considered case can be found which so holds; but that when a subsequent creditor attacks a conveyance from a husband to a wife as being fraudulent the burden is upon him to establish such a fraud. Jansen is a subsequent creditor of John Lewis. At the time he became indebted to Jansen the title to the real estate in controversy was of record in the name of John Lewis' wife, and in order for Jansen to have this conveyance from Lewis to his wife through Barrett set aside as fraudulent, the burden is upon Jansen to show that the transaction was in fact fraudulent. We do not doubt that a conveyance from a husband to his wife may be overturned by a subsequent creditor as fraudulent upon its being established that the conveyance was made with the expectation of contracting the debt on account of which it is sought to set aside the conveyance; but there is nothing of this character in this record and that subject need not be discussed.

Bank of United States v. Housman, 6 Paige Ch. [N. Y.], 526, was a bill filed by a subsequent creditor to set aside certain real estate conveyances which he alleged were fraudulent. The chancellor summed up his conclusions

in the syllabus as follows: "Where there is no evidence of fraud in fact in the giving of the deed, nor in subsequent acts of the parties from which fraud can be legally inferred, subsequent creditors of the grantor cannot avoid the deed by showing that the consideration expressed therein was not the true consideration." *Claflin v. Mess*, 30 N. J. Eq., 211, was a bill filed by a subsequent creditor to set aside conveyances of real estate made by his debtor on the ground that such conveyances were fraudulent. The court said: "It is a sound principle of law as well as of morals that a man must be just before he is generous. But there is no such presumption in respect to subsequent debts, and a creditor whose debt is incurred subsequent to the making of a voluntary deed, in order to impeach it, must show fraud in fact. * * * For present purposes it will be assumed, notwithstanding some evidence to the contrary, that the deed in controversy is without sufficient consideration to support it against creditors whose debts existed at the time it was made. The complainant's rights as a creditor arose long after the title he seeks to avoid became a matter of public record. The evidence will not support a finding that the deed in question was made with the intent to defraud future creditors." In *Webb v. Roff*, 9 O. St., 430, the rule is formulated as follows: "A conveyance made without consideration by one indebted at the time, cannot be avoided by subsequent creditors without showing actual fraud or a secret trust for the benefit of the grantor." In *Lyman v. Cessford*, 15 Ia., 229, the rule is clearly and tersely stated in the following language: "To render a voluntary conveyance fraudulent, as to subsequent creditors, it must be made to appear, either by positive evidence or by facts which justify the inference, that it was executed with a fraudulent intent on the part of the grantor."

The appellant has not brought himself within the doctrine of these cases. The conduct of the parties subsequent to the conveyances, in using the proceeds of the

sale of the land to pay the debts existing against John Lewis at the time he and his wife conveyed this land to Barrett, was evidence which tended at least to show that the conveyances were made in good faith. Whether the evidence would have sustained a finding that the conveyances were made in bad faith it is not necessary to decide. It is sufficient that it justified the finding of the court that the transactions were free from fraud. The decree of the district court is

AFFIRMED.

PHŒNIX INSURANCE COMPANY OF HARTFORD V. CLYDE KING ET AL.

FILED NOVEMBER 4, 1897. No. 7531.

1. **Review:** RULINGS ON EVIDENCE: ASSIGNMENTS OF ERROR. An assignment in a petition in error, as to the admission or exclusion of testimony, which does not indicate what particular testimony out of a great mass is referred to, is too indefinite for consideration. *Bloedel v. Zimmerman*, 41 Neb., 695, followed.

2. ——: ——: ——. This court will not examine a bill of exceptions for the purpose of ascertaining if the verdict is sustained by sufficient evidence unless that question is specifically assigned in the petition in error. *Wiseman v. Ziegler*, 41 Neb., 886, followed.

3. **Process:** AMENDMENT OF SHERIFF'S RETURN: REVIEW. The district court has power to permit a sheriff to amend his return on a process to conform to the facts, upon proper showing and notice to the parties interested, and the permitting of such an amendment will not be disturbed by the supreme court when it appears that there has been no abuse of discretion. *Shufeldt v. Barlass*, 33 Neb., 785, followed.

4. **Trial:** SPECIAL INTERROGATORIES: VERDICT: REVIEW. Whether special interrogatories shall be submitted to a jury to be answered, in addition to their returning a general verdict, is a matter resting in the sound discretion of the trial court; and unless, from the nature of the case or some other fact, it appears that the court abused its discretion in refusing to submit such special interrogatories, its action will not be disturbed. *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356, followed.

5. **Instructions:** ASSIGNMENTS OF ERROR. This court will not review the

action of a district court in giving or refusing instructions unless such action of the court be specifically assigned in the motion for new trial and as a ground thereof. *Graham v. Frazier*, 49 Neb., 90, followed.

6. ———: ———: NEW TRIAL. An assignment in a motion for a new trial, "Errors of law occurring at the trial," does not present to the district court the question of the correctness of its ruling in giving or refusing instructions. *Graham v. Frazier*, 49 Neb., 90, followed.

7. **New Trial:** ASSIGNMENTS OF ERROR. Where a motion for a new trial contains seven grounds therefor, an assignment that the court erred in overruling such motion is too general for review. *Moore v. Hubbard*, 45 Neb., 612, followed.

ERROR from the district court of Holt county. Tried below before KINKAID, J. *Affirmed.*

Wright & Stout, for plaintiff in error.

R. R. Dickson, contra.

RAGAN, C.

One McEvony was sheriff of Holt county, and while such officer he performed certain services for the Phœnix Insurance Company of Hartford, Connecticut,—hereinafter called the "insurance company,"—in and about the levying upon, having appraised, advertising, and offering for sale lands upon which the insurance company had foreclosed mortgages. The claim against the insurance company for the fees which he alleged he had earned in the performance of said services McEvony assigned to King & Cronin; and to recover these fees from the insurance company, they brought this action in the district court of Holt county. The petition contained seven distinct causes of action, to each of which the insurance company interposed nine defenses. The trial resulted in a verdict and judgment in favor of King & Cronin and the insurance company brings the judgment here for review.

1. The first assignment of error is that the district court erred in sustaining the demurrer of King & Cronin

to the seventh defense interposed by the insurance company to King & Cronin's first cause of action. There are two answers to this contention: If the court ever made any such a ruling as that complained of the record does not disclose it; and, in the second place, this alleged action of the district court is not one of the grounds of the petition in error filed here for review of this judgment.

2. The second assignment is that the district court erred in sustaining the demurrer of King & Cronin to the eighth and ninth defenses interposed by the insurance company to the causes of action pleaded in the petition. The record does not disclose that the court made any such ruling as that complained of, and no such an assignment is contained in the petition in error.

3. The third, fourth, fifth, and sixth assignments of error argued in the brief relate to the action of the district court in the admission and the exclusion of evidence. The assignments on this subject in the petition in error are that the court erred in rejecting evidence offered on behalf of the insurance company as appears from the record at "pages 209, 209½, 210, 211, 212, 216, 216½, 217, 220, 223, 224, 230, 238, 239, 240, 241, 243;" that the court erred in rejecting documentary evidence offered by the insurance company as shown by the record at pages "206, 207, 219, 221, 228, 235, 242;" that the court erred in admitting evidence on behalf of King & Cronin as shown by the record at pages "197, 198, 199, 200, 204, 216, 218, 219, 232, 233, 234;" that the court erred in admitting evidence on behalf of King & Cronin as appears in the record at "pages 196, 197, 204, 233." These assignments of error are too indefinite to make it the duty of this court to go through the pages of the record referred to and pass upon the rulings of the court in the admission and rejection of evidence. In *Bloedel v. Zimmerman*, 41 Neb., 695, it was held: "An assignment in a petition in error as to the admission or exclusion of testimony, which does not indicate which testimony out of a great mass is referred to or intended, is too indefinite to be considered."

4. The seventh assignment of error argued in the brief is in substance that the verdict is not sustained by sufficient evidence. We cannot review the evidence in this record for the purpose of ascertaining whether this assignment is well taken since that question is not specifically assigned in the petition in error. (*Wiseman v. Ziegler*, 41 Neb., 886.)

5. The eighth assignment of error is that the court erred in permitting McEvony, the sheriff, who was a party to the suit below, to amend some of the returns made by him to the orders of sale which had been executed by him in the foreclosure suits of the insurance company. This was a matter resting within the sound discretion of the trial court; and since the record does not disclose that the court abused its discretion in permitting the amendment to be made the judgment cannot be reversed for that reason. *Shufeldt v. Barlass*, 33 Neb., 785, was an action brought to amerce the sheriff for failing to execute and return an order for the sale of attached property. On the trial of the amercement proceeding the court permitted the sheriff to file an amended return stating as a matter of fact that he had not levied upon any property and that the original return made was erroneous. The sheriff having had a verdict and judgment Shufeldt prosecuted here a petition in error. This action of the court in permitting the amendment to be made was relied upon by Shufeldt & Co. for a reversal of the judgment. This court summed up its conclusion in the syllabus as follows: "The district court has power to permit a sheriff to amend his return on a process to conform to the facts, upon proper showing, and notice to the parties interested, and the permitting of such an amendment will not be disturbed by the supreme court when it appears there has been no abuse of discretion.

6. Another assignment of error argued here is that the district court erred in refusing to submit to the jury certain special findings requested by the insurance company. This also was a matter resting within the discre-

tion of the trial court, and there is nothing in this record or in the nature of this case from which we are able to say that the district court abused its discretion in refusing to submit to the jury these special findings. (See *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356.)

7. The next assignment of error argued here relates to the action of the district court in giving and refusing to give certain instructions. No complaint of this action of the court was made by the insurance company in its motion for a new trial, and the action of the court in this respect cannot be reviewed under an assignment in the motion for a new trial of "errors of law occurring at the trial." (*Graham v. Frazier*, 49 Neb., 90.)

8. A final assignment of error is that the court erred in overruling the motion of the insurance company for a new trial. As the motion for new trial assigns seven grounds the assignment is too general for review. (See *Moore v. Hubbard*, 45 Neb., 612.)

The judgment of the district court is

AFFIRMED.

PHŒNIX INSURANCE COMPANY OF HARTFORD v. H. C. MCEVONY ET AL.

FILED NOVEMBER 4, 1897. No. 7532.

1. **Sheriffs' Fees:** MILEAGE. The statute limits the mileage of a sheriff to five cents per mile for each mile actually and necessarily traveled in making a levy upon and appraisal of real estate.

2. ———: COST OF PRINTING NOTICE OF SALE. A sheriff may not legally charge as costs for printing a notice of sale of real estate any greater sum than he actually paid the printer therefor.

3. **Judicial Sales:** FEES OF APPRAISERS. Freeholders summoned by a sheriff to appraise real estate levied on are entitled to only 50 cents each per day for each day they are employed in such duty.

4. ———: ———. Such appraisers are not entitled to mileage.

5. **Sheriffs' Fees:** APPRAISAL. The sheriff is not entitled to the fees of an appraiser for assisting in appraising real estate levied upon.

6. **Sheriffs:** ILLEGAL FEES: PENALTY: JOINDER OF CAUSES OF ACTIONS: ELECTION. In an action against a sheriff and the sureties on his bond to recover illegal fees charged and collected by him, the plaintiff may join in his petition a cause of action to recover the penalty provided by statutes for the charging and taking of illegal fees by an officer.

7. ———: ———; CONTRACTS: PUBLIC POLICY. The statute prescribes and limits the fees and compensation which a sheriff may charge and receive for any services performed by him by virtue of his office; and he cannot make a valid agreement with a litigant for any compensation beyond that prescribed by statute for the performance of an official duty.

ERROR from the district court of Holt county. Tried below before KINKAID, J. *Reversed.*

Wright & Stout, for plaintiff in error.

H. M. Uttley and *R. R. Dickson, contra.*

RAGAN, C.

The Phœnix Insurance Company of Hartford, Connecticut,—hereinafter called the "insurance company,"—brought in the district court of Holt county against H. C. McEvony, the sheriff thereof, and the sureties on his official bond, ten actions at law to recover certain fees which the insurance company alleged the sheriff had charged and taken from it for services performed by him as sheriff, in certain proceedings brought in the district court of said county by said insurance company to foreclose certain real estate mortgages, which said fees were in excess of those which the statute permitted the sheriff to charge and take for the services rendered. The petition in each of the cases claimed also the $50 penalty provided by section 34, chapter 28, Compiled Statutes, for the charging and taking of illegal fees. The cases in the district court were numbered 4128 to 4137, both inclusive. On the motion of the sheriff these ten suits were consolidated and tried as one. The jury found a verdict for the

defendants in the court below, upon which a judgment of dismissal of the insurance company's action was rendered and it prosecutes here a petition in error.

1. The ten cases are substantially alike and the conclusion reached here is applicable to each of said cases. The case considered here is based upon the alleged illegal charges made by the sheriff in the case of the insurance company against Cullen,—a case brought to foreclose an ordinary real estate mortgage. A decree having been obtained, an order of sale was issued and delivered to the sheriff. He caused the property to be appraised, levied upon, advertised the same and offered it for sale, but it was not sold for want of bidders. We assume, without deciding, that the evidence sustains the finding of the jury that the sheriff actually traveled 98 miles in levying upon and appraising the land sought to be sold in the foreclosure case of the insurance company against Cullen. We also assume, without deciding, that the evidence sustains the finding of the jury that the printer actually charged the sheriff $9 for publishing the notice of sale of the land in the Cullen case, and that such charge did not exceed the lawful rate for such services. We then inquire what services did the sheriff perform in the Cullen case? what were his legal fees therefor? and what did he actually charge and take for such services? The result is as follows:

Traveled 98 miles to make levy and app.—		
Legal fees for same, 5c for each mile....	$4 90	
Illegal fees taken, none.		
Calling inquest, appraisers—		
Legal fees therefor, 50c.		
Charge therefor	50	
Illegal fees taken, none.		
Fees of two appraisers—		
Legal fees therefor, 50c each, $1.		
Charge therefor	3 00	
Illegal fees collected		$2 00

Levy and return of execution—		
Legal fees for same, $1.		
Charge therefor	$2 00	
Illegal fees collected		$1 00
Three certificates incumbrances—		
Legal fees therefor, $2 each.		
Charge therefor	6 75	
Illegal fees collected.....		75
Advertising sale in newspaper—		
Legal fees therefor, 50c.		
Charge therefor, nothing.		
Illegal fees taken, none.		
Making copy of appraisal—		
Legal fees therefor, 25c.		
Charge therefor	50	
Illegal fees collected		25
Publishing notice of sale in newspaper—		
Legal fees therefor, legal rate, $9.		
Charge therefor	9 00	
Illegal fees collected, none.		

In other words, the sheriff charged and collected from the insurance company for the services rendered in the Cullen case, fees in excess of those allowed by law of $3.50. We have said above that we assume that the sheriff, in advertising and appraising this land, actually traveled 98 miles. We do not think, however, that he did. The record shows that this land was levied upon and appraised on December 10, 1892, on which date a number of other pieces of land were levied upon and appraised, the appraisers in each case being the same; and totalizing the mileage charged up in these cases, it aggregates 1,295 miles. It is very evident that the sheriff and the appraisers did not travel 1,295 miles on the 10th day of December. Again, it appears that from the 10th to the 16th of December inclusive, the mileage charged by the sheriff for levying upon and appraising lands amounted to more than 4,000 miles. Again, it is evident

that the sheriff and the appraisers in these six days did not travel that distance. This remarkable state of facts was probably brought about in this way: At the time the sheriff appraised and levied upon the lands in the Cullen case he had in his hands other orders of sale in other cases; and, if he went into the country and levied upon and appraised these lands upon actual view thereof, upon his return to his office he did not limit himself in his mileage to the actual number of miles traveled during his absence and apportion the mileage to the various cases in which he had made levies and appraisals, but charged mileage to each case, computing the distance from the county seat to the piece of land and return. The statute limits the mileage of the sheriff to five cents per mile for each mile actually and necessarily traveled in making a levy and appraisal. And if a piece of land is situate 50 miles from the county seat and the sheriff goes upon said land for the purpose of making a levy thereon and an appraisal thereof, and during the same trip he makes a levy upon and an appraisal of another piece of land, and necessarily and actually travels in making both said levies only 100 miles, he may not legally charge mileage in each case of 100 miles, but must apportion the mileage between the two cases. (*Burlington & M. R. R. Co. v. Beebe*, 14 Neb., 474.)

Section 17, chapter 28, Compiled Statutes, prescribes the legal fees which a printer may charge for publishing a notice of sale; but we know of no law which compels a printer to charge the full legal rate; and if the printer charges the sheriff less than the legal rate for printing a notice of sale then the sheriff may not legally charge as costs in the case any more than he actually paid the printer.

We do not know upon what theory the sheriff charged $3 for appraisers' fees since the statute (Code of Civil Procedure, sec. 512) limits the compensation of appraisers to the sum of 50 cents each for each day each appraiser may be engaged as such. These appraisers were only

engaged in appraising land in the Cullen case one day, and the only fees that could be legally charged for their services was the sum of one dollar. The sheriff himself was not entitled to the fees of an appraiser for assisting in making the appraisal, though he was *ex officio* one of such appraisers, as the statute limits the compensation for appraising the lands to the two freeholders summoned by the sheriff. The statute does not provide for freeholders summoned to appraise land being paid any mileage whatever. Doubtless the legislature supposed that a sheriff, when he had levied upon lands, would summon freeholders who resided in the vicinity of such lands to make the appraisal, and for that reason failed to provide that such appraisers might be allowed mileage. Certainly it was never in the contemplation of the legislature that a sheriff would keep in his employ, so to speak, two men residing in a county seat for the purpose of making an appraisal of all the lands upon which he levied, as the record shows seems to have been the custom of this sheriff of Holt county.

We are unable to understand upon what theory the sheriff charged the insurance company $6.75 for three certificates of incumbrances existing against the land appraised, as section 491*c* of the Code of Civil Procedure, as it existed in 1892, fixed the charge which each officer might make for his certificate at two dollars. Section 5, chapter 28, Compiled Statutes, allows the sheriff a fee of one dollar for levying a writ of execution and returning the same, and he may not charge a fee of one dollar for making a levy and also a fee of one dollar for returning the execution as he did in the case under consideration. The sheriff was probably led into this last charge by section 10, chapter 28, Compiled Statutes, which fixes the fee of a master in chancery for levying upon and selling real estate. This section was a part of chapter 19 of the Revised Statutes of 1866; but it does not, nor does it purport to, fix the fees or compensation of the sheriff in the making of the sales of real estate. His fees for such

services are prescribed by section 5 of chapter 28, Compiled Statutes. The only fees which a sheriff may now legally charge and collect for levying upon and selling real estate under one execution are as follows: Levying and returning execution, $1; calling an inquest to appraise lands, 50 cents; fees of two appraisers, 50 cents each for each day engaged; making copy of appraisal 25 cents; advertising the sale, 50 cents; cost of publishing notice of sale, the legal rate prescribed by section 17, chapter 28, Compiled Statutes, not exceeding the actual charge made to him by the printer; each certificate of incumbrances, $1; commissions on money received at the sale as provided by section 5, chapter 28, Compiled Statutes, but in case no money is received at the sale he cannot charge anything for making it; making a deed, $1; five cents per mile for each mile actually and necessarily traveled in making the levy and appraisal. In case the property should be twice advertised and offered for sale the sheriff will then be entitled to 50 cents for each advertisement of the sale and the legal fees for the two publications of the notice of sale. It follows from what has been said that the verdict of the jury on which the judgment of the district court was based is wholly unsustained by the evidence.

2. After the plaintiff had rested its case the court, on motion of the defendant, compelled the insurance company to elect on which of the two causes of action stated in its petition it would stand and take the verdict of the jury,--that is, the court by its ruling compelled the insurance company to abandon the cause of action against the sheriff for the recovery of the illegal fees collected by him from it, or to abandon the cause of action for the statutory penalty. This action of the court was erroneous. The learned district court seems to have been of opinion that the two causes of action could not be united in the same petition; but the two causes of action in each of the petitions of the insurance company grew out of the same transaction and were connected with the same

subject of action. The two causes of action affected all the parties to the suit and did not require different places of trial (Code of Civil Procedure, secs. 87, 88); and the plaintiff had the right to join those two causes of action in one petition. It is true that the two causes of action were not separately stated and numbered as the Code requires, but that could not be taken advantage of by a motion to compel the plaintiff to elect on which cause it would stand.

3. The sheriff and his bondsmen, among other defenses to the action, pleaded that the fees sued for herein were charged and collected by the sheriff in pursuance of an agreement to that effect between the sheriff and the duly authorized counsel and attorney of the insurance company; and it is insisted here that the jury found the fees sued for were collected by the sheriff and paid by the insurance company in pursuance of such agreement; and therefore the insurance company is estopped from prosecuting this action. If the verdict of the jury is based on their finding that issue in favor of the sheriff and his bondsmen, the evidence does not sustain the finding. If the agreement was made, as pleaded, between the sheriff and the attorney for the insurance company that the sheriff should be paid fees for his services in excess of those provided by statute, the agreement was contrary to public policy and absolutely void. The statute prescribes and limits the fees and compensation which a sheriff may charge or receive for any services performed by him by virtue of his office; and he cannot make a valid agreement with a litigant for any compensation over and above that prescribed by statute for the performance of his duties as a sheriff. (*Burke v. Webb*, 32 Mich., 173; *Peck v. City Nat. Bank of Grand Rapids*, 16 N. W. Rep. [Mich.], 681.)

The judgment is reversed and the cause remanded, with instructions to the district court to set aside the order dismissing the petitions of the insurance company in the ten cases before mentioned, and to permit the insurance

company to proceed to trial in each of said cases upon the two causes of action mentioned in said petitions.

REVERSED AND REMANDED.

MOLINE, MILBURN & STODDARD COMPANY V. WILLIAM NEVILLE.

FILED NOVEMBER 4, 1897. No. 7537.

1. **Compensation of Bailee:** PRESERVATION OF GOODS. An involuntary bailee of goods may conserve the same, and for so doing recover from the owner what such service is reasonably worth.
2. ———: ———. *Moline, Milburn & Stoddard Co. v. Neville*, 38 Neb., 433, distinguished.

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

The facts are stated by the commissioner.

D. O. Dwyer and *J. H. McIntosh*, for plaintiff in error:

If the goods were on the premises of defendant in error without his consent, and he was injured thereby, his remedy is in tort, and not on contract. (*Durrell v. Emory*, 9 Atl. Rep. [N. H.], 97; *Dixon v. Ahern*, 14 Pac. Rep. [Nev.], 598; *Lathrop v. Standard Oil Co.*, 9 S. E. Rep. [Ga.], 1041; *Depere Co. v. Reynen*, 22 N. W. Rep. [Wis.], 761; *United States Mfg. Co. v. Stevens*, 17 N. W. Rep. [Mich.], 934.)

A. N. Sullivan, contra.

RAGAN, C.

One F. A. Burke, from March, 1889, until January, 1891, was a dealer in agricultural implements in the city of Plattsmouth, Nebraska. In addition to his own prop-

erty he had for sale on commission implements of various manufacturing companies,—among others, the Moline, Milburn & Stoddard Company. Burke conducted his business and kept his merchandise in a building which he leased of one William Neville. Burke's lease on this building expired April 1, 1891, up to which time he settled with Neville for the rent thereof. Burke, some time prior to that date, surrendered the key of the building to the attorney or collection agent of the Moline, Milburn & Stoddard Company, and removed from the city. At the time Burke went out of business, or left the city of Plattsmouth, there remained in the building which he had leased of Neville a quantity of goods belonging to the Moline, Milburn & Stoddard Company, which Burke had for sale on commission. These goods remained in the building of Neville until June 1, 1891, at which time they were removed or taken possession of by the owner. Neville brought this suit in the district court of Cass county against the Moline, Milburn & Stoddard Company to recover the reasonable worth of storing their said goods from April 1 to June 1, 1891. He had a verdict and judgment, and the Moline, Milburn & Stoddard Company prosecutes to this court a petition in error.

1. The case was previously before this court. (See *Moline, Milburn & Stoddard Co. v. Neville*, 38 Neb., 433.) By his original petition Neville declared on an express contract, and having recovered a judgment, the Moline, Milburn & Stoddard Company brought it here for review and this court reversed the same, for the reason that the verdict finding that an express contract existed between the parties was wholly unsustained by the evidence. After the case was remanded Neville filed an amended petition alleging that he had furnished storage for the goods of the Moline, Milburn & Stoddard Company, and sought to recover on an implied contract what such service was reasonably worth. We have carefully examined all the assignments of error argued here, of which we shall notice only two.

The first contention is, in effect, that the plaintiff in

error is not liable to Neville for the storage furnished for its goods after their abandonment by Burke. Of course, at no time while these goods were in the possession of Burke would his principal be liable for the rental of the building in which he kept them, nor for their storage or preservation, but by the conduct of Burke Neville became an involuntary bailee of these goods; and if we assume that they remained in Neville's store after April 1 without the knowledge or consent of the Moline, Milburn & Stoddard Company, it does not necessarily follow that the latter is not liable for what it was reasonably worth to preserve and care for them. Certainly Neville would not have been justified in throwing these goods into the street. In *Preston v. Neale*, 78 Mass., 222, a tenant at the expiration of his term left his goods in the leased building without any agreement with his landlord. Subsequently the tenant demanded these goods and the landlord claimed a lien upon them for storage. The court held that while the landlord had no lien upon the goods for their storage, he was an involuntary depositary of them, and as such entitled to be paid a reasonable compensation for their storage and care until they were demanded of him. The court in its opinion cites Doctor and Student, to this effect (chapter 51): "'Though a man waive the possession of his goods and saith he forsaketh them, yet by the law of the realm the property remaineth still in him, and he may seize them after when he will. And if any man in the meantime put the goods in safeguard to the use of the owner, I think he doth lawfully, and that he shall be allowed for his reasonable expenses in that behalf, as he shall be of goods found; but he shall have no property in them, no more than in goods found.'" In the case at bar it is true that the Moline, Milburn & Stoddard Company did not abandon their goods, but their agent did. He was rightfully in possession of the goods. But this manufacturing company did not lose the title to its goods by putting them into the hands of its agent for sale, nor by his abandonment of them; and we have no doubt that

Neville would be liable to this manufacturing company had he injured or destroyed the goods, or put them out on the street and they had been thereby lost to their owners. Certainly this would be true had he done any of these things without first having given the owner of the goods notice of the fact that they were in his building, and a reasonable time in which to remove them. When Neville found himself involuntarily in possession of these goods, we think he might preserve them; and for the reasonable worth of the care and preservation of the goods until they were removed the owners were liable.

2. The evidence shows that the fair rental value of the building in which the goods were stored was $15 per month, but that by reason of the presence of the goods in the building Neville could and did rent it for only $10 a month during the months of April and May. In other words, the evidence shows that the reasonable compensation for the storage afforded the goods, for the time, was $10. The jury awarded Neville $23.25, for which sum judgment was rendered. This judgment is excessive in the sum of $13.25. The defendant in error may within thirty days from this date file with the clerk of this court a remittitur of such excess. In case he does so the judgment of the district court will be affirmed; otherwise it will be reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

MOLINE, MILBURN & STODDARD COMPANY V. LAWRENCE PEREAU.

FILED NOVEMBER 4, 1897. No. 7484.

Sale of Ricker: WARRANTY: NOTICE OF DEFECTS. By the terms of a contract for the sale of a hay "ricker," warranted by the vendor, the vendee was to retain the ricker "for trial" to a certain date;

and if it complied with the warranty he was then to execute his notes for the purchase price; and if it failed to comply with the warranty he was at that date to notify the vendor thereof. The vendee did not notify the vendor of the failure of the ricker to comply with the warranty until after the date fixed therefor in the contract, and retained the machine. *Held*, That by reason of the failure of the vendee to give the notice at the time agreed in his contract the sale became absolute.

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

Gaslin, Newman & Hallowell, for plaintiff in error.

References: 1 Parsons, Contracts [5th ed.], 539; *Prairie Farmer Co. v. Tailor*, 69 Ill., 441; *Butler v. School District*, 24 Atl. Rep. [Pa.], 308; *Stultz v. Loyal-Hanna Coal & Coke Co.*, 18 Atl. Rep. [Pa.], 875; *Johnson v. MacLain*, 43 Am. Dec. [N. Y.], 103; 21 Am. & Eng. Ency. Law, 517; *Washington v. Johnson*, 7 Humph. [Tenn.], 468; *Reed v. Randall*, 29 N. Y., 363; *Gaylords Mfg. Co. v. Allen*, 53 N. Y., 515; *Dewey v. Erie Borough*, 53 Am. Dec. [Pa. St.], 533; *Barton v. Kane*, 18 Wis., 275; *Boothby v. Scales*, 27 Wis., 637; *Burton v. Stewart*, 20 Am. Dec. [N. Y.], 694; *Owens v. Sturgis*, 67 Ill., 267; *Voorhees v. Earl*, 2 Hill [N. Y.], 291; *Casey v. Gruman*, 4 Hill [N. Y.], 625; *Maxwell v. Lee*, 34 Minn., 511; *Olson v. Mayer*, 56 Wis., 555; *McCormick v. Martin*, 32 Neb., 726.

W. D. Oldham, contra.

RAGAN, C.

In the district court of Buffalo county, Moline, Milburn & Stoddard Company sued Lawrence Pereau to recover the purchase price of a hay ricker which the company alleged it had sold and delivered to him at an agreed price. Pereau answered that he purchased the ricker on trial with the agreement that if after giving it a fair trial it should do satisfactory work then he should pay $80 for it; that he gave the ricker a fair trial and it did not do satisfactory work. The jury found a verdict in

favor of Pereau, whereupon the district court dismissed the company's action and it prosecutes error.

1. The undisputed evidence in the case shows that about the middle of August, 1891, the company, through its agent, entered into a contract with Pereau in and by which it sold to him for $80 the ricker sued for, warranting it to do good work. Pereau was to give the ricker a fair trial, and if it proved satisfactory he was to execute to the company his two promissory notes of $40 each therefor; that about the 25th of August the company delivered the ricker to Pereau, who in connection with the company's agent put up the ricker and tried it, and Pereau then expressed himself as being entirely satisfied with it; whereupon the company's agent made out the notes for him to sign according to the contract; but Pereau then requested that he might be given one more day's time in which to try the ricker, and promised the company's agent that if he was given such additional time,—if the machine on another day's trial proved satisfactory,—he, Pereau, would sign the notes which the agent left with him and transmit them to the company's place of business in Omaha; and if the machine did not prove satisfactory he, Pereau, would telegraph the agent to that effect at Grand Island. The company's agent accepted this modification of the original contract of sale and Pereau retained the machine. He did not execute the notes, and he did not notify the company or its agent by wire or otherwise of his dissatisfaction with the machine until the 5th day of October following.

The contract between the parties as finally modified at the time the machine was put up was a conditional sale of this property to Pereau, or a sale on trial, and if the parties, by their contract, had not fixed a time in which Pereau should try the machine then he would have had a reasonable time in which to try it, and if found unsatisfactory to notify the seller of his trial and the unsatisfactory work of the ricker; and whether from the latter part of August to the 5th of October was a reasonable

time in which to try the ricker would have probably been a question of fact for the jury. (*Boothby v. Scales*, 27 Wis., 626.) But since the parties fixed a time in which Pereau should try the ricker, and if found unsatisfactory advise the company thereof, his failure to advise the company within the time fixed by the contract made the sale absolute.

In *Johnson v. McClane*, 7 Blackf. [Ind.], 501, two persons exchanged horses with a privilege to one of the parties to return the horse received by him within a given time. The party neglected to return the horse received within that time and the court held that the exchange or the sale thereby became absolute. In *McCormick Harvesting Machine Co. v. Martin*, 32 Neb., 723, it was held that one who purchased a machine under a warranty, with leave to return it after a fair trial if found not to comply with the warranty, and failed to return it within a reasonable time, would be deemed to have waived the objections to the machine.

The verdict of the jury is not sustained by sufficient evidence, and the judgment based thereon is reversed and the cause remanded.

REVERSED AND REMANDED.

ANSON B. CODDING V. GILES W. MUNSON.

FILED NOVEMBER 4, 1897. No. 7520.

1. **Non-Existent Principal:** LIABILITY OF AGENT. One who as agent assumes to respect a principal who has no legal existence or status is himself liable. *Learn v. Upstill*, 52 Neb., 271, followed.

2. ——: ——. The foregoing rule is founded upon the presumption that the parties intended to create an enforceable legal obligation, and does not obtain when it appears that a different method of fulfillment was provided, and that the agent was not to be held personally liable.

3. ——: ——: PLEADING: INSTRUCTIONS. When the petition de-

clares only upon a contract with the defendant in his own behalf and his promise to pay, it is error to submit to the jury the theory that he was agent for another and had received from his principal money to the use of plaintiff.

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

F. C. Power and *S. H. Sedgwick*, for plaintiff in error.

Gilbert Bros., contra:

A person contracting as agent will be personally liable, whether he is known to be an agent or not, in all cases where he makes the contract in his own name, or voluntarily incurs a personal responsibility, either express or implied. (Story, Agency [7th ed.], sec. 269; *Hewes v. Andrews*, 20 Pac. Rep. [Colo.], 338.)

The law does not exempt an agent from personal responsibility when he chooses by his own act or contract voluntarily to incur it, or when from his own conduct or the form of the act or contract it is necessarily implied or created by operation of law. (*Bell v. Teague*, 3 So. Rep. [Ala.], 861; *Farmers Co-operative Trust Co. v. Floyd*, 26 N. E. Rep. [O.], 110; *Moore v. Booker*, 62 N. W. Rep. [N. Dak.], 607.)

An agent is personally liable where there is no responsible principal, or where the principal has no legal existence. (1 Am. & Eng. Ency. of Law, 402; *Button v. Winslow*, 53 Vt., 430; *Blakely v. Bennecke*, 59 Mo., 193; *Eichbaum v. Irons*, 6 W. & S. [Pa.], 67; *Edings v. Brown*, 1 Rich. [S. Car.], 255; *Steele v. McElroy*, 1 Sneed [Tenn.], 341; *Comfort v. Grasham*, 54 N. W. Rep. [Ia.], 242; *Lewis v. Tilton*, 19 N. W. Rep. [Ia.], 911.)

IRVINE, C.

Munson sued Codding, alleging that he had sold and conveyed to him certain land for the price of $10,000, that $9,750 thereof had been paid, and praying judgment for the remaining $250. The answer was a general denial.

The plaintiff recovered and the defendant brings the case here by petition in error.

The evidence discloses that there were held several open meetings of citizens of York for the purpose of securing the location there of an institution for the care of orphans, under the patronage of the Woman's Home Missionary Society of the Methodist Episcopal Church. It was understood that a gift of about $10,000 would be necessary to accomplish the purpose. Both plaintiff and defendant attended the meetings and contributed to the undertaking. It was determined that the donations should be in the form of negotiable promissory notes, made to the order of a trustee to be designated for that purpose. A committee appointed at one of the meetings, under power possessed or assumed by it, designated the defendant Codding as trustee. It would seem that the institution was formally located at York; but instead of giving the notes or their proceeds to the society, the land of plaintiff was purchased and conveyed to "Anson B. Codding, Trustee," he in turn conveying to the Missionary Society. Codding indorsed without recourse a number of subscription notes to Munson, and these notes, together with other items accepted by Munson, made up the sum of $9,750 which Munson admits receiving. It is not contended that the price was other than claimed, or that the remainder was paid. The only question is as to Codding's personal liability therefor. So far as has been stated, the evidence is quite clear and free from conflict. As to the extent of Codding's authority, if he possessed any, and the nature of the transactions between him or other citizens of York on the one side and Munson on the other, with reference to the purchase, the evidence is exceedingly vague and leaves much to inference, if not to conjecture. Still, it is upon the last question that the case must be made chiefly to turn.

It is the general rule that one who assumes to act as agent for a principal who has no legal status or existence renders himself individually liable on contracts so made. (*Learn v. Upstill*, 52 Neb., 271.) This doctrine receives

its most frequent application in cases like the present, where a person or committee incurs obligations as the result of instructions given by a body gathered together informally for a special purpose, and possessing no definite membership or continued power of existence. The rule is founded upon a presumption of fact, and is not the expression of any positive or rigid legal principle. The presumption referred to is that the parties to a contract contemplate the creation of a legal obligation capable of enforcement, and that, therefore, it is understood that the obligation shall rest on the individuals who actively participate in the making of the contract, because of the difficulty in all cases, the impossibility in many, of fixing it upon the persons taking part in or submitting to the action of the evanescent assemblage. If, however, the person with whom the contract is made expressly agrees to look to another source for the performance of its obligations, or if the circumstances be such as to disclose an intention not to charge the agent, as where the other agrees to accept the proceeds of a particular fund, there is no longer reason to indulge the presumption, and it may be rebutted by proof of such facts. This qualification of the general rule is clearly indicated in *Learn v. Upstill*, and is recognized by nearly all the cases discussing the general subject. (See cases cited by Judge NORVAL in *Learn v. Upstill;* also *Heath v. Goslin*, 80 Mo., 310; *Button v. Winslow*, 53 Vt., 430; *Comfort v. Graham*, 54 N. W. Rep. [Ia.], 242.)

Applying these principles to the case at bar, the evidence would raise *prima facie* the presumption upon which the general rule is based. On the other hand, it was sufficient to justify the inference that the plaintiff did not look to defendant personally, but was to receive merely the subscription notes or their proceeds. The instructions should have stated the law as we have indicated it and submitted to the jury the issues bearing thereon. Instead thereof the court charged as follows: "If you find from the evidence that Codding was in this

transaction only agent and trustee for the Mothers' Jewels Home, and that all his transactions as such agent and trustee have been performed in good faith, then you should find for the defendant." This was erroneous, because it made Codding's release from liability depend upon his action as agent for the Home, and his performing his duty in good faith. It was not claimed that he was agent for the Home, but for the citizens of York. This principal having no legal status, the instruction should have been that Codding was liable unless the agreement was that Munson was to look solely to the subscriptions. The error was prejudicial to the defendant, because there was no evidence of an agency such as the instruction submitted, and a verdict for plaintiff was therefore required without regard to that phase of the evidence which, if properly submitted, might have induced a different finding.

The court also charged as follows: "If you find from the evidence that Codding, defendant, has sufficient funds in his hands of the Mothers' Jewels Home, or that there was placed in his hands sufficient funds to pay Munson in full for his lands, then you should find for the plaintiff." While some evidence of that character appeared over defendant's objection, it was not relevant to the issues and should not have been submitted to the jury. The petition was not framed on the theory that Munson had sold to third parties, and that Codding had received from them moneys to his use. It declared solely on a contract direct with Codding and a promise by him to pay.

It is contended by plaintiff that the contract was made by Codding in his own name, that he thereby made himself liable, and the judgment should for that reason be affirmed. No doubt a contract for the sale of land, if made by an agent in his own name, will bind him personally even though he describe himself therein as agent and disclose his principal. (*Morgan v. Bergen*, 3 Neb., 209.) But in this case we have no contract so made. Although

the addition of the word "trustee," in the deed to Codding, be *designatio personæ* merely, still that deed is not the contract sued upon. It does not follow that the grantee named in a deed is liable for the purchase money.

REVERSED AND REMANDED.

JOHN GREEN SMITH V. THOMAS M. LOGAN ET AL.

FILED NOVEMBER 4, 1897. No. 7547.

Fraudulent Conveyances: EVIDENCE. In a contest between vendees of goods and creditors of the vendor, evidence examined and *held* insufficient to sustain a verdict that the sale was made in good faith.

ERROR from the district court of Franklin county. Tried below before BEALL, J. *Reversed.*

Sheppard & Black, for plaintiff in error.

James McNeny, contra.

IRVINE, C.

This was an action of replevin by the defendants in error, Logan and Shryock, against the plaintiff in error, Smith, who was sheriff of Franklin county, for a stock of merchandise and certain other chattels. Logan and Shryock claimed as purchasers from one Petring. The sheriff justified under a writ of attachment against Petring sued out by a creditor. The only issue litigated was the *bona fides* of the transfer by Petring to the plaintiffs. A jury trial resulted in a verdict in favor of plaintiffs.

Petring was engaged in business in the town of Upland. Logan lived twelve miles from that point and Shryock six miles. For some time Petring had been in-

debted to the Bank of Upland in the sum of $800, Logan and Shryock being indorsers. On October 9, 1893, the bank insisting that some adjustment be made upon a different basis, and expressing a preference for the paper of Logan and Shryock, without Petring's name thereon, Logan and Shryock gave their note, payable on demand, to the bank, and took from Petring his demand note, secured by mortgage on the stock of merchandise. As to subsequent transactions we have nothing material except the testimony of Logan and Shryock themselves. The following is their narrative: On October 13, Logan went to Upland and asked Petring to pay the note, saying that he needed the money. Petring expressed his inability to pay, but asked Logan to buy him out. Logan offered to trade land for the goods, but Petring said he must have some money to pay debts. It was then arranged that if Logan could get the necessary money he should pay Petring $1,000 in cash, assume the $800 indebtedness, and convey to Petring eighty acres of land in Fayette county, Illinois, estimated at $3,200, thus making a purchase price of $5,000. Logan then went out and opportunely met Shryock, to whom he imparted the contemplated bargain, requesting Shryock to let him have $600 wherewith to consummate it. Shryock happened to have that much currency in his pocket and expressed his willingness to let Logan have it, but inquired about security. Logan said he would give him an interest in the store. He suggested that Shryock advance the $600, assume half of the $800 indebtedness, and make to Logan his note for $1,500 and take in exchange a half interest. Shryock forthwith agreed, although he had no knowledge as to the value of the goods except Logan's statements. Logan and his wife then drove to Riverton, some twenty-odd miles from Upland, and Shryock and Petring followed, arriving between eleven o'clock and midnight. Mr. Fulton, a notary public, had been employed by Logan, and he proceeded to draw the instruments of conveyance,—a bill of sale of

the chattels from Petring to Logan, a bill of sale of a half interest to Shryock from Logan, and a deed of the Illinois land from Logan to Petring. The money was paid, the $800 note surrendered, and the instruments delivered some time after midnight. Then a significant transaction took place. Petring conveyed the Illinois land to Shryock. This feature will be referred to later. After all this Shryock and Petring at once drove back to Upland, arriving between six and seven in the morning, when possession of the goods was delivered to Shryock. Logan remained in Riverton until morning, when he proceeded to Bloomington, the county seat, and filed for record not only the two bills of sale, but also the mortgage he and Shryock had, five days before, taken from Petring to secure a note which had been satisfied and delivered up the night before.

What did Logan and Shryock receive through this transaction? There can be no doubt that they obtained property worth practically $5,000. One witness says that the stock of goods, "if it had to be sold for what it would bring, would bring about $3,500." In addition to the stock of goods there were included in the sale several hundred dollars' worth of accounts, two horses, a harness, two heifers, a small frame barn, and the furniture in Petring's bedroom,—in fact everything Petring possessed. Other witnesses, including Logan himself, place a much higher value on the stock of goods.

What did they give for this property? To answer this question we must look into the transfer of the Illinois land. It was, as has been said, significant, that this was conveyed to Shryock by Petring almost as soon as he acquired it, and apparently as part of the same transaction. Neither Shryock nor Petring had seen the land, and Logan swears that even he had not. To account for the second transfer Shryock testifies that after the other business had been completed, and after Logan had left Fulton's office, it occurred to Shryock that as Petring owed him $240 for borrowed money, it would be a good

time to request payment. Parenthetically it may be here remarked that the accounts of Petring show payments of cash by Shryock in settlement of his account for goods, during the period when these small loans were outstanding. Petring was again unwilling to pay and again proposed a purchase instead, this time of the recently acquired Illinois land. It was agreed that Shryock should surrender the notes for $240, which he seems to have had conveniently with him, pay $160 in cash, and convey some property which is nowhere more definitely described than "some mineral rights in Pennsylvania." The money was then paid and the notes surrendered, but the "mineral rights" were not then conveyed, because Shryock did not know their description. Petring soon after left the region without requesting a conveyance or leaving Shryock an address, and he has never made any request concerning these rights. Shryock says that some time thereafter he procured a description of the "mineral rights" and executed a deed thereof to Petring, but he says that he was then garnished in a suit in the county court against Petring and was required, by order of that court, to deposit the deed there. It would be interesting to ascertain by exactly what procedure the county court of Franklin county thus contrived to subject real estate in another state to the satisfaction of Petring's debts, but unfortunately for such inquiry the records of the court were not offered to corroborate Shryock. No memorandum of the agreement was made. It is as certain as anything can be, beyond the domain of pure mathematics, that these "mineral rights" were not considered by either party as a material part of the bargain, and that Petring completely ignored them. We have thus presented the somewhat unusual spectacle of a man driving across country, almost fifty miles, during the night, for the purpose of buying land for $3,200 and immediately selling it for $400. No one seems to have suggested anything concerning the title to the Illinois land, or even its character. On these points implicit con-

fidence seems to have been reposed all around. We have in the record the testimony of several witnesses residing near the land, as to its character and value. They agree that it is bottom land, subject to overflow, covered with small timber, and worth from three to five dollars an acre. It is suggested in argument that this is contradicted by Logan, but counsel are in error. Logan's testimony as to value was excluded, and properly so, as he did not show himself qualified to testify. It follows from what has been said that Logan and Shryock gave just $2,200 for Petring's property, and we think it too clear for doubt that the parties never considered the Illinois land to be worth more, or that they really estimated it at more than the $400 at which it passed as between Petring and Shryock.

When a man is willing to sell property worth $5,000 for less than half that sum he usually has some urgent reason for so doing, and a prudent purchaser is apt to seek that reason. There can be no doubt that Petring's desire to make such a sale was due to the fact that he owed, including his debts to Logan and Shryock, about $4,925. If he could discharge $1,040 of this and obtain $1,160 in cash at the same time, he might be willing to make the sacrifice. Logan and Shryock must have known of his condition. They knew his demand note for $800 had been in bank for three months, and that the bank had insisted that Petring's name should come off. It seems to have been regarded by the bank as a positive injury to the paper. Petring told Logan that he must have money to pay debts, and mentioned one debt at least. Furthermore he told Logan that he did not see how he "could pull through," and Logan says that he took it from the conversation that Petring intended to leave the country. Again, all the indebtedness, except that to plaintiffs themselves, appeared on Petring's ledger, which Logan examined. Logan says he examined it merely to ascertain the amount of collectible accounts, but he could hardly find what accounts were on the credit

side without, at the same time, seeing what were on the other. If they did not know the precise amount of Petring's debts, they at least knew that his condition was desperate and that he so considered it.

The plaintiffs suddenly, and without any of that deliberation which usually characterizes transactions of considerable magnitude, bought property which would require them to at least partially change their vocation in life from farmers to merchants. They knowingly bought property at less than half its value from a man they knew to be deeply in debt and unable to pay his debts except out of the property. They went twenty or more miles away from home to consummate the bargain, yet such was their haste, or their desire for secrecy, that they transacted the business at midnight. They deliberately sought to make the transaction look different from what it was by juggling conveyances of land in a distant state, the value of which, as considered by the purchaser even, they grossly overestimated. From eighty acres of land worth $40 an acre, it shrank by transfers to $400 and certain undefined, if not indefinable, mineral rights, and these vanished mysteriously, something like Emerson's road, which dwindled into a squirrel track and ran up a tree. This court has always been careful not to infringe upon the proper province of the jury, and it is with particular reluctance that we interfere in a case of this character, where the issue is wholly one of fact, and that fact to be ascertained largely by inference from others. But this case is too plain to permit of a reasonable difference of opinion. Sane men do not act as the plaintiffs did, from honest motives. Accepting their testimony in every point where it can be accepted without self-stultification, it is impossible, without reasoning abnormally, to believe that plaintiffs were not fully conscious of an illegal intent on the part of Petring, if they did not actively participate in that intent, and become conspirators with him. The case is one where the verdict is wholly unsustained by the evi-

dence. The jury placed too little faith in the intelligence of plaintiffs and too much in their morals.

REVERSED AND REMANDED.

WILLIAM GRONEWEG ET AL. V. G. D. MATHEWSON.

MOLINE PLOW COMPANY V. G. D. MATHEWSON.

FILED NOVEMBER 4, 1897. NOS. 7529, 7530.

Bill of Exceptions: AUTHENTICATION. In order to authenticate a document filed here as either the original bill of exceptions settled and filed in the district court or a transcript thereof, a certificate of the clerk of that court is essential.

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

T. C. Patterson and *Grimes & Wilcox*, for plaintiffs in error.

T. Fulton Gantt, contra.

IRVINE, C.

The records in these two cases are substantially alike. They are both proceedings in error from orders of the district court of Lincoln county discharging attachments. The questions presented require for their determination a review of the evidence. This cannot be had, because what purports to be the bill of exceptions is not authenticated by a certificate of the clerk as either the original bill settled and filed in the district court or a transcript thereof.

AFFIRMED.

WILLIAM CORRY V. JACOB B. KLUMP.

FILED NOVEMBER 4, 1897. No. 7555.

1. **Negotiability of Note:** INSTRUCTIONS. The construction of a written instrument is for the court. Therefore, it is proper for the court to instruct the jury whether or not a note sued on, the terms of which are not disputed, is negotiable.

2. **Instructions:** REVIEW. Several rules of practice, heretofore established by repeated decisions, applied.

ERROR from the district court of Custer county. Tried below before HOLCOMB, J. *Affirmed.*

Alpha Morgan, for plaintiff in error.

Sullivan & Gutterson and *Kirkpatrick Bros.*, *contra.*

IRVINE, C.

Several of the assignments of error in this case require for their investigation an examination of the evidence and rulings thereon during the trial. These we cannot consider, for the reason that the document attached to the transcript and purporting to be a bill of exceptions is not authenticated as such by a certificate of the clerk as the statute requires.

It is contended that the court erred in instructing the jury. In the motion for a new trial error is assigned generally to the giving of the instructions numbered from one to fourteen. This assignment can be considered no further than to ascertain that one of the group was correct. The suit was on a promissory note by an assignee thereof. The answer pleaded that it was given in part payment for a stallion, and that the sale thereof had been effected through false representations by the payee of the note. The first instruction was to the effect that the note was non-negotiable, and that the plaintiff's right to recover was therefore no greater than would have been that of the payee in the absence of an assignment. The

note was not negotiable, and so much is conceded, but it is contended that the instruction invaded the functions of the jury. Not so. The construction of the instrument, which was unambiguous in its terms, was for the court, and the instruction was correct.

It is urged that the court erred in not instructing the jury to disregard an answer made by a witness, which it is said was not responsive and had been stricken out for that reason. No instruction was requested of that character.

AFFIRMED.

BRIDGET MURPHY V. J. H. EVANS CITY STEAM LAUNDRY COMPANY.

FILED NOVEMBER 4, 1897. No. 7506.

Married Women: LIMITATION OF ACTIONS. Since the enactment, in 1871, of the Married Woman's Act, permitting married women to sue in the same manner as if they were unmarried, the statute of limitations runs against women during coverture, notwithstanding an earlier statute (Code of Civil Procedure, sec. 17) in terms allowing to infants, married women, insane persons, and prisoners the general periods of limitation after the removal of such disabilities.

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

E. Wakeley and *A. C. Wakeley,* for plaintiff in error.

C. F. Breckenridge and *Greene & Breckenridge, contra.*

IRVINE, C.

Title 2 of the Code of Civil Procedure relates to the time of commencing civil actions. It constitutes our general statute of limitations. Section 17 thereof, so far as it is material to the present inquiry, is as follows: "If a person entitled to bring any action mentioned in

this title, except for a penalty or forfeiture, be at the time the cause of action accrued, within the age of twenty-one years, a married woman, insane, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this title after such disability shall be removed." This section was enacted as a part of the Code in 1858 (Session Laws, p. 111, sec. 18), and has remained without express amendment, as to the part quoted, ever since. In 1871 there was enacted what is commonly known as the "Married Woman's Act" (Session Laws, 1871, p. 68, Compiled Statutes, ch. 53). By section 3 of this act it is provided that "a woman may while married sue and be sued in the same manner as if she were unmarried." The sole question presented by the case before us is whether this provision of the Married Woman's Act had the effect of removing married women from the protection of section 17 of the Code, above quoted. This question is raised by a demurrer to the petition, which disclosed on its face that the action was barred unless allegations of plaintiff's coverture for some time after the injury complained of prevented the running of the statute. The district court sustained the demurrer and we think its judgment must be affirmed.

Section 602 of the Code gives to district courts power to vacate or modify their judgments after the term at which they were rendered for certain specified causes; among them: "Fifth—For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings." In 1877 there was before this court for review an order vacating a decree of foreclosure, upon a petition by the defendants, one of whom was a married woman. The court, after disposing of the case adversely to the defendants so far as the other grounds of complaint were concerned, said: "It is, however, urged in the argument for defendants, that as defendant Elizabeth Hooper is a married woman, being the wife of Richard, the other defendant, this ac-

tion by original petition may be maintained under subdivisions three and five of section six hundred and two of the Civil Code. * * * The power to vacate or modify judgments under the provisions of subdivision five is confined to 'erroneous proceedings against an infant, married woman, or persons of unsound mind,' and this provision was intended for the protection of persons subject to legal disability; but by section three of the act of June 1, 1871, it was enacted that 'a married woman may, while married, sue and be sued, in the same manner as if she were unmarried.' Therefore this act of 1871 has wholly removed the common law disability of a married woman, and consequently she no longer comes within the protection of the provisions of this subdivision." (*Pope v. Hooper*, 6 Neb., 178.) It is argued that this language was *obiter*, but we cannot so regard it. The coverture of the one defendant was urged as justifying the vacation of the decree independently of the other causes alleged, and the court spoke in answer to that contention. The decision of the point was essential to a determination of the case. That the court then so regarded it is evident from the language of Judge MAXWELL, who dissented in *Pope v. Hooper*, and who, speaking for the court in *Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481, said: "In *Pope v. Hooper*, 6 Neb., 187, it is held that the act of 1871 wholly removed the common law disability of married women." The same construction was placed upon the case in *Morse v. Engle*, 28 Neb., 534, although the facts of that case did not call for an application of the rule. In *Smithson v. Smithson*, 37 Neb., 535, the court was called upon to construe section 609 of the Code, whereby "proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions four, five, and seven of section six hundred and two, must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, married woman, or person of unsound mind, and then within two years after removal of such disability." Of this it was

said: "This section appears in its present form in the Revised Statutes of 1866, hence the exception in favor of married women can have no force at this time, in view of subsequent statutes removing the disabilities imposed upon them at common law." In *Real v. Hollister*, 17 Neb., 661, the court held that the act of 1871 abrogated section 48 of chapter 73, Compiled Statutes, providing that "a married woman shall not be bound by any covenant in a joint deed of herself and husband." The bearing of these decisions upon the case before us is too plain for discussion. If those decisions are to be adhered to we must hold that the act of 1871, by permitting married women to sue as if unmarried, so operated upon section 17 of the Code as to nullify its exception in favor of married women.

Counsel concede the logical force of those decisions if they should be followed, but argue that they are wrong in principle, opposed to the better authority, especially in view of our constitutional provisions concerning the amendment and repeal of laws, and that they should be disregarded and the question examined anew. We do not think that the matter is one justifying such a course. The first decision on the subject was rendered soon after the act of 1871 went into effect, and fully twenty years ago. Other cases have followed promising a steady adherence to the doctrine so established. That doctrine based the construction uniformly placed upon the statute throughout its history, and has become a rule of property. (*Geisen v. Heiderich*, 104 Ill., 537, Breese, J., in *Castner v. Walrod*, 83 Ill., 171.) Titles have been settled and contentions set at rest in reliance upon the rule. Great mischief might result from now overturning it, while even if it be wrong on principle, adherence to it at this time can work no harm. In New York and Indiana—perhaps elsewhere—decisions indicating a view such as we are now asked to take were followed by the enactment of statutes expressly removing married women from the protection theretofore afforded them by the statute of

limitations, and there can be little doubt that had *Pope v. Hooper* been otherwise decided, our own legislature would long ago have brought the law into the condition in which that case actually placed it.

AFFIRMED.

JOSEPH S. WELLS V. HENRY STECKELBERG.

FILED NOVEMBER 4, 1897. No. 7113.

1. **Estoppel by Deed.** One who in a representative capacity assumes to sell and convey to another the entire estate in land, is estopped as against the purchaser from asserting an estate in his own right in the same land, and this although the first sale and deed were void.

2. ——: QUITCLAIM: EJECTMENT. A mother died intestate seized of land in which her husband took an estate by the curtesy and her infant son the remainder in fee. The father applied to the district court, falsely alleging that he had been appointed guardian of the son and obtained license to sell the land. In the petition he averred that the land was the son's and alleged other facts from which an estate in fee in possession was inferable. He sold the land under the license and in the deed recited that he was guardian and recited all the proceedings in such manner as to make them appear valid. The deed purported to convey the whole estate and also the right of "the party of the first part," to-wit, the father. Thereafter the father executed to the son a deed of quitclaim, and the son on reaching his majority, and during the father's lifetime, brought ejectment against the purchaser at guardian's sale, claiming that such sale was void. *Held*, (1) That the father was estopped from setting up his life estate against the purchaser; (2) that the estoppel operated equally against his grantee by quitclaim; (3) that ejectment being a possessory action the son's right of action must be traced through the deed to the current life estate, and not as heir to the remainder, and that the action must therefore fail.

REHEARING of case reported in 50 Neb., 670. *Judgment below affirmed.*

George G. Bowman, Albert & Reeder, and *J. A. Ehrhardt*, for plaintiff in error.

W. W. Young and *Allen, Robinson & Reed, contra.*

IRVINE, C.

This case is before us on rehearing. The former opinion, 50 Neb., 670, contains a statement of the facts, which, with one or two incidental additions, is sufficient for the purposes of the present inquiry. The former decision was based on the proposition that inasmuch as plaintiff's father, John B. Wells, had never been appointed guardian of the plaintiff, there was no jurisdiction in the district court of Platte county to grant him a license to sell the infant's land. Our attention is now for the first time called to certain facts which render a re-examination of that question at present unnecessary. On the death of plaintiff's mother the law did not cast the descent immediately in plaintiff. He then took an estate in remainder, his father acquiring an estate for life as tenant by the curtesy. Ejectment is a possessory action. In order to recover the plaintiff must plead, and under the general issue must prove, not only a legal estate in himself, but a present right of possession. Unless both facts are established the defendant prevails. (Code of Civil Procedure, secs. 626, 627; *Dale v. Hunneman*, 12 Neb., 221; *Staley v. Housel*, 35 Neb., 160; *Wanser v. Lucas*, 44 Neb., 759; *George v. McCullough*, 48 Neb., 640.) It is therefore apparent that plaintiff could not prevail in this case, although the guardian's sale were absolutely void, unless either the father's life estate had determined or had in some way passed to the plaintiff. It had not determined by the death of the life tenant; but in order to show that it had passed to the plaintiff there was introduced in evidence a deed of quitclaim from John B. Wells to Joseph S. Wells, bearing date August 31, 1891. This operated merely to pass such estate as remained in the father at that time. Had he then any title or right which could be asserted against the defendant?

Recurring now to the proceedings and sale through

which the defendant claims title, it is found that, in the petition for license to sell, John B. Wells not only describes himself as the guardian of Joseph S. Wells, duly appointed by the probate court of Platte county, but he alleges and swears that Joseph S. Wells is the owner of the land, together with other land likewise inherited from the mother. Nothing is said about there being a particular estate in himself, but on the contrary there are allegations concerning rents and their application from which it is directly inferable that the minor's estate was one in fee simple in possession. The facts from which John B. Wells' estate by the curtesy arose are not alleged, nor does the fact appear that the ostensible guardian was also the father of the minor. There was nothing in the record to notify defendant that there was a life estate outstanding. On the other hand, the conduct of the tenant of that estate was such as to induce the belief that there was not. On this petition a license was obtained directing the sale of the land, not of an expectancy therein. The report showed that the land was sold. Finally John B. Wells conveyed it to defendant—apparently the fee, certainly not merely the interest of Joseph S. Wells, unless every guardian's deed is to be given that limited effect. The form and contents of this deed require notice. It opens as follows: "This indenture, made this 3d day of December, A. D. 1883, between John B. Wells as guardian of Joseph S. Wells, a minor, duly appointed by the probate court of Platte county, state of Nebraska, party of the first part, and Henry Steckelberg, of Madison county, said state, party of the second part." Then follow recitals of all the proceedings, from which they appear valid and regular. The granting part of the deed is as follows: "Now this indenture witnesseth, that the said John B. Wells, guardian as aforesaid, by virtue of the premises and in consideration of the said sum of three thousand and forty dollars, to him paid by the said Henry Steckelberg, the recipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by

these presents does grant, bargain, sell, and convey, unto the said Henry Steckelberg and to his heirs and assigns forever the said land [describing it], together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever of the said party of the first part of, in, and to the same, or any part thereof." The deed closes with a covenant that Wells "took the oath and gave the bond by law required, and gave public notice of said sale as above set forth, and in all things observed the requirements of the law and of said orders in said sale." Note that the deed recites that John B. Wells was the duly appointed guardian; that it purports to convey the fee, without reserving or excepting any particular estate; that to the grant of the ward's estate is added an express grant of the title of the "party of the first part," a clause which can be given no independent effect unless as conveying John B. Wells' title, and that it closes with a covenant that all the requirements of the law have been observed.

We are of opinion that under the circumstances John B. Wells was estopped, both by deed and *en pais*, from setting up his own life estate against the defendant, and that the estoppel continued as against his grantee by quitclaim. There is in the deed no covenant of title or of warranty, but to create such an estoppel covenants seem unnecessary. As said by the supreme court of the United States, reviewing the authorities and enforcing an estoppel under somewhat similar facts: "If a deed bears on its face evidence that the grantors intended to convey and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantors and those claiming under them, in

respect to the estate thus described, as if a formal covenant to that effect had been inserted." (*Van Renssalaer v. Kearney*, 11 How. [U. S.], 297.)

That an estoppel arises against the assertion of a right in oneself by reason of a conveyance made in a representative capacity, see *Poor v. Robinson*, 10 Mass., 131. In that case a release was made by executors purporting to act under a power in the will. The power did not in fact extend to the estate in question, and the court held that the release was void. But it happened that the executors were also heirs, and the court further held that as such they were estopped from setting up title as against the release they had made as executors. (See, also, *Little v. Giles*, 25 Neb., 313.) The present right of the plaintiff depends not on his inheritance of the remainder, but on his father's conveyance to him of his life estate. This the father and those claiming under him are estopped from setting up as against the prior conveyance by the father to the defendant. It follows that the judgment of the district court is

AFFIRMED.

POST, C. J., not sitting.

FRANCIS N. GIBSON, APPELLANT, V. WILLIAM S. HAMBLETON ET AL., IMPLEADED WITH SIMEON RECTOR, APPELLEE.

FILED NOVEMBER 18, 1897. No. 7413.

1. **Liability of Purchaser Who Assumes Mortgage.** A purchaser of real estate who covenants to pay and satisfy a mortgage upon the property conveyed, is personally liable to the mortgagee, in an action of foreclosure, for any deficiency remaining after the proceeds of the mortgaged property shall have been exhausted.

2. ———: RESCISSION. After notice of such covenant and assent thereto by the mortgagee his right of action thereon cannot be divested by a voluntary rescission thereof by the contracting parties.

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J. *Reversed.*

Wooley & Gibson, for appellant.

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

POST, C. J.

This was an action in the district court for Cass county to foreclose a certain mortgage executed by William S. Hambleton and wife to Jonathan Chase, and by the latter assigned to the plaintiff, Francis N. Gibson. In addition to the decree of foreclosure sought there was a prayer for a deficiency judgment against the appellee, Simeon Rector, a subsequent purchaser of the mortgaged premises, who had, as alleged, for a sufficient consideration assumed and expressly agreed to pay and satisfy the plaintiff's mortgage. The only issue presented by the pleadings related to the personal liability of Rector as to which there was a finding and judgment for the defendant, and from which the plaintiff has prosecuted an appeal to this court. The answer of Rector, so far as material to the issue stated, is as follows: "Comes now the said Simeon Rector and for his separate answer to the petition filed in this cause, says: * * * He denies that William S. Hambleton and Clara Hambleton ever made a conveyance to this answering defendant of said premises by warranty deed, and alleges that the title to said premises never vested in him by any pretended conveyance so made by them. * * He alleges the fact to be that any contract that was ever made between this answering defendant and William S. Hambleton and Clara Hambleton concerning the premises in question, was duly rescinded upon a valuable consideration and the right in law and equity of Francis N. Gibson, plaintiff, in the premises remain unaffected by any act of this answering defendant. He denies each and every allegation in said petition contained except such

as hereby specifically admitted." The reply was a general denial.

That Rector purchased the mortgaged property from Hambleton and took from his said grantor a warranty deed, in which was recited his agreement to pay and satisfy the said mortgage is a proposition not controverted in this court. It appears, however, that he, Rector, subsequently sold said premises to one Mutz, to whom, at his request, Hambleton and wife executed a deed upon the surrender of the conveyance first above described, said instrument not having been filed for record. It was further claimed by Rector that he did not agree with Hambleton to assume the mortgage, and that he was not aware of the condition to that effect in his deed until about the time of the conveyance to Mutz, six months later, at which time he surrendered his said deed to Hambleton, who, for the consideration of one dollar, conveyed the mortgaged premises direct to Mutz. There is no charge of fraud or mistake in the purchase of the property or in the execution of the deed by Hambleton, and the alleged rescission was at most the voluntary act of the parties thereto. The covenant here relied upon was made for the benefit of, and with the knowledge and express approval of Chase, the mortgagee, whose right of action immediately vested, and will not be defeated by a subsequent voluntary agreement of the parties to the conveyance. (*Bassett v. Hughes*, 43 Wis., 319; *Hare v. Murphy*, 45 Neb., 809; 1 Jones, Mortgages, 763, *et seq.*)

The judgment of the district court is reversed and the cause remanded for further proceedings therein not inconsistent with this opinion.

REVERSED.

HENRY MCKEE ET AL. V. JOHN M. BAINTER.

FILED NOVEMBER 18, 1897. No. 7459.

1. **Sales:** DELIVERY. B. sold a car of wheat to M., which by agreement was to be delivered on the car at B.'s place of business, M. agreeing to accept B.'s weight and grade. *Held*, That B., by delivering the wheat in the car at his place of business, causing it to be consigned to M., and surrendering it to the railway company, fully completed his contract.

2. **Trial to Court:** ERRONEOUS ADMISSION OF EVIDENCE: REVIEW. This court will, in a case tried to the court without the assistance of a jury, presume that the district court considered and gave effect to proper evidence only; and if there is sufficient evidence to sustain the finding made, the judgment will not be set aside because of error in the admission of evidence.

3. **Sales:** EVIDENCE OF DELIVERY. Evidence examined and *held* to sustain the finding of the district court.

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

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

Hastings & McGintie and *A. S. Sands*, *contra.*

POST, C. J.

In the district court of Saline county John M. Bainter sued McKee & Warner, copartners, alleging in his petition that he had sold and delivered to them a car of wheat containing 646 bushels and 50 pounds, at 52½ cents per bushel, amounting to $333.10, of which sum the defendants had paid $195 only, and claimed a judgment for the balance of $138.10. The defense was that the car contained only 373 bushels and 40 pounds of wheat, for which the defendants had fully paid. A jury was waived by the parties and a trial had, resulting in a finding and judgment for Bainter for the amount claimed, and which it is sought to reverse by means of this proceeding.

1. The first assignment of error is in effect that the

evidence does not sustain the finding of the trial court. By the contract between the parties the car of wheat was to be delivered to the plaintiffs in error on the railroad track at Dorchester, Bainter's place of business. The plaintiffs in error were in business at Crete, nine miles east of Dorchester, the two places being connected by the Burlington railway. The plaintiffs in error were to take Bainter's weights and grades. The evidence on behalf of Bainter shows that he purchased and placed in a car at Dorchester 646 bushels and 50 pounds of wheat, sealed said car, caused it to be billed to the plaintiffs in error at Crete, and surrendered possession of the car to the railway for transportation. In other words, the evidence sustains the finding of the court that Bainter delivered to the plaintiffs in error at Dorchester, on the car, 646 bushels and 50 pounds of wheat, in accordance with the terms of the contract between the parties.

It is true that the evidence on behalf of the plaintiffs in error tends to show that some three days after its shipment they caused the wheat to be weighed and it fell short of the amount above mentioned; but the delivery took place at Dorchester in pursuance of the contract between the parties; and if the car when turned over to the railway company, consigned to the plaintiffs in error, contained 646 bushels and 50 pounds of wheat, then the delivery of that amount of wheat was then and there complete; and if it be true that the car when it reached its destination did not contain the amount of wheat shipped, defendant in error is not required to make good the loss. He had performed his contract when he placed the wheat in the car at Dorchester and surrendered it to the railway company for transportation, properly billed to the plaintiffs in error.

2. There are numerous complaints in the brief as to the action of the district court in admitting testimony on the trial. But where a jury is waived and the case is tried to the court, its judgment will not be reversed on account of the admission of incompetent, immaterial, or

irrelevant evidence, provided the finding is supported by sufficient material and competent evidence. (*Bilby v. Townsend*, 29 Neb., 220; *Ward v. Parlin*, 30 Neb., 376; *King v. Murphy*, 49 Neb., 670.)

The judgment of the district court is

AFFIRMED.

JOSEPH A. KIME, APPELLANT, V. FRANK E. JESSE ET AL., APPELLEES.

FILED NOVEMBER 18, 1897. No. 7562.

1. **Pleadings:** METHODS OF ATTACK: JUDGMENT. The proper and orderly course of attack on a defective petition or answer under the provision of the Code of Civil Procedure, is by motion to make more definite and certain, to strike out, or by demurrer, as to reach the claimed defect may require; but under section 440 of said Code, which is as follows: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party,"—a motion for judgment on pleadings may be interposed before trial or at any time during the course of the pleadings, and if sustained and the pleading attacked is open to the objections urged against it, the ruling will not be reversed on the ground that such a motion was not proper or allowable.

2. **Alteration of Mortgage.** A material alteration of a mortgage without the consent of the mortgagor renders it void. (*Pereau v. Frederick*, 17 Neb., 117.)

3. ———: EFFECT ON NOTE. The material alteration of a mortgage by which it is avoided does not avoid a note or evidence of the debt for the payment of which it is the security.

APPEAL from the district court of Box Butte county. Heard below before BARTOW, J. *Modified.*

R. C. Noleman and *Chas. T. Jenkins*, for appellant.

William Mitchell, contra.

HARRISON, J.

July 26, 1894, the appellant commenced this action in the district court of Box Butte county, alleging in the

petition filed that Frank E. Jesse executed and delivered to him on December 16, 1892, a promissory note in the sum of $440, due one year after date, and to secure payment of the debt evidenced by the note, executed and delivered to appellant a mortgage in which it was intended to describe and render liable to the lien the northwest quarter of section 4, township 25, range 47, in Box Butte county, Nebraska; that the note and mortgage were prepared in the office of and by an attorney at law and notary public in Alliance, Box Butte county, he having been employed by the parties for such purpose; that in writing the mortgage a mistake occurred in the description of the land therein, by which it was located in township 24 instead of in township 25, its true location, and as it was intended to and should have appeared in the mortgage; that the mortgage as written and executed was on December 19, 1892, duly recorded in the proper office. It was further pleaded that at a date subsequent to the reception by the appellant of the mortgage and its record, he discovered that the mistake in the description of the land had been made, and the steps then taken by him we will give in the words of the petition, as follows:

"This plaintiff went at once to the said W. G. Simonson, who drew the mortgage as set out in this petition, and asked him, as the agent of the parties and as an attorney at law, what was best to be done in the matter, and thereupon the said W. G. Simonson advised and said that he was the agent of both parties to draw up said mortgage, and that it was to be correct, and to convey by mortgage another tract of land, and the said W. G. Simonson then corrected said mortgage to read 'township 25,' as was intended that it should read, instead of 'township 24,' as it by mistake did read.

"10. The said plaintiff, acting in good faith and relying on the validity of said correction, at once had said mortgage recorded as the same was after being corrected, in manner and form as heretofore set out in this petition.

Said recorded mortgage as recorded at this time, to-wit, June 14, 1893, was duly recorded in Book 14 of the mortgage record of Box Butte county, Nebraska, at page 8, and remains of record to this date. He relied wholly on the ability of W. G. Simonson as an attorney, and on his statements that he was agent for both parties and had a right to correct said mortgage; and that it was corrected not by the request of plaintiff, but by the consent of plaintiff, relying on the statements of W. G. Simonson that he was the agent of Frank Jesse, and if there was a wrong done in this matter it has been done by the agent of Frank Jesse, as this petitioner believes."

It was further pleaded that Frank E. Jesse intermarried with the daughter of one Frank Bauer, Sr., and afterward, and also subsequent to the time Frank E. Jesse had ascertained the fact of the mistake in the description of land in the mortgage, he conveyed the real estate, which it was intended should have been included in the mortgage, to Frank Bauer, Sr., who was then the father-in-law of the said Frank E. Jesse, the consideration for such transfer stated in the conveyance being $1,000; that in fact there was no consideration passed between the son-in-law and the father-in-law; the conveyance was but a pretension and the sale pursuant to which it purported to be executed was a sham and unreal.

The prayer of the petition was for a reformation of the mortgage and its foreclosure. A demurrer to the petition was filed for the defendant Bauer, but it seems not to have received any further notice. The record does not disclose that it was ever presented to the court or passed on.

For Frank E. Jesse and his wife, of defendants, there was filed the following motion: "Comes now the defendants Frank E. Jesse and Mrs. Frank E. Jesse and move the court for judgment of cancellation of mortgage in above entitled case, and that same be declared void and fraudulent, for the reason that plaintiff admits and pleads in his petition that mortgage upon which this

action is brought is not —— mortgage executed by Frank E. Jesse, but one that was changed so as to conform to ideas and understanding of W. G. Simonson, a notary public, who executed first mortgage."

Of the action taken on this motion there is the following journal entry: "Now on this 19th day of September, 1894, this cause came on to be heard on motion of defendants Frank E. Jesse and Mrs. Frank E. Jesse, first name unknown, for judgment on pleadings, a cancellation of mortgage in this case, and that same be declared void. Whereupon the plaintiff was allowed to amend his petition instanter, but plaintiff asking for more time, he was allowed until September 20, 1894, to amend his petition.

"September 21, 1894, the above motion of defendants Jesse is sustained and mortgage and note involved in this case is, and the same is hereby, considered and adjudged by the court, after being fully advised in the matter, to be null and void, and note and mortgage is hereby cancelled. Plaintiff excepts and is given forty days to file his bill of exceptions."

It is argued that a motion for judgment on the pleadings could not be interposed and entertained at the stage of the proceedings at which it was filed and presented in the case at bar, that the only proper and allowable method to make such an attack was by demurrer. In the case of *Hedges v. Roach*, 16 Neb., 673, it was stated: "After * * * answer was filed the plaintiff moved for judgment *non obstante*, and the overruling of his motion he assigns as the first error. It was no doubt the law and the practice, under the old system in courts of equity, that at a certain stage of the case the plaintiff could have it set down for argument on bill and answer, and when upon such argument it appeared to the court that the plaintiff's cause of action was undenied either at law or in fact, a decree would be rendered for the plaintiff. This practice has, I think, been superseded under the Code by that of demurrer to the answer, motion for order requiring defendant to make his answer more defi-

nite and certain, and motions to strike the answer from the files as frivolous. Some one of these will in each case be found to furnish the appropriate remedy against a faulty answer. So that, in the absence of authorities, this point cannot be sustained." And in the syllabus to the opinion it was said on this subject: "The overruling by the district court of a motion by the plaintiff for judgment *non obstante* the defendants answer, sustained; such motion not being in accordance with Code practice."

In *Simons v. Sowards*, 29 Neb., 487, wherein, before a justice of the peace, after bill of particulars and answer thereto, the plaintiff in the action made a motion for judgment on the pleadings, which was sustained by the justice and judgment rendered, which on error to a district court was affirmed, on review in error proceedings to this court it was stated in the opinion: "It is objected that the justice rendered judgment on the pleadings, which it is claimed he had no authority to do. It is true that a demurrer to a pleading is unauthorized in an action before a justice of the peace, yet where an insufficient defense is set up in writing to a bill of particulars that state a cause of action, and the case is submitted to the justice on the pleadings, he may decide as to the sufficiency of such answer, and if he hold that it fails to state a defense, and no effort is made to amend the same, he may render judgment on the pleadings."

In *Hedges v. Roach*, 16 Neb., 673, where on the trial the plaintiff moved for judgment, notwithstanding the answer, it was held that the motion was properly overruled, the ordinary procedure being to demur to the answer, and thus test its sufficiency before the expense of summoning witnesses was incurred, and this, we think, is the correct mode of procedure, but it was not intended to supersede the practice which prevails to some extent of submitting cases on the pleadings.

In the case of *Humboldt Mining Co. v. American Mfg., Mining & Milling Co.* in the circuit court of appeals (62 Fed. Rep., 356), the cause of action was based on the

guaranty by a corporation formed under the laws of Ohio of the contract of another corporation for the erection of a mining plant. In the answer one of the defenses interposed was that the Ohio corporation had no power to enter into the pretended agreement of guaranty; hence it was *ultra vires*. A reply was filed which had no bearing on this particular defense. Prior to answer a demurrer to the petition was filed on which it was stated in the opinion there seemed to have been no ruling. After the answer and reply were filed, one of the defendants made a motion for judgment on the pleadings, which was sustained. The court observes in the course of the decision: "The question in the case is whether the averment of the petition in reference to the corporate character of the iron-works company, read in the light of the corporation laws of Ohio, shows the guaranty sued on to be in excess of the powers of the company." It was determined that the power did not exist, and with reference to the right of the court to grant the motion it was said: "Section 5328 of the revised statutes [of Ohio] provides that 'When upon the statement in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party.' It was in accordance with this section that the court below entered the judgment here complained of. The contention on behalf of the plaintiff is that this section applies only after a verdict has been rendered, and that until then the court has no power to enter judgment. There is no such limitation in the words of the section, and it would seem to be absurd that when, upon the statements of the parties to the pleadings, one or the other is entitled to judgment, the court should go through the useless ceremony of submitting to a jury immaterial issues in order to enter judgment upon the pleadings without regard to the verdict."

We believe that, as was stated in *Hedges v. Roach, supra*, the proper practice under the Code requires that an attack

on a defective pleading, petition, answer, etc., should be by motion or demurrer, as the nature of the defect would seem to suggest. It will be noticed that the writer of that opinion closes what is therein written on the subject with the remark that "in the absence of authorities this point cannot be sustained," thus probably placing the conclusion announced, to some extent, at least, on the lack of authorities to the contrary effect.

The opinion in *Simons v. Sowards, supra*, holds that motion for judgment on the pleadings before a trial or verdict is allowable; and the one in the *Humboldt Mining Co. v. American Mfg., Mining & Milling Co.* is to the effect that such a motion is within the spirit, reason, and letter of the Code. Section 440 of our Code of Civil Procedure is as follows: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." This, it will be noticed by comparison, is identical in meaning, if not entirely so in terms, with that of the Ohio section, *supra*, under consideration in the decision to which we have last herein referred. We are satisfied that a motion for judgment on the pleadings may be interposed before trial or verdict or during the course of the pleadings, and if the party whose pleading is attacked does not desire to amend, and on submission to the court the motion is sustained, if it further appears that the pleading was open to the objection urged against it, the judgment of the court which followed a favorable ruling on the motion will not be reversed on the ground that such a motion was not proper or allowable under the rules of practice.

Another question which arises is, was it disclosed by the petition that there had been a material alteration of the mortgage sought to be foreclosed? To this we think that the answer must be in the affirmative. It was set forth in the petition that there was a mistake in the description in the mortgage of the real estate which it was

intended to render liable as security for the payment of a debt of the mortgagor, by which such property was practically omitted from the instrument,—was not described therein. The mortgagee, after the delivery of the instrument to him and its record, discovered the mistake, returned with it to the draughtsman, and in reliance on his assertion that he was the agent of both parties to draw the mortgage, and as such could correct any mistakes which had occurred during the performance of such work, procured or allowed him to change the instrument in a material portion of its description of land. From these statements in the petition it was clear that the mortgage had been avoided by the actions of the mortgagee and the draughtsman and could not be enforced. In *Pereau v. Frederick*, 17 Neb., 117, a case very much in point, it was held: "Where the description of mortgaged premises was altered without the assent of the mortgagor, after the execution of the mortgage, held, that the mortgage was void even in the hands of a *bona fide* holder." The altered mortgage could not be foreclosed or reformed. (*Marcy v. Dunlap*, 5 Lans. [N. Y.], 365.) It follows that the trial court did not err in sustaining the motion for judgment on the pleadings and declaring the mortgage in suit void; but it went further and also adjudged the note void, the payment of which it was the purpose of the mortgage to secure. In this last the court erred. In this state a mortgage is but an incident to the note or debt,—a security for its payment. And while it is true that if the note, the payment of which is secured by a mortgage, is materially altered and thereby avoided, the mortgage is rendered unenforceable, it does not follow that a material alteration of a mortgage and its consequent annulment also renders the debt, the payment of which is secured by it, incapable of collection or any instrument by which the debt is evidenced void. The indebtedness or instrument evidencing its existence is or testifies to a personal obligation of the debtor for the enforcement of which the creditor may

proceed against the debtor in a personal action, or the mortgage may be foreclosed and the property described therein subjected to the payment of the debt.

These are existing, different, and concurrent remedies, and subject to some restrictions; either may be resorted to at any time for the enforcement of the payment of the debt, the restrictions not going to the validity or existence of the debt, or the substance of an action for enforcement, but to the prosecution of both remedies at the same time. The destruction or avoiding of the mortgage, the incident to the debt, or evidence of it, does not carry with it the principal obligation, if it remains unaltered.

It follows from the conclusions announced that the judgment of the court, insomuch as it adjudged the mortgage void, will be affirmed, and to the extent it declared the note void will be reversed.

JUDGMENT ACCORDINGLY.

JOHN V. FARWELL, JR., V. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY.

FILED NOVEMBER 18, 1897. No. 7505.

1. **Instructions:** NEW TRIAL: ASSIGNMENTS OF ERROR. If there are no assignments of error, in the motion for a new trial, of the giving of certain instructions, objections to such instructions will not be reviewed in the supreme court.

2. **Eminent Domain:** CITY LOTS: DAMAGES: EVIDENCE. In condemnation proceedings it appeared that the real estate involved consisted of lots so located in the city that they were mainly suitable for residence purposes; and further, they were low ground, and to make them entirely fit for "residence lots" it would be necessary to fill them with earth to grade. *Held*, That the amount of expense which would necessarily be incurred in filling the lots to grade and thus fitting them for a useful purpose was a proper subject of inquiry on the trial.

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

Cornish & Lamb, and *Tibbets, Morey & Ferris*, for plaintiff in error.

L. W. Billingsley and *R. J. Greene, contra.*

HARRISON, J.

During the month of March, 1892, the railroad company, defendant in error herein, instituted condemnation proceedings in the county court of Lancaster county, whereby it sought to have appraised and to appropriate to its use certain lots situate in the city of Lincoln and which belonged to the plaintiff. The appraisers appointed assessed the plaintiff's damages at the sum of $2,200. From this determination of the matters involved, the plaintiff appealed to the district court, where in a trial to the court and a jury he was accorded a verdict and judgment in a like amount. He presents the case to this court for review.

It is urged that certain stated instructions of the court to the jury were erroneous. There was no assignment of error in relation to either of the instructions to which reference is made in the brief, in the motion for a new trial; hence, the alleged errors cannot be reviewed here. (*Schreckengast v. Ealy*, 16 Neb., 510; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb., 475.)

It was of the evidence introduced on the part of the company that these lots in question were not business lots and must, by reason of their location, be classed as residence lots; and that where they were situated the ground was low, and, for residence purposes, it would be necessary to deposit on the surface some three or four feet of earth and thus fill them up to grade,—to the level of the residence lots generally in that portion of the city. This evidence tended very strongly to show that by reason

of the condition of the lots to which the witnesses referred their values were much depreciated. Some witnesses stated that in estimating the values they considered the cost of the necessary filling of the lots. On rebuttal the plaintiff in error offered, through a witness then testifying, to show what would be the cost of the filling the lots to grade, and an objection of the company to the question asked was sustained; also to the offer of evidence on the subject. These rulings and the resultant exclusion of evidence are assigned as errors. "In the trial of condemnation cases by a court or jury, the general rules of evidence apply, except as modified by the statute under which the proceedings are had." "It may be stated as a general rule that any evidence is competent which tends to prove or disprove the matters at issue. In nearly all condemnation proceedings the only matter at issue is the amount of just compensation or damages." (Lewis, Eminent Domain, secs. 430, 431.)

The opinions of the witnesses differed greatly as to the values of the lots, and some of them stated that in estimating the values they considered, with other things, what it would cost to fill the lots to grade and fit them for residence purposes, for which their location in the city made them more especially suitable. It would seem that the minds of the witnesses had naturally looked to this element of the value of the lots, and a prospective purchaser would undoubtedly have thought of it as entering into the calculation of the values, as no doubt would the owner or a real estate agent if called upon to fix the selling or market prices; hence we think that the conditions of the lots, and that to make them suitable for the market would require that they be filled with earth to the grade level, were proper subjects of inquiry by the company as matters tending to give the real estate low market values.

The idea was conveyed by portions of the evidence that to raise the lots to grade, as must be done to make them salable for residence or for almost any useful purposes,

would be quite expensive, and the plaintiff in error should have been allowed to put in evidence, as he sought to do, the amount of the expenses which would have necessarily been incurred; hence it was error, and prejudicial to the rights of plaintiff in error, to exclude the offered evidence. It follows that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

GEORGE F. BURR ET AL. V. REDHEAD, NORTON, LATHROP COMPANY.

FILED NOVEMBER 18, 1897. No. 7519.

1. **Sales:** WARRANTY. During the course of a sale of personal property the vendor made statements in letters relative to the qualities and conditions of the property which were positive affirmations of facts and not mere opinions, and which were accepted and relied upon by the vendee in making the contract of purchase of the property. *Held*, To constitute a warranty.

2. ———: ———: BREACH: DAMAGES. All damages in contemplation of the parties to the contract, or which naturally may result from a breach of a warranty, accrue in favor of the party injured by such breach.

3. ———: ———: ———: ———. What are sometimes denominated "consequential damages" may be recoverable in an action for a breach of a warranty, if they are certain and determinate in nature or amount, or can be rendered so by evidence, and are also directly attributable to the breach of the contract as their cause.

4. ———: ———: CATALOGUE AND PRICE-LIST: EVIDENCE. The admission of certain evidence examined and *held* erroneous.

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

Sedgwick & Power, for plaintiffs in error.

Coffin & Stone and *Merton Meeker*, *contra.*

HARRISON, J.

This action was instituted in the county court of York county by the defendant in error, hereinafter designated the "company," to recover an amount alleged to be its due from the plaintiffs in error on account of a number of bicycles sold by the company to plaintiffs in error. The balance claimed to be due on the account after the deduction of a payment of $100, was $443.75. The case was in the course of the litigation appealed to the district court of York county, where, in the petition filed, the claim was set forth of the amount due on the account as we have just stated it. The answer admitted the purchase of the bicycles and asserted that there was an overcharge in the account of $41.75; and it was further pleaded therein as follows:

"And these defendants further allege that prior to, and at the time of, the purchase of the said bicycles, and as a part of the contract of purchase thereof, and as an inducement to enter into said contract, the plaintiff represented and warranted said property to be well and properly made, and of good materials, and to be of the highest possible grade, and that the said bicycles would give the purchasers thereof every satisfaction; and these defendants, relying upon the said warranty, purchased the said bicycles, which otherwise they would not have done. Defendants say that said bicycles were not well and properly made, and were not of good materials and of the highest possible grade, but, on the other hand, were of poor workmanship and made of poor material, and were of poor grade and inferior machines. And these defendants sold several of said machines to different parties and the same did not give the purchasers satisfaction, but failed in their construction and materials and other respects, as above stated, and were not of greater value than $150.

"4. And at the time of entering into said contract, these defendants were engaged in the implement business, and were dealing in bicycles at York, Nebraska, and had a

large business and patronage in said business, and by reason of the failure of the said bicycles, as represented and warranted, these defendants were compelled to purchase and make repairs to said bicycles to the amount of $35, and were compelled to, and did, lose a large amount of time of themselves and their employes in their attempting to repair said bicycles and make them work as warranted, to the amount and value of at least $100, and were compelled to, and did, pay a large amount of express charges, to the amount of $15, and were greatly injured and damaged in their said business by reason of the said failures of the said bicycles as warranted.

"5. The defendants sold said bicycles to various of their customers, and the same failed and were not good machines, and the said customers refused to keep the same but returned them and refused to pay therefor, and the customers and patrons of said defendants learning of the said failure of the said machines, refused to purchase bicycles of the said defendants so that defendants lost sales of bicycles which they otherwise would have made, to the amount and value of at least $500, and the commissions lost the defendants on such sales were at least of the value of $100, so that these defendants had been damaged in the premises in the sum of $250."

For the company there were interposed motions that the allegations of damages claimed to have accrued in favor of plaintiffs in error in the sum of $35, by reason of their being compelled to purchase repairs for, and to repair, the bicycles bought of the company, the one in which the claim in the sum of $100 was made for loss of time of plaintiffs in error and their employes in repairing the bicycles and trying to make them as warranted, also the averment of damages to the amount of $15 express, and other charges, and the further claim for $100 loss of profits on sales of machines returned to plaintiffs in error by purchasers because unsatisfactory and defective, and not as warranted, should all be stricken out of the answer. The grounds of these motions were that the allegations

attacked were not of proper elements of damages; also that they raised issues which were not of those tried in the county court. The motions were sustained. A reply was filed, and in a trial of the issues before the court and a jury the company received a verdict in the sum of $——, on which judgment was rendered. The unsuccessful parties have prosecuted error to this court.

The first question to be settled is whether the company made any warranty of the machines sold to plaintiffs in error. The warranty of the property sold, if any was shown, consisted of statements in letters written by, or for, the company and forwarded to plaintiffs in error in the course of the correspondence between the parties which resulted in the purchases by plaintiffs in error. These particular letters were written at or about the time of the purchases and in their terms may be said to have been parts of the contract of sale. We think, under a fair construction of these letters, it may be stated that they contained positive affirmations of the qualities and conditions of the bicycles, as facts, and not as mere opinions, which if accepted and relied upon by the plaintiffs in error in making the purchases, were sufficient to constitute a warranty.

Other points to be discussed relate to the action of the trial court in sustaining the motions to strike from the answer certain portions thereof with reference to elements of damages, and to which we have hereinbefore specifically called attention. With this may be considered the assignments of error in regard to the exclusion of evidence offered for plaintiffs in error on each branch of the subject of damages included in the parts of the answer which were stricken out. Of the rule of damages, speaking generally, it may be stated as in *Hadley v. Baxendale*, 9 Exch. [Eng.], 341: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally,—*i. e.*, ac-

cording to the usual course of things,—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." The substance of this statement has been adopted as the rule in this state. (See *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb., 210; *Aultman v. Stout*, 15 Neb., 586; *Deering v. Miller*, 33 Neb., 654; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb., 68.) To afford damages which will compensate the party aggrieved by the breach of the contract is the intent of the law. "The damages recoverable for a breach of warranty * * * include all damages which, in contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act." (*Dushane v. Benedict*, 7 Sup. Ct. Rep., 696.) Under this general rule, ordinarily the measure of damages is the difference between the actual value of the article and its value if it had been as warranted. (28 Am. & Eng. Ency. of Law, 837; *Young v. Filley*, 19 Neb., 545.)

The plaintiffs in error were in business in York, Nebraska, and desired the bicycles purchased, for sale in their trade, all of which was known to the company. An agreement was made by the parties by which the plaintiffs in error were constituted the sole agents of the company for the sale of its bicycles at York, and the discounts to be allowed from listed prices were stated in the agreement.

Of the stated elements of damages which, by the trial court's rulings on the motions and the offers of evidence, were eliminated from the case was that of $15 express charges. That the plaintiffs in error were obliged to pay express charges in and about the sales of the wheels or in obtaining the "repairs" for them would not arise as a natural consequence of the breach of the warranty, nor do we think it may reasonably be said to have been contemplated by the parties as a probable outcome of the breach; hence the court did not err in its rulings as to

this portion of the answer and the evidence offered on the same subject-matter. That the plaintiffs in error would probably repair the bicycles sold to their customers, if defective, we think was a natural result and to be expected as to any parts covered by the warranty and fairly within the contemplation of the parties at the time of entering into the contract; hence the court erred in striking the allegations in regard to this claimed element of damages from the answer, and in excluding the evidence offered relative to it.

A portion of the answer referred to loss of profits on "wheels" which had been purchased of plaintiffs in error and returned by purchasers because defective. This was a proper element of damages, having its origin in the breach of the warranty and must have been in contemplation of the parties when the contract was made, as a probable consequence of its breach. The court should not have stricken out the portion of the answer in which this claim of damages was made, or excluded the offered evidential facts of this claim of damages. Both this and the claim in relation to repairs were certain in their nature, or could be rendered reasonably so by evidence, and were also certain in respect to what caused them; hence were proper elements of damages.

Relative to the ground of each of the motions to strike out parts of the answer for the reason that issues were thereby raised not litigated in the county court, it appears that since the case was filed in this court an addition to the transcript has been supplied which contains the pleadings filed in the county court, from which it is evident that no new issues were presented by the answer in the district court; consequently this ground of each motion was of no avail.

It is assigned that the trial court erred in admitting in evidence portions of a catalogue issued by the company, and which contained the price-list of the bicycles sold by the company. Attached to the agreement, by which plaintiffs in error became the agents for sale of the com-

pany's wares at York, Nebraska, was what was designated a "discount sheet," in which was stated the per cent, presumably of the list prices of wheels and parts thereof, to be deducted in all sales to plaintiffs in error. In this sheet appeared the following:

"Agents' Confidential Discount Sheet for 1893.

"Keep this for your own reference only.

"THE REDHEAD, NORTON, LATHROP COMPANY,

"Des Moines, Iowa.

"Bicycles and Cycling Sundries.

"Terms: Bicycles and sundries, 30 days net, 2 per cent cash discount in 10 days. Repairs, net cash on delivery of work.

"Pacemakers, pages 7-10.

"These machines are sold at a discount to agents, they having the exclusive sale of them in their territory, as agreed and contracted for by the agency contract.

1 to 3 machines .....25 per cent
4 to 10 machines .....an extra 5 per cent

"Parties selling over three machines during the season are allowed the extra five per cent rebate October 1st.

"Western Wheel Works goods. Comprising all machines listed on pages 16-31 (except Ideal Rambler)."

A witness for the company identified a catalogue as being one issued by the company and similar to one sent to the plaintiffs in error prior to their purchases of wheels, and over the objections of plaintiffs in error the portions of the catalogue included in pages from seven to ten and from sixteen to thirty were introduced. Of the matter thus brought into the record was the following, which was made a separate exhibit:

"We warrant our bicycles to be free from imperfections of workmanship and material, and hereby agree to make good, at any time within one year after purchase, any defect in them not caused by abuse, misuse, or neglect. If such defects be found, the part worn or broken must be sent to us by prepaid express or mail, for examination before the claim can be allowed."

In allowing this extract from the catalogue in evidence the court committed an error. If properly identified as the price list of the company and the one by which the company and plaintiffs in error were to and had agreed to be governed in their dealings, then so much of the lists of prices as appeared on pages referred to in the agreement might have been competent and allowable, but not a portion which purported to be a warranty differing from, and in effect rendering nugatory, the one pleaded, introduced and relied upon by the plaintiffs in error. It had in no manner been identified as, or shown to be, the contract of the parties, and the mere fact that it appeared on a page of a catalogue possibly mentioned in an agreement of the parties, which by its broadest fair construction could not be said to indicate more than so much of the pages as were devoted to setting forth prices, did not entitle it to be received in evidence as a part of the matters referred to in the agreement. The allowance of this extract in evidence was probably prejudicial to the rights of plaintiffs in error. If accepted by the jury as the contract between the parties litigant it would have effectually destroyed any significance of the warranty claimed by plaintiffs in error.

There are some other assignments of error but of such a nature as not to need particular notice at this time. For the errors committed as herein indicated the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

FARM-LAND SECURITY COMPANY, APPELLEE, V. PETER B. NELSON ET AL., APPELLANTS.

FILED NOVEMBER 18, 1897. No. 7582.

Usury: PLEADING. A plea quoted in the body of the opinion construed and *held* to state a defense of usury in the inception of a note.

APPEAL from the district court of Dawes county. Heard below before BARTOW, J. *Reversed.*

C. H. Bane and *D. B. Jenckes*, for appellants.

Albert W. Crites, contra.

HARRISON, J.

This action was instituted by the appellee in the district court of Dawes county, the purpose of the suit being the foreclosure of a real estate mortgage to enforce payment of the amount of a note secured thereby. As the result of a trial the appellee was accorded the relief sought, and the unsuccessful parties have prosecuted an appeal. In the answer filed for appellants appeared the following: "Admits that they executed and delivered the instrument and mortgage sued upon in this case to the Showalter Mortgage Company on the first day of March, 1889, and that afterwards, to-wit, on the — day of ——, 1889, the said Showalter Mortgage Company, through its authorized agent in the city of Chadron, paid these answering defendants thereon the sum of $5,750 and no more, and that the note executed to the said Showalter Mortgage Company by these defendants for and upon said loan was $6,725 at the rate of 6 per cent interest thereon for the period of five years, which would amount to $8,742.50, and that the amount actually borrowed at 10 per cent interest from the date of the loan for a period of five years thereon would amount to $8,625, which would leave a difference of $117.50 usurious, upon the said loan, and that said rate of interest is illegal and usuriously contracted for, taken and reserved by the Showalter Mortgage Company and received by them at the time the said mortgage was given." By objections to evidence the question was raised that the foregoing was not a plea of usury. The trial court sustained the objection and determined that there was no sufficiently stated defense of usury.

A fair construction of the foregoing allegation, although it probably lacks definiteness and certainty, we think is, that it states a contract for a loan to appellants of the sum of $5,750, and the execution of the note described in the mortgage in amount $6,725, with interest at 6 per cent per annum for the time of the loan, five years, pursuant to a contract by which there was reserved and to be paid to and received by the lender, a greater interest than the legal rate, 10 per centum per annum, on the amount of the loan; so construed it was a plea of usury and the court erred in excluding evidence offered to prove it. For the error indicated, the judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SOPHIA WINQUEST ET AL. V. CHARLES H. SCHAEFER ET AL.

FILED NOVEMBER 18, 1897. No. 7611.

Bill of Exceptions: AUTHENTICATION. "A bill of exceptions in a cause tried in the district court must be authenticated by the certificate of the clerk of such court to entitle it to be considered in the supreme court." *Romberg v. Fokken*, 47 Neb., 198, followed.

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

C. H. Roberts and *R. St. Clair*, for plaintiffs in error.

S. A. Dravo, contra.

HARRISON, J.

All the questions presented in this case,—an action instituted in the district court of Phelps county by plaintiffs in error, and removed to this court by proceedings in error,—would require for their proper determination a

reference to and an examination of the bill of exceptions. The document in the record which purports to be such bill is not authenticated by the clerk of the trial court and will not be considered by this court. (*Romberg v. Fokken*, 47 Neb., 198.) It follows that the judgment of the district court will be

AFFIRMED.

W. A. SAUSSAY, CONSTABLE, ET AL. V. W. J. LEMP BREWING COMPANY.

FILED NOVEMBER 18, 1897. No. 7568.

1. **Replevin:** DISMISSAL. "A plaintiff in an action of replevin, who had obtained possession of the property under the writ, cannot be permitted, without the consent of the defendant, to dismiss the action." (*Garber v. Palmer*, 47 Neb., 699.)

2. ———: ———. In an action of replevin where the property has not been taken under the writ, or if taken has been returned to the defendants by reason of the failure of the plaintiff to furnish the requisite bond, the action "may proceed as one for damages only." (Code, sec. 193.) It then is in the nature of a personal action, and the plaintiff may dismiss it as any other personal action.

3. **Procedure on Appeal from Justice of the Peace.** "When the proceedings of a justice of the peace are taken on error to the district court, * * * and the judgment of such justice shall be reversed or set aside, the court shall render judgment of reversal * * *; and the cause shall be retained by the court for trial and final judgment as in cases of appeal." (Code, sec. 601.)

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

Charles Ogden and *J. W. West*, for plaintiffs in error.

Smith & Sheean, contra.

HARRISON, J.

It appears from the record herein that on June 2, 1894, there was filed for the brewing company, with a justice

of the peace of Douglas county, an affidavit in replevin, in which it was asserted that the company was the owner of, and entitled to the immediate possession of, certain specifically described property unlawfully and wrongfully detained by W. A. Saussay, constable, one of the plaintiffs in error herein. The usual process was issued on the same day, returnable June 5, 1894, and delivered to a constable for service. On June 5 the cause was continued by consent of parties to June 11, 1894, and in the same manner to June 18, from the 18th to the 25th, and at 9 o'clock A. M. of the 25th to 2 o'clock P. M. of the same day; and then to July 2, 1894. On June 25 a motion was filed for the company that the case be dismissed at its costs, which was overruled. Of the proceedings on July 2, the following is the entry: "This cause coming on this day to be heard, plaintiff being represented by Smith & Sheean, and the defendants being represented by Charles Ogden, and after hearing the proofs, and the court being fully advised in the premises, does find in favor of the defendants. The court further finds that at the commencement of this suit the defendants were entitled to the possession of the property in controversy, and finds that the value of said property, being the interest of the defendants therein, was the sum of $190.66, together with interest from the 8th day of May, 1894, at the rate of 7 per cent per annum and increased costs, $1.10-100; and the court further finds that the damages of said defendants, by reason of the wrongful detention of the property, at $3.43, being the interest on said value to the date of the rendition of the judgment. Wherefore, it is considered and adjudged that the defendants have judgment for a return of the property replevied herein, and in default of said return, that the said defendants have and recover from the said plaintiffs the sum of $195.19 and the costs herein expended, taxed at $——."

The case was removed to the district court of Douglas county by error proceedings, the following being the assignments in the petition in error:

"First—The court erred in failing and refusing to sustain plaintiff's motion to dismiss said cause at its costs.

"Second—The said justice erred in ordering the return of any property, for the reason that no property had been taken under the writ of replevin issued in said cause, and, therefore, the court had no jurisdiction of said property.

"Third—The court erred in ordering that in default of the return of any property that said defendants have and recover from said plaintiff the sum of $195.19, for the reason that said court was without jurisdiction to make such an order, no property having been taken under and by virtue of the writ of replevin issued in said cause, nor was any bond filed or any property turned over to this plaintiff by the officer to whom the writ of replevin was issued in said cause.

"Fourth—The court erred in entering a judgment for the return of any property or its value, for the reason there was no finding on the part of said court sufficient to sustain said judgment. The court in no manner having found that any property had been turned over to said plaintiff under and by virtue of the writ of replevin issued in said cause.

"Fifth—The court erred in entering a judgment against the plaintiff for the sum of $195.19 in default of the return of said property, for the reason there was no finding by said court sufficient to sustain such a judgment; the court in no manner having found that any property had been delivered to the plaintiff under and by virtue of the writ of replevin issued in said cause."

In the district court the judgment of the justice was reversed and the action dismissed, and the parties defendant in the justice court present the case here for review, alleging as error:

"1. That the judgment reversing said judgment of said justice is contrary to law and contrary to the facts which appear upon the face of the transcript whereupon said proceedings were had.

"2. That there was error in law in reversing said judg-

ment of the justice court, and that, apparent on the face of the transcript, said judgment of the justice should have been affirmed.

"3. That said district court erred in dismissing the suit and should have retained said cause to be tried on its merits as provided by the statute in such case made and provided.

"4. That the court erred in finding that there was error apparent upon the record in said proceedings of said justice.

"5. That said proceedings of said justice were valid and that the judgment rendered therein, in favor of plaintiffs in error and against said defendant in error, is a valid judgment and was obtained after the parties had appeared before the justice and fully submitted to the jurisdiction of said justice's court; that said judgment is binding and conclusive upon the parties thereto."

The record does not disclose that prior to the hearing of July 2, in the justice's court, there had been any service of the summons or writ of replevin; hence it did not appear that the property had been taken under the writ or delivered to the company. There had been no return of the process. There is a recitation in the transcript of a return of the writ which was of date July 21, 1894, long after the hearing, in which it is stated that the property was never taken under the writ for the reason that when found by the officer it was in the possession of the company, but this return not having been in the hands or within the knowledge of the justice at the time of the hearing must be ignored here and cannot be considered in the case for any purpose.

The record in this case does not show that the writ of replevin was ever served; that the property described therein was taken under the writ or delivered to the plaintiff in the action. It does disclose that the property never was taken under the writ, and that when the trial was had in the justice's court the writ had neither been served nor returned. This being true, was the plaintiff

in the suit entitled to have the case dismissed as asked in his motion for that purpose? This court has repeatedly said that "a plaintiff in an action of replevin, who has obtained possession of the property under the writ, cannot be permitted, without the consent of the defendant, to dismiss the action. When a plaintiff in replevin who has obtained the property fails in his proof or fails to prosecute the action, the defendant is entitled to judgment, and to a trial of his right of property or possession for the purpose of establishing his damages." (*Garber v. Palmer*, 47 Neb., 699; *Aultman v. Reams*, 9 Neb., 487; *Moore v. Herron*, 17 Neb., 697; *Ahlman v. Meyer*, 19 Neb., 63; *Vose v. Muller*, 48 Neb., 602.)

In the opinion in the case last cited it was stated: "Plaintiff insists that, after the filing of the dismissal, the court had no jurisdiction, and that defendant's sole remedy was to sue upon the bond. The right to dismiss is claimed under section 430 of the Civil Code, which provides: 'An action may be dismissed without prejudice to a future action: first, by the plaintiff, before the final submission of the case to the jury, or to the court, where the trial is by the court,' etc. Doubtless, as a general rule, a plaintiff has the right under said provision to dismiss his own case before it has been submitted on the merits. But this rule does not obtain in actions of replevin. In such suits, after the delivery of the property to the plaintiff under the writ, as was done in the case before us, he cannot dismiss and thereby defeat the defendant of his right to the possession of the property, without trial."

In all these cases the holding hinges on the conditions that the writ had been served, the property taken and delivered to the plaintiffs; and as was well said in *Garber v. Palmer, supra,* "It follows from the nature of this action, and from the feature of the plaintiff's securing the property before he has established his right, that he cannot by a dismissal of the action avoid the necessity of making the necessary proof. He cannot by his own

ex parte affidavit obtain property in the possession of another and then by dismissal leave the other party without an opportunity to defend his right and without a remedy. The proposition is so evident, the contrary so unjust, so absurd, and so preposterous, that neither argument nor authority should be necessary."

The main object of an action of replevin is to obtain possession of the property claimed and the trial of the right to such possession. Where the property is not seized under the writ, or if seized, and on failure of the plaintiff in the action to give a bond is returned to the defendant, the court from which the process issued has no jurisdiction over the property, no power to dispose of it. Under our Code the action "may proceed as one for damages only." (Code of Civil Procedure, sec. 193.) The action then becomes in effect a personal one, the property not having been taken by the officer or delivered to the plaintiff, or if taken, having been returned to the defendant because of the failure of the plaintiff to furnish bonds. The reason for the court retaining the suit and receiving proof of defendants' right to possession, in order that, if he establishes such right, the property may be adjudged to be returned to him, has failed; and, where the reason fails, the rule ceases to be operative. We must conclude that an action of replevin wherein the property in specie is no longer involved because of the existence of the conditions hereinbefore set forth, has no elements in it other and further than any other personal action which will bar the plaintiff of the right to a dismissal of his action at any proper time.

When the plaintiff in this action moved its dismissal in the justice's court the return day of the writ had passed. There had been no return. The officer had not taken the property under the process and the court had acquired no power or jurisdiction over it, and the action, if it proceeded, must have been one for damages only, and the plaintiff was entitled to dismiss it.

It is urged that when the district court reversed the

judgment of the justice of the peace it should have retained the case and set it down for trial agreeably to the provisions of section 601 of the Code of Civil Procedure, as follows: "When the proceedings of a justice of the peace are taken on error to the district court, in manner aforesaid, and the judgment of such justice shall be reversed or set aside, the court shall render judgment of reversal, and for the costs that have accrued up to that time, in favor of the plaintiff in error, and award execution therefor; and the cause shall be retained by the court for trial and final judgment as in cases of appeal." In the opinion in *Lichty v. Clark*, 10 Neb., 472, it was decided: "Where the judgment of a justice of the peace is reversed in the district court, the case stands for trial *de novo* in that court." We think there is no doubt under the provisions of the Code quoted above that the district court erred in dismissing this cause, after reversal of the judgment of the justice of the peace. It should have been retained for further proceedings and such disposition as might have been proper and right in its future course as a lawsuit. The judgment of the district court of reversal of the judgment of the justice of the peace is affirmed; the further judgment of dismissal of the action is reversed, and the cause is remanded for further proceedings.

JUDGMENT ACCORDINGLY.

NORVAL, J.

I concur in the foregoing opinion to the extent it holds that the justice of the peace erred in not permitting plaintiff to dismiss the action, since the record affirmatively discloses that the property was never taken by the constable under the writ, but, on the contrary, the plaintiff obtained possession of the goods independent of the process of replevin.

STATE OF NEBRASKA, EX REL. PETER W. BIRKHAUSER, V. FRANK E. MOORES ET AL.

FILED NOVEMBER 18, 1897. No. 9241.

1. **Quo Warranto:** TITLE OF RELATOR. One who seeks by *quo warranto* to obtain possession of a public office must show a better title than the incumbent.

2. ———: ———: VALIDITY OF STATUTE: ESTOPPEL. In a proceeding in the nature of a *quo warranto* brought by a private person to determine the right to a public office, the relator cannot assail the constitutionality of the statute under which the respondent claims to hold such office, as a basis for a judgment of ouster, when the argument adduced by relator for declaring the law bad applies with equal force as against the statute under which he himself asserts title to the office.

3. ———: ABANDONMENT OF OFFICE: ESTOPPEL. One who voluntarily abandons or surrenders a public office to another will not afterward be permitted to assert title thereto against such subsequent incumbent.

ORIGINAL action in the nature of *quo warranto* by the state on the relation of A. C. Foster, H. E. Palmer, and Peter W. Birkhauser, to oust the respondents Frank E. Moores, Daniel D. Gregory, William C. Bullard, James H. Peabody, and R. E. Lee Hurdman, from the offices of fire and police commissioners of the city of Omaha. The action was dismissed as to relators Foster and Palmer. *Writ denied.*

McCoy & Olmsted, for relators.

Ed P. Smith and *George A. Day, contra.*

NORVAL, J.

This was an action of *quo warranto* instituted in this court by A. C. Foster, H. E. Palmer, and Peter W. Birkhauser to determine the rights of relators and respondents, respectively, to the offices of fire and police com-

missioners of the city of Omaha. Relators were appointed to said office by a board, consisting of the governor, commissioner of public lands and buildings, and attorney general, created by section 145, chapter 12*a*, Compiled Statutes, 1895, which said chapter is entitled "Cities of the metropolitan class." The last state legislature created a new charter for the government of cities of the class to which the city of Omaha belongs, and by the same law, in express terms, repealed the said "chapter 12*a* of the Compiled Statutes of Nebraska, seventh edition, 1895." Session Laws, 1897, chapter 10, section 166, of said act, known as chapter 12*a*, Compiled Statutes, 1897, declares: "In each city of the metropolitan class there shall be a board of fire and police commissioners, to consist of the mayor, who shall be *ex-officio* chairman of the board, and four electors of the city who shall be appointed by the governor." By section 167 it was provided substantially that immediately upon the taking effect thereof, the governor should appoint for each city embraced within the law four fire and police commissioners, of whom not more than two should belong to the same political party,—one to serve for one year, one for two years, one for three years, and one for four years,—and that the governor should annually thereafter appoint one commissioner in each of such cities for the term of four years. The section also makes provision for the filling of vacancies occurring in said offices. The respondent Frank E. Moores is the duly qualified and acting mayor of the city of Omaha, and by virtue of said section 166, claims to be an *ex-officio* member, and chairman of the board of fire and police commissioners of said city. The other four respondents claim to be members of said board, and the right to discharge the duties thereof by virtue of appointments made by the governor under the provisions of said section 167. The relators Foster and Palmer, leave of court having been first obtained, have dismissed the proceeding as to themselves, and the action thereafter was prosecuted in the name of Birkhauser alone.

In this proceeding the constitutionality of the entire act of which said sections form parts is assailed upon the same grounds, among others, as those urged and presented against the law in *State v. Stuht*, 52 Neb., 209, where the validity of the legislation was sustained. The writer had no part in that decision, and does not wish to be understood as now agreeing that the conclusion then reached by his associates was sound. A discussion of the questions there considered will not be undertaken at this time, since the writ of ouster sought herein must be denied for reasons hereafter stated.

It is important to remember that this action was not instituted by the attorney general, but was brought by private persons asserting the right to the offices in question. Had the attorney general been the relator, it would have devolved upon the respondents to show that they were rightly inducted into office; in other words, that they were appointed and are acting under a constitutional law. (*State v. Tillma*, 32 Neb., 789.) When the information is filed by a private person the same rule does not obtain. He is required to show that his title to the office is better than the incumbent's, and must recover, if at all, upon the strength of his own title and not upon the weakness of the claim of his adversary. This doctrine is not new, but has been more than once asserted by this court. (*State v. Stein*, 13 Neb., 529; *State v. Hamilton*, 29 Neb., 198; *State v. Boyd*, 34 Neb., 435.)

The principal argument of counsel for relator is that said sections 166 and 167 of the act of 1897 are unconstitutional and void, because they are inimical to the inherent right of local self-government. Precisely the same objection could be successfully made against the statute under which Mr. Birkhauser was appointed. In violation of the principle of local self-government, it empowered the governor, commissioner of public lands and buildings, and attorney general, to appoint the fire and police commissioners for cities of the metropolitan class, while, under the existing law, that duty was devolved

upon the governor alone. The reasons and arguments adduced for declaring the 1897 law bad, if sound, would likewise make clear the invalidity of the act under which relator was appointed to office; hence, under the decisions mentioned, he could not successfully prosecute this action.

Another contention of respondents, which is not devoid of merit, is that the writ must be denied for the reason the relator voluntarily abandoned the office in question, and acknowledged the right of the incumbents to discharge the duties pertaining to the board of fire and police commissioners of the city of Omaha. This the relator denies, and on his direct examination as a witness in his own behalf he testifies that it never was his intention to vacate the office nor relinquish his right and title thereto. Whatever may have been his secret intentions upon the subject, the reading of his cross-examination in connection with the other testimony taken before the referee leaves no trace of a doubt that all the relators deliberately abandoned their offices upon the appointment and qualification of the respondents. The testimony establishes beyond dispute that regular meetings of the old board of fire and police commissioners were held on each Monday evening; and that, since respondents qualified, no meeting of the old board for the discharge of business has been held, and no official duty has been by it transacted. There is likewise testimony in the record conducing to show, although contradicted to some extent, that at the last meeting of the relators as a board, held on March 29, 1897, the members thereof agreed among themselves to make no further claim to the office of fire and police commissioners and that they would severally and collectively turn over to the respondents, as their successors in office, peaceably and courteously, the books and records belonging to said board; that relator Foster was then and there directed by Palmer and Birkhauser to meet with the members of the incoming board and extend to them their good wishes and to proffer any

assistance to the respondents which lay in their power, and that said Foster thereafter met with the respondents as directed and otherwise obeyed this said instruction. In view of the matters aforesaid, and the further fact that the relators Palmer and Foster have voluntarily dismissed the proceedings herein, and that the information prays for a writ of ouster against the respondents, and that the relators be inducted into offices, we can see it in no other light than that the relators abandoned and surrendered all their right, title, and possession of the offices of fire and police commissioners of the city of Omaha to the respondents.

One who voluntarily abandons a public office will not be permitted thereafter, at will, to assert title thereto. The principle was fully recognized and applied in *State v. Boyd*, 34 Neb., 435. The doctrine that the continual failure and refusal of a public officer to perform the duties thereof will operate as an abandonment is well established by the authorities. (Mechem, Public Officers, 435; *People v. Hartwell*, 67 Cal., 11; *State v. Allen*, 21 Ind., 516; *People v. Kingston T. R. Co.*, 23 Wend. [N. Y.], 193, 19 Am. & Eng. Ency. Law, 562*; *Yonkey v. State*, 27 Ind., 236; *Page v. Hardin*, 8 B. Mon. [Ky.], 666; *People v. Hanifan*, 96 Ill., 420; 6 Brad. [Ill. App.], 158.) *Turnipseed v. Hudson*, 50 Miss., 429, sustains the contention of relator that there has been no abandonment of the office by him. That decision was rendered by a divided court, and the opinion of the majority fails to carry conviction to our mind. The writ is denied.

WRIT DENIED.

EDWARD BUCKLEY V. H. H. MASON.

FILED NOVEMBER 18, 1897. No. 7494.

1. **Execution:** SHERIFF'S RETURN: TIME. An execution issued by a county court, or justice of a peace, is returnable thirty days after its receipt by the officer to whom the writ is directed, and the statute is mandatory that the writ must be returned within that time by the officer, stating what he has done under it, whether the property levied upon has been sold or not.

2. ——: ——: ——. A sheriff or constable has no authority to act under such an execution after the return day thereof.

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

W. H. Richards and *F. N. Prout*, for plaintiff in error.

Griggs, Rinaker & Bibb, contra.

NORVAL, J.

This action was in replevin for the possession of a wagon. In a trial to the court, without a jury, the defendant prevailed, and the plaintiff has brought the record here for review by an appropriate proceeding.

The facts are undisputed, and so far as they are necessary for an understanding of the case, are as follows: On the 18th day of November, 1893, an execution was issued by the county court upon a judgment obtained by the Wyeth Hardware Company against Vorhees & Vorhees, and the writ, two days later, was levied upon the property in controversy by J. W. Ashenfelter, as constable, who advertised the sale to take place on November 30, and left the property for safe keeping with the defendant H. H. Mason. The wagon not having been sold on the date specified, the constable, on the 8th day of December, 1893, again advertised it to be sold on the 19th day of the same month. Subsequently, Edward Buckley, for a valuable consideration, purchased the

wagon from the execution defendant, demanded possession thereof from Mason, and the delivery of the property being refused, this action was instituted. Said execution was not returned to the county court within thirty days from the receipt thereof by the constable, nor was any order ever issued by said court to expose for sale the property levied upon.

The only question presented for consideration in this case is whether the failure of the constable to return his execution to the court whence it issued within thirty days from the date the officer received the writ, and the omission to obtain an order from the county court for the retention and exposition of the property by the constable, released the wagon from the lien of the execution. If the lien of the levy was discharged, it is obvious that plaintiff was entitled to recover in this action. The question for consideration is one of statutory construction.

Section 1058 of the Code of Civil Procedure, relating to the requisites of an execution issued upon a judgment of a justice of the peace, provides, *inter alia:* "It must in all cases direct the officer to make return of the execution and the certificate thereon, showing the manner in which he has executed the same, in thirty days from the time of his receipt thereof."

Section 1064 declares: "The officer is liable to the party in whose favor an execution issued to him for the amount thereof, in the following cases: First—Where he suffers thirty days to elapse without making a true return thereof to the justice, and paying to him, or to the party entitled, the money collected thereon by him."

Section 1071 provides: "Where a constable or sheriff shall have levied on any goods and chattels which remain unsold for want of bidders or other just cause, it shall be his duty to return, with the execution, a schedule of all goods and chattels. And the justice shall, unless otherwise directed by the party for whom such execution issued, or his agent, immediately thereafter issue an order, thereby commanding any officer to whom the same may

be directed or delivered, to expose such property for sale; which sale, and the proceedings thereon shall be the same as if such property had been sold on the original execution."

By section 1077 it is made the duty of any constable to make return of all processes which come into his hands at the proper office, and upon the proper return day thereof; and the next succeeding section requires every constable, on the receipt of any writ or process, other than subpœnas, to indorse thereon the time of receiving the same. The foregoing provisions, by section 19, chapter 20, Compiled Statutes, are made applicable to proceedings upon executions issued out of the county court.

It is very evident that the statutory provisions under consideration require that an execution issued by a justice of the peace or a county judge be returnable to the court whence it issued within thirty days after the receipt by the sheriff or constable, as the case may be. There can be no doubt that this is true, whether a levy has been made or not, or whether the property seized under the writ has been sold before the return day or not. But counsel for defendant urge strenuously that the statute respecting returns of execution is not mandatory, but is directory merely, and the failure to comply with the provisions thereof is nothing more than an irregularity, which does not affect the lien of the levy. Each party has cited numerous authorities as bearing upon the proposition, which we shall not attempt to review, or comment upon, since substantially the question now before us was determined in *Burkett v. Clark*, 46 Neb., 466, and the decision there indicated was contrary to the contention of the defendant herein. Section 510 of the Code of Civil Procedure, relating to the return of executions issued from the district court, was construed in that case, and it was held that said section limited the life of an execution to sixty days from its date, and the requirement of the statute that it be returned within that time is mandatory. Said section 510 requires an execution is-

sued out of the district court to be returned "within sixty days from the date thereof," while said section 1058 makes an execution issued by a justice of the peace returnable within thirty days from the time of the receipt of the writ by the sheriff or constable. This difference in the language of the two sections is not sufficient to authorize the court to construe as directory merely the provisions relating to a return of an execution issued by a justice of the peace. The conclusion is irresistible that it was the duty of the constable, Ashenfelter, to have returned the execution to the county court within thirty days from the time the writ came into his hands, stating what he had done under it, and having omitted to comply with the same in that regard, the levy on the wagon was released. He had no authority to act under the execution after the return day thereof. (*Shultz v. Smith*, 17 Kan., 306; *Vail v. Lewis*, 4 Johns. [N. Y.], 450; *Cain v. Woodward*, 12 S. W. Rep. [Tex.], 319; *Towns v. Harris*, 13 Tex., 507; *Young v. Smith*, 23 Tex., 598; *Hester v. Duprey*, 46 Tex., 625; *State v. Kennedy*, 18 N. J. Law, 22.) The judgment is

REVERSED.

GEORGE E. DOVEY, AS SURVIVING PARTNER OF THE FIRM OF E. G. DOVEY & SON, V. CITY OF PLATTSMOUTH.

FILED NOVEMBER 18, 1897. No. 7507.

1. **Municipal Corporations:** NEGLIGENCE: PRESENTATION OF CLAIM FOR DAMAGES. It is solely in actions against a city of the second class having more than 5.000 inhabitants, to recover damages resulting from negligence, that the filing with the clerk of such city, the detailed statement required by the provisions of section 34, article 2, chapter 14, Compiled Statutes, is a condition precedent to a recovery.

2. ——: ——: ——. *City of Lincoln v. Grant*, 38 Neb., 369; *City of Lincoln v. Finkle*, 41 Neb., 575, and *City of Hastings v. Foxworthy*, 45 Neb., 676, distinguished.

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

Beeson & Root, for plaintiff in error.

Charles D. Grimes and *John A. Davies, contra.*

NORVAL, J.

This proceeding was brought to obtain a review of the action of the court below in sustaining a general demurrer to the petition, and in dismissing the cause. The suit was against the city to recover damages sustained by plaintiff by reason of the location and construction of a storm sewer in the alley upon which plaintiff's property abuts. A single question is presented, which is whether a suit can be maintained against a city of the second class having more than 5,000 inhabitants, to which class the defendant city belongs, to recover damages to property occasioned by the construction of a public improvement, without fault or negligence of the city, unless he has first filed with the city clerk, within six months from the date of the sustaining of the injury or damages, the statement contemplated by section 34, article 2, chapter 14, of the Compiled Statutes. The section mentioned is in the following language: "Sec. 34. All claims against the city must be presented in writing with a full account of the items verified by the oath of the claimant or his agent that the same is correct, reasonable, and just, and no claim (or demand) shall be audited or allowed unless presented and verified as provided for in this section; *Provided*, No costs shall be recovered against such city in any action brought against it for any unliquidated claim, including claims for personal injury sustained by reason of the negligence of such city, which has not been presented to the city council to be audited; nor upon claims allowed in part, unless the recovery shall be for a greater sum than the amount allowed, with the interest thereon; *Provided, further*, That all actions against such

city for injury or damage to person or property hereafter sustained by reason of the negligence of such city must be brought within six months from the date of sustaining the same; and to maintain such action it shall be necessary that the party file in the office of the city clerk, within six months from the date of the injury or damage complained of, a statement giving full name and the time, place, nature, and circumstances of the injury or damage complained of, and the name or names of the witness or witnesses thereto."

The city attorney insists, in his brief, that the giving of the notice specified in the last proviso of the section quoted above, is a condition precedent to the maintaining of an action against the city for any unliquidated demand, and there is cited in support of this line of argument, *City of Lincoln v. Grant*, 38 Neb., 369, and *City of Hastings v. Foxworthy*, 45 Neb., 676. The first of those decisions was cited and followed in *City of Lincoln v. Finkle*, 41 Neb., 575. The two cases reported in 38th and 41st Nebraska were predicated upon that portion of section 36, article 1, chapter 13*a*, Compiled Statutes, which reads thus: "And to maintain an action against said city for any unliquidated claim it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and the time, place, nature, circumstances, and cause of the injury or damage complained of." It cannot escape attention that the foregoing in express terms requires the giving of notice in every action upon a claim which is unliquidated, while the section of the charter involved in the case at bar contains no such provision. Obviously, under said section 36, article 13*a*, the notice therein required must be given as specified to entitle any one to prosecute successfully a suit against a city governed by its provision to recover upon any unliquidated demand, whether the damages sought to be recovered were occasioned by the careful making of some public improvement, or were

caused by the negligence of the city authorities. But it is very evident that the decisions predicated upon said section 36 throw no light upon the proposition now before the court, owing to the dissimilarity of the provisions contained in said section 36, and the section 34 under consideration.

Said section 34 was construed in *City of Hastings v. Foxworthy*, 45 Neb., 676, which was an action to recover damages caused by the alleged negligence of the city. It was there said, in substance, that the filing of the statement or notice contemplated by said section was indispensable to the maintaining of a suit against the municipal corporation for any injury or damages to person or property. Said statement is too broad, although the decision upon the point was correct, when it is considered that the action in which it was announced was to recover for personal injuries resulting from the negligence of the defendant. It was not the purpose of the court to hold in that case that the said section 34 required the notice therein mentioned to be given prior to the bringing of any action for damages against a city governed by its provisions, but rather the intention was to hold that the filing of such notice with the city clerk was a condition precedent to the maintaining of an action against the city for negligence. The conclusion is reached that the precise point involved in this case has not, up to this time, been passed upon by this court.

What is the proper construction or interpretation of the last proviso of said section 34? The section first provides that all claims against the city must be submitted in writing, itemized, and verified under oath, and that no claim shall be audited unless presented and verified as required thereby. The first proviso declares, in effect, that the city shall not be liable for costs in actions brought against it upon any unliquidated claim, including claims for personal injuries sustained by reason of the negligence of such city, which has not been presented for allowance to the city council. Then follows the second, or

last, proviso which reads: "*Provided, further*, That all actions against such city for injury or damage to person or property hereafter sustained by reason of the negligence of such city must be brought within six months from the date of sustaining the same; and to maintain such action," etc. The city attorney contends, and doubtless such was the opinion entertained by the court below, that the words "such action," as used in said last proviso, refer to and embrace the different classes of actions against the city specified in the section, and not alone to the kind of actions previously mentioned in the same proviso. To give the words quoted such meaning is to ignore the grammatical construction of the section. Evidently the legislature intend by the use of "such action," to refer alone to the particular class, or kind, of actions described immediately preceding in the same proviso, namely, suits against a city for injury or damage to person or property, resulting from the negligence of the city. To maintain said kind of an action alone the filing of the statement or notice with the city clerk is made a condition precedent. This is the plain import of the language employed. Had it been the intention of the legislature to require the filing of the detailed statement in cases of unliquidated demands, whether based upon the negligence of the city or not, language plainly expressing such purpose should have been employed in the framing of the law. The damages sustained by reason of the location and proper construction of the sewer, plaintiff was entitled to recover without filing the statutory notice, but such a notice is indispensable to a recovery for any negligence of the city in making the improvement.

There are some averments in the petition from which the charge of negligence might be inferred, but if they be eliminated from the pleading or treated as surplusage, a cause of action is stated for damages to private property for public use. (*Harmon v. City of Omaha*, 17 Neb., 548.) The judgment is

REVERSED.

LEWIS FINK V. JOHN L. DAWSON.

FILED NOVEMBER 18, 1897. No. 7523.

1. **Adverse Possession:** TITLE TO REALTY. Ordinarily one who has been in the actual, open, exclusive, adverse, and uninterrupted possession of real estate for ten years thereby acquires absolute title to the same.

2. **Ejectment:** ADVERSE POSSESSION: PLEADING: EVIDENCE. In an action of ejectment, under an answer denying plaintiff's title and right of possession to the premises, the defendant may show title in himself by adverse possession.

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

Alfred Hazlett and *Fulton Jack*, for plaintiff in error.

E. N. Kauffman, contra.

NORVAL, J.

This cause originated in the district court of Gage county on the 2d day of January, 1893, to recover possession of a strip of land in the southwest quarter of section 30, township 2 north, of range 7 east, 1.04 chains in width at the east end of said strip, 2.19 chains in width at the west end, and 160 rods long. From a verdict and judgment for plaintiff, defendant has brought the record to this court for review.

The plaintiff below, John L. Dawson, is the owner of the north half of said quarter section, and Lewis Fink is the owner of the south half of the same quarter section. The controversy is over the location of the original government corners, which mark the boundary line dividing the north and south halves of the southwest quarter of said section 30, and whether the defendant had held adverse possession of the strip in dispute continuously for ten years immediately prior to the bringing of this suit. The testimony adduced on the trial relating to the loca-

tion of the government monuments in question was, as is usual in cases of this character, exceedingly conflicting. The testimony of the defendant was to the effect that he had possession of, and cultivated, all the strip now in litigation since 1888, and at least one-half thereof since 1881.

Error is predicated upon the giving of the following instruction at the request of plaintiff below:

"The jury are instructed that the boundary lines of lands are determined from the location of the original stakes and corners by the government surveyors, and that these stakes and corners control the location, course, and distances of boundary lines, and that these lines are not subject to change or correction by subsequent surveys by county or private surveyors. And if you find that the government surveyor located the corners at the point contended for by plaintiff, you must find for the plaintiff."

By the foregoing the only issue presented to the jury for determination was the exact location, by the government surveyor, of the boundary line between the north and south half of the southwest quarter of said section 30. If they ascertained from the evidence that the original corners were located at the places claimed by the plaintiff, then, under the instruction, they were bound to return a verdict for him. The defense of adverse possession was entirely withdrawn from the consideration of the jury by the above paragraph of the charge, notwithstanding there was some evidence adduced from which the conclusion might have been drawn that the defendant had held at least a portion of the land adversely for the full statutory period. It is a well recognized rule that ordinarily a person who has been in the continuous, exclusive, adverse possession of real estate for ten years, thereby acquires a perfect title to the same, and the jury should have been so advised by the trial court, especially since the defendant requested an instruction upon that feature of the case.

It is argued by counsel for plaintiff below that this de-

fense of adverse possession was not available, because it was not specially pleaded in the answer. This contention is not well founded. The answer denied title and right of possession in plaintiff, which was sufficient, under section 627 of the Code of Civil Procedure, to entitle the defendant to interpose the defense of adverse possession. (*Staley v. Housel*, 35 Neb., 160; *Wanser v. Lucas*, 44 Neb., 759.) For the error indicated the judgment is

REVERSED.

LEXINGTON BANK V. JOHN WIRGES.

FILED NOVEMBER 18, 1897. No. 7482.

1. **Chattel Mortgages:** FORECLOSURE SALE: WAIVER OF RIGHTS UNDER STATUTE. Section 6, chapter 12, Compiled Statutes, prescribing the mode of conducting a chattel mortgage sale, was designed for the protection of the mortgagor, and he may waive his right thereunder to have the mortgaged property in view at the time of sale, if he chooses to do so.

2. ———: ———: ———. *Held*, The mortgagor waived the benefit of the statute by stipulating in the mortgage for the sale of the property by the mortgagee, "at public or private sale with or without, as the holder may deem best, an advertisement, and sale according to law, being hereby expressly waived."

ERROR from the district court of Dawson county. Tried below before HOLCOMB, J. *Reversed.*

C. W. McNamar, for plaintiff in error.

H. M. Sinclair and *N. R. Greenfield, contra.*

NORVAL, J.

The defendant below, the Lexington Bank, is a corporation engaged in the banking business in the city of Lexington, Dawson county, and plaintiff, John Wirges, was one of its customers, having an open account with the bank. At divers times he also borrowed money from the

defendant at a usurious rate of interest, giving his notes for the sums thus obtained. Some of the notes have been paid in full, while others, or some portions thereof, by a series of renewals were finally merged into three notes for $270, $3,300, and $4,000 respectively, which have not been fully paid. To secure the payment of the said note of $4,000 Wirges executed and delivered to the bank a chattel mortgage upon one brick machine and connections and tools; one boiler, engine, and connections; one boiler house; one windmill, tower, tank, and pipes; five frame sheds; two frame houses; 435,000 bricks, burned and unburned; ten head of horses; three wagons; two buggies; five sets of harness, and other personalty. Default having been made in the condition of the mortgage by Wirges, the bank took possession of the mortgaged property, advertised and sold the same, and applied the proceeds upon the indebtedness of the mortgagor. Wirges brought this action against the bank for an accounting, and for damages for the alleged conversion of the mortgaged chattels, the contention being that the bank sold the property without complying with the statutory requirements relating to foreclosing chattel mortgages. There was a trial before a referee, who found, and so reported to the court, that the amount due the bank on the note, together with $73.80 as expenses in taking, keeping, advertising, and selling the chattels, to be the sum of $5,482.55, and that the bank had received as usurious interest on the notes the sum of $1,805.17. The 9th and 10th findings of fact of the referee are as follows:

"9. I find that the defendant made a lawful sale of the mortgaged property, to-wit: 10 horses, 1 buggy, 2 wagons, 3 sets of harness, 1 single harness, for which it received the sum of $439.

"10. I find that the following mortgaged property was not in view at the time and place of sale, and that the same was unlawfully sold, and converted by the defendant: 1 windmill and tank, of the value of $60; 5 sheds, of

the value of $250; 1 stable, of the value of $50; 1 house, of the value of $100; 1 house, of the value of $500; 1 engine house, of the value of $50; 1 lot of tools, etc., of the value of $100; 1 engine and boiler, of the value of $500; 170,000 burned bricks, of the value of $1,190; 200,000 unburned bricks, of the value of $700; loose lumber, $45,—all being of the aggregate value of $3,545."

The referee also found as conclusions of law: First—That defendant should be credited with $5,482.55. Second—That plaintiff should be credited for usurious interest as shown by finding number 4, $1,805.17; for item shown in No. 9, $439; for item shown in No. 10, $3,545,—total, $5,789.17. Third—That plaintiff should have judgment against the defendant for the difference between $5,789.17 and $5,482.55, to-wit, $306.62.

Exceptions were filed by the bank to the referee's report, which were overruled, as was likewise a motion for a new trial, and judgment was rendered against the bank in accordance with the findings of the referee. Counsel for defendant below assail the tenth finding of fact, and the second and third conclusions of law based thereon. It is true, as found by the referee, that the portion of the mortgaged chattels described in the said tenth finding was not in sight at the time of the sale. It is on this fact alone that the charge of conversion is based. If the sale for that reason was not unlawful, defendant should only have been held accountable for the amount actually received for the property, rather than the market value thereof. The important question to which we shall then give attention is whether the sale of the property was illegal. The legislature, by chapter 12, Compiled Statutes, has provided the manner in which chattel mortgages may be foreclosed in this state; how notice of sale shall be given, the requisites of such notice, when and where the sale shall be conducted, and that the same shall be had in view of the property. This last requirement not having been complied with as to the property mentioned in the tenth finding, a strict statutory sale of all the mort-

gaged property has not been had, and the bank should account to the mortgagor for the value of that portion thereof which was disposed of in a manner other than is provided by law, unless the statutory requirements relating to foreclosure cannot be invoked in this case. The legislature has not established, nor attempted to do so, an inflexible rule for the foreclosure of chattel mortgages; but said chapter 12 has merely specified a method of sale by which the equity of redemption of the mortgagor may be extinguished. That the mode therein prescribed is not the only one the mortgagee may pursue is obvious. A verbal chattel mortgage cannot be thus foreclosed, since such a mortgage cannot be recorded as required by section 2 of said chapter 12, which is a prerequisite to a statutory foreclosure. And yet this court has upheld the validity of a verbal chattel mortgage. (*Conchman v. Wright*, 8 Neb., 1; *Sparks v. Wilson*, 22 Neb., 112.) The rights of the mortgagor may be cut off by an action in equity to foreclose the mortgage, and undoubtedly mortgaged chattels may be sold in accordance with the stipulation in the mortgage, although different from the mode laid down in said chapter 12, especially where the rights of third parties are not involved. (*Faeth v. Leary*, 23 Neb., 267; *Chaffee v. Atlas Lumber Co.*, 43 Neb., 225; *Scott v. Davis*, 44 Pac. Rep. [Kan.], 1001; Jones, Chattel Mortgages, sec. 709.)

The statute prescribing the time, place, and manner of sale was designed for the protection of the mortgagor, but he may waive his right thereunder if he sees proper to do so. The right of a mortgagor of chattels to waive the benefit of the statute relating to foreclosure has been recognized by this court. (See *Callen v. Rose*, 47 Neb., 638.) By proper stipulation in the mortgage the mortgagor may dispense with a public auction or with the mortgaged property being in actual view at the time of sale. (*Darnall v. Darlington*, 28 S. Car., 255; *Stevens v. Breen*, 75 Wis., 600; *Welcome v. Mitchell*, 81 Wis., 566; *Rose v. Page*, 46 N. W. Rep. [Mich.], 227; *Harris v. Lynn*, 25 Kan., 281; *Reynolds v. Thomas*, 28 Kan., 810.)

It remains to be determined whether this mortgagor waived a strict statutory foreclosure. It is disclosed that when the mortgage was executed, none of the mortgaged property was situate in the city of Lexington, but the larger portion thereof was at the yards of the mortgagor, some two miles distant from the city. Especially was this true as to the major part of the property described in the tenth finding of the referee. It is likewise noticeable that most of the property therein specified was not movable ordinarily, at least without great loss and damage. And yet the mortgage provided for the sale of the property in Lexington. It is evident that the parties never for a moment contemplated that the unburned bricks, sheds, stable, houses, engine house, and engine and boiler should be removed to Lexington for the purpose of sale, but rather that the statutory right to have this property present at the sale was waived by the mortgagor. This view is emphasized by the fact that the mortgage contained a clause authorizing the mortgagee to sell the property "at public or private sale, at Lexington, Nebraska, with or without an advertisement, and sale according to law being hereby expressly waived." This constituted an effectual waiver of the mortgagor's right, under the statutes, to have the sale made in sight of the property. There has been no conversion by the bank, and the referee and the district court each erred in holding that the mortgage sale was illegal. The judgment is

REVERSED.

JOHN B. WALKER V. SARAH E. STEVENS, ADMINISTRATRIX.

FILED NOVEMBER 18, 1897. No. 7551.

1. **Summons:** PLACE OF SERVICE: EFFECT. In a personal action having but one defendant, a summons issued to a county other than the one in which the suit was brought and served upon him

therein is void and confers no jurisdiction over the person of the defendant.

2. ———: ALIAS SUMMONS. When a void summons is issued, another writ may issue without either an order of the court or the return of the first "not summoned."

3. ———: SHERIFF'S RETURN. The return of a sheriff to a summons that he served the same by leaving a copy at the usual place of residence of the defendant, while not conclusive as to residence, is *prima facie* evidence of such fact.

4. ———: SERVICE UPON PRISONER: RESIDENCE: JURISDICTION. W., a single man, having a legal home and domicile in F. county, was arrested at his said residence for a felony committed in D. county, to which county he was conveyed and committed to the jail thereof, pending trial. While thus imprisoned he was sued in F. county and the summons was served by leaving a copy at his usual place of residence in said county. *Held*, That the court thereby acquired jurisdiction over the person of the defendant.

ERROR from the district court of Frontier county. Tried below before WELTY, J. *Affirmed.*

C. W. McNamar, for plaintiff in error.

Greene & Hostetler, contra.

NORVAL, J.

On November 29, 1893, Sarah E. Stevens, as administratrix of the estate of George P. Stevens, brought this suit in the district court of Frontier county to recover damages for the deliberate and malicious killing of plaintiff's intestate by the defendant. The defendant made a special appearance in the court below, objecting to the jurisdiction of the court over his person, which was overruled, and from a judgment against him in the sum of $5,000 he prosecutes an error proceeding to this court.

A single question is argued upon the record, which is, whether the court below acquired jurisdiction over the person of the defendant. He made no general appearance in the cause. Two summonses were issued,—one on November 29, 1893, directed to the sheriff of Dawson

county, and the other on December 2, 1893, to the sheriff of Frontier county. The former was served upon the defendant personally while he was confined in the jail of Dawson county for murder, and the other writ was returned by the sheriff of Frontier county indorsed served on December 7, 1893, by leaving a true and certified copy, with all the indorsements thereon, at the defendant's usual place of residence. Under section 60 of the Code of Civil Procedure this action could be brought alone in the county where the defendant resided or could be summoned. Section 65 declares: "Where the action is rightly brought in any county, according to the provisions of title four, a summons shall be issued to any other county, against any one or more of the defendants, at the plaintiff's request." Under said section a summons in an action *in personam* cannot be issued to a county of the state, other than the one in which the suit is brought, to bring in a party, unless service of summons can be and is properly made in the county where the cause is pending, upon a co-defendant who has a substantial and actual interest in the litigation adverse to the plaintiff. This court in *Hanna v. Emerson*, 45 Neb., 708, held that said section 65 does not apply where the person served in the county is merely a nominal defendant. By a parity of reasoning the statute confers no authority to issue a summons in a personal action to a county other than the one in which the suit was instituted, where there is only one defendant. Manifestly said section 65 is not susceptible of any other construction. (*Cobbey v. Wright*, 23 Neb., 250.) It follows that the summons issued to Dawson county was void, and no jurisdiction over the person of the defendant was acquired by the service of the same upon him.

It is suggested that the summons directed to the sheriff of Frontier county is invalid, because the same was issued without an order of the court to that effect, and prior to the returning of the writ issued to Dawson county. Section 67 of the Code of Civil Procedure declares: "When a writ is returned 'not summoned,' other writs may be is-

sued, until the defendant or defendants shall be summoned; and when defendants reside in different counties, writs may be issued to such counties at the same time." The provisions of this section were under consideration in *Ensign v. Roggencamp*, 13 Neb., 31, where it was decided that an alias summons should not issue until the first writ has been returned "not summoned," except upon an order of the court, but if issued without such return or order, the proceedings are not thereby rendered void, and a judgment entered by default against the defendant upon whom the writ was duly served is at most error without prejudice. Said section is applicable alone where the summons first issued is valid, and manifestly cannot be invoked in a case like this, where the prior writ from the inception was absolutely void and without any binding force and effect whatsoever, the same having been issued without authority of law. The second summons was therefore properly issued. (*Williams v. Welton*, 28 O. St., 451.)

Lastly, it is urged that jurisdiction was not acquired by the service of the summons directed to the sheriff of Frontier county. The return of the officer discloses that it was served by leaving a copy at the defendant's usual place of residence. This return is not conclusive as to the fact of residence, but is *prima facie* correct. The return must stand unless its truthfulness is impeached by the evidence introduced on the hearing of the objections to the jurisdiction in the court below. The uncontradicted testimony established that said John B. Walker is a single man, and on, and for at least nine years prior to, May 12, 1893, was the owner of a farm in Frontier county on which a dwelling house was situated; that during all of said time he lived therein and occupied the same as his home and had no other place of residence, and that on the date aforesaid he was arrested at his said residence for the murder of one George P. Stevens, in Dawson county, and since which time continuously to the institution of this suit in November, 1893, he has been imprisoned in the jail of said county.

The proposition contended for by counsel for defendant is that the service of summons in Frontier county was unavailing, since at the time of such service and return the defendant had no usual place of residence in said county, and had not been within the county for nearly six months prior thereto. In other words, "usual place of residence," as employed in the statute, means the place of abode at the time of service. This doctrine has been stated in some of the earlier decisions of this court, but the same was expressly disapproved, and some of the cases reviewed, by POST, J., in *Wood v. Roeder*, 45 Neb., 311. It was there distinctly ruled:

1. That the words "residence," and "usual place of residence," as employed in statutes, are generally synonymous with the term "domicile."

2. The residence essential to confer jurisdiction is a legal one equivalent to the domicile of the defendant.

3. Domicile is that place of residence of a defendant where he has his fixed and permanent home, and to which, when absent, he has the intention of returning.

4. To effect a change of domicile there must be not only a change of residence, but an intention to permanently abandon the former home.

In the light of the foregoing principles there is no room to doubt that the legal place of residence of Walker, at the time the service of summons was made, was in Frontier county. That county had been his residence and domicile for years. He did not leave his home for the purpose of abandoning the same. He acquired no residence elsewhere, and could not have been legally sued in Dawson county, since he was held in custody there to answer to the charge of felony. (*Palmer v. Rowan*, 21 Neb., 452.) If this summons was not properly and legally served, then the defendant could not be sued at all. We hold that the defendant's usual place of residence was in Frontier county, and that jurisdiction over his person was acquired by the service of the summons therein. The judgment is

AFFIRMED.

C. F. EISELEY V. C. F. TAGGART, RECEIVER FOR OMAHA HARDWARE COMPANY.

FILED NOVEMBER 18, 1897. No. 7617.

1. **Contracts:** ACTIONS: DESCRIPTION OF PLAINTIFF: OBJECTIONS. A defendant cannot object that the description by which the contract sued upon was entered into by plaintiff is not a sufficiently full description of such plaintiff and of the capacity in which he brings his action.

2. **Pleading:** DESCRIPTION OF PARTIES: OBJECTIONS. A plaintiff who, in his petition, has been sufficiently described in the title of the case need only be referred to as plaintiff in the statement of the facts constituting his cause of action or in his prayer for relief.

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

Mapes & Hazen, for plaintiff in error.

George N. Beels and *Beels & Schoregge, contra.*

RYAN, C.

This action was begun in the county court of Madison county, wherein there was a judgment in favor of the plaintiff C. F. Taggart, receiver, etc. By petition in error the same questions were presented in the district court that are now urged for our consideration. These will now be stated and determined on the line pursued by the contending parties, both in their pleadings and briefs. In the county court the plaintiff was described as "C. F. Taggart, receiver for Omaha Hardware Co., plaintiff." The plaintiff and defendant were parties to a draft accepted by the last named party, in which draft the party first referred to was thus named: "Omaha Hardware Co., C. F. Taggart, Rec." By a demurrer to the petition two objections were presented. Of these the first was that "Plaintiff has not the legal capacity to sue;" the second was, "That the petition itself does not state facts suffi-

cient to constitute a cause of action." The overruling of this demurrer presents the question to be considered.

The argument of the plaintiff in error in this court on the first of these propositions is that the petition was defective in not alleging the appointment of the receiver, by whom such appointment was made, and the existence of the receivership at the commencement of the action, so that issue might be joined upon one or more of these propositions. It is a sufficient answer to this contention to call attention to the fact that the plaintiff in error in the contract on which this suit was brought dealt with the defendant in error as being the receiver of the Omaha Hardware Co. The principle involved is analogous to that which forbids the maker of a note payable to a bank raising the question of the incorporation of such bank, and the right to raise such an issue has been denied by this court. (*Platte Valley Bank v. Harding*, 1 Neb., 461; *Exchange Nat. Bank v. Capps*, 32 Neb., 242.)

The argument on the proposition that the petition does not state sufficient facts to constitute a cause of action is based upon the alleged failure to state that C. E. Eiseley, the acceptor of the draft, was the same person described as "Charles F. Eiseley, defendant," in the petition. It has been held by this court that a plaintiff or defendant is sufficiently described by naming him as such in the petition, and that afterwards in the petition it is sufficient for all purposes to refer to such party by that descriptive term. (*Stubendorf v. Sonnenschein*, 11 Neb., 235.) In the petition under consideration the averments as to the defendant, who in the title had been described as above stated, were, that defendant made the acceptance, had refused to make payment, and that there was due from him the sum for which judgment was prayed. This was sufficient not only to describe the defendant, but, as well, it served to identify him as the same party who had accepted the draft sued upon. The judgment of the district court is

AFFIRMED.

MOSES NATHAN ET AL., APPELLEES, V. AARON SANDS ET AL., APPELLEES, AND ROSS GAMBLE, APPELLANT.

FILED NOVEMBER 18, 1897. No. 7490.

1. **Witnesses:** IMPEACHMENT. A person who calls a witness impliedly recommends him as worthy of belief, and afterwards cannot be permitted to introduce evidence which has no tendency other than to impeach such witness.

2. **Fraudulent Conveyances:** EVIDENCE. Where a purchase of an entire stock of goods was made from a merchant at a fair price and with no knowledge that such merchant was indebted to other parties than those whose debts were paid through such purchase, the transfer will not be declared void, though the purpose of the purchaser was, in part, to secure payment of a debt due himself and another debt due a bank of which he was at the time the president and managing officer.

3. ———: ———. The evidence examined and *held* insufficient to sustain a finding that the transfer to appellant was fraudulent and void as to creditors of the party by whom such transfer had been made.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J. *Reversed.*

Greene & Hostetler and *F. G. Hamer*, for appellant.

Ira D. Marston, *S. M. Nevius*, and *Dryden & Main*, *contra.*

RYAN, C.

This action was brought in the district court of Buffalo county by numerous judgment creditors of Aaron Sands, against the said Aaron Sands, Ross Gamble, and Allie Sands as defendants. It was alleged in the petition that from March 1, 1890, until November 15, 1891, Aaron Sands had been engaged in business in Kearney as a retail dealer in ready-made clothing, furnishing goods, boots, shoes, etc.; that in pursuance of a fraudulent conspiracy, to which all the defendants were parties, the said Aaron Sands, upon the faith of a credit secured largely by the recommendation of Ross Gamble, president and man-

aging officer of the Buffalo County National Bank, accumulated a stock of goods of the value of $40,000; that while the accumulation was progressing there existed an understanding between Ross Gamble and Aaron Sands that when sufficient goods had been obtained, the entire stock was to be fraudulently transferred by the said Aaron Sands to Ross Gamble, and that it was with the above fraudulent purpose in view that the merchandise was purchased by Sands from the plaintiffs, whereby the latter were ultimately compelled to become judgment creditors of the said Aaron Sands. It was further alleged that the consummation of the above described fraudulent design was the pretended sale of the accumulated stock of goods of Aaron Sands to Ross Gamble, November 14, 1891. It was charged that, at the date last named, Aaron Sands was not indebted to the Buffalo County National Bank or to Ross Gamble or both in a sum in excess of $8,000; that the recited consideration of the bill of sale evidencing the above transfer was $29,000, of which amount $6,500 was pretended to be due as clerk hire from Aaron Sands to Allie Sands, and that a simulated payment was made of this amount by Ross Gamble giving his note to Allie Sands for that amount, which note was soon afterwards returned to Gamble, and that in fact nothing was paid except the sum not exceeding $8,000 above referred to. The plaintiffs in their petition furthermore alleged that no change of possession of the stock of goods followed the pretended transfer thereof, and that upon levies being made on said stock to satisfy the debts of the respective plaintiffs and other creditors of Sands, Ross Gamble had instituted some thirty or forty replevin suits by virtue of which he had gained and still held possession of goods which had been owned by Aaron Sands, and had been selling and disposing of the same, and for this purpose had replenished the stock as the requirements of trade demanded, and that by the means above indicated the Buffalo County National Bank and Ross Gamble had been paid a sum greatly in excess of that due

them, while the plaintiffs had been able to obtain nothing in satisfaction of the several amounts due them. The prayer of the petition in effect was that the transfer of the stock of goods from Aaron Sands to Ross Gamble might be declared fraudulent, that said Gamble might be required to account for the value of said stock and pay the judgments due plaintiffs; and to prevent a multiplicity of suits at law, and to save expense, that all the suits at law of said Gamble relating to said property and the proceeds thereof might be stayed until a full hearing could be had under the allegations of the petition, and for general equitable relief. The defendants answered separately, admitting such averments of the petition as were consistent with a *bona fide* transfer of the property to Gamble, and denying all such as were otherwise. On the trial of the issues there was a general finding in favor of the plaintiffs against the defendants, and accordingly a judgment was rendered against Ross Gamble in favor of the plaintiffs in gross in the sum of $16,945, to draw interest at seven per cent per annum. For the reversal of this judgment, which carries all the costs of the action, Ross Gamble has appealed to this court.

The district court found that the value of the property described in the bill of sale at the date of its execution, November 14, 1891, was $26,000, and that the aggregate amount of the sums due from Aaron Sands to the plaintiffs at the date of the decree, July 3, 1894, was $21,147.69. There was also a finding that Gamble, as part of the consideration for the transfer of the stock of goods to him, paid to the Buffalo County National Bank the sum of $10,100 as a *bona fide* debt at the time owing by Aaron Sands to said bank, and cancelled a *bona fide* debt at that time due from Sands to the bank of the amount of $663. As the interest on the amounts due from Sands to plaintiffs seems to have been included in the judgment against Gamble we cannot, without a full computation, make an exact comparison, but in general terms it will answer our purpose to say that the amount of that judgment,

$16,945, added to $10,100 and $663 paid and discharged by Gamble, is $27,708, while the finding of the value of the goods, as it was on November 19, 1891, was $26,000. These figures suggest the basis on which probably Gamble's liability was declared. In other words, he seems to have been charged with the value of the stock as it was on November 19, 1891, and credited what he had paid to the bank, and for the balance a judgment seems to have been rendered against him in favor of the plaintiffs in this case. At any rate we are relieved of considering any representations made to procure a credit to be extended to Aaron Sands, for the reason that the only letters introduced in evidence which had that tendency were written by the cashier of the Buffalo County National Bank, and not by Ross Gamble, and there is no pretense of any other representation. Since the finding was that there was due the Buffalo County National Bank the sum of $10,100 as a *bona fide* indebtedness, we are not required to review the evidence introduced on that proposition, for, of course, Ross Gamble, the sole appellant, does not question the correctness of this finding. It may be conceded, as claimed by the appellees, that as between the cousins, Aaron Sands and Allie Sands, a fictitious claim for clerk-hire due the latter from the former had been trumped up, and that the story of Allie Sands as to carrying in his inside vest pocket $6,500 in currency for a period of about six months was a pure fabrication, as was also the manner in which he testified he loaned it. This alone was not sufficient to justify the judgment which was rendered against Gamble, for it was requisite, to have this effect, that he should have obtained the goods with knowledge, actual or constructive, of the proposed fraud, or there must have been a want of consideration. (*Farrington v. Stone*, 35 Neb., 456; *Bank of Commerce v. Schlotfeldt*, 40 Neb., 212.) For the purpose of showing the facts tending to disclose a fraudulent purpose on the part of all parties concerned in the transfer to Ross Gamble, the plaintiffs called and used as their own witnesses the said Gamble, Aaron Sands,

and Allie Sands. In *Blackwell v. Wright*, 27 Neb., 269, the principle was recognized that a person may not impeach the character of his own witness, and that having called him is equivalent to a recommendation that he is entitled to belief which cannot be contradicted. The application of this rule eliminates from this case the attempts to show that transactions actually took place which Mr. Gamble denied, when the sole effect of the proposed proof was to show that Mr. Gamble was not worthy of belief.

The special circumstances on which plaintiffs, in oral argument, seemed to rely as indicating a common corrupt purpose between Ross Gamble and the Sands were, the improbability that between the Sands there had been suffered to accumulate an indebtedness of $6,500 for clerk-hire alone, and the lack of likelihood that Gamble should have advanced by way of loans the several amounts which he testified as a witness that he had advanced. Of these matters there was no attempt at contradiction. The plaintiffs, then, are in this situation: They have furnished evidence of transactions so unusual in their nature that we are expected to reject this evidence as being false upon its face. What now has been gained? As we have already intimated, plaintiffs are in no position to impeach the witnesses for whose credibility they have vouched in a certain sense by offering them as witnesses. No one has contradicted them, hence, if they are discredited, nothing has been gained by plaintiffs, because the ultimate inquiry in this case is not with reference to the truthfulness of these witnesses. It may be possible that they cannot speak the truth, and yet evidence of that fact would not alone be sufficient to justify the inference that a transaction in which they were interested as parties was necessarily fraudulent as to creditors of one of them. If the transaction testified to was so inherently improbable that we could not believe in its existence, we are simply brought to the point that with reference to the propositions to be established to entitle plaintiffs to a recovery there is no proof whatever. If believed to any extent

the tendency of such belief is in that degree to disprove the very facts essential to the establishment of the claim made by the plaintiffs. A very careful consideration of the evidence with reference to the allowance of the clerk-hire and its payment by Gamble fails to impress us that he acted in bad faith with reference to this claim. It is true it was of a large amount, but both Aaron Sands and Allie Sands assured him that it was due and unpaid and that he could not get his claim paid without allowing it. He therefore accepted the concurrent statement of these parties, and, as we are satisfied from all the evidence, actually paid to Allie Sands $6,500. This payment is questioned; but in view of the fact that it was testified to, not only by the Sands and Ross Gamble, but as well by Albert T. Gamble, the cashier of the Buffalo County National Bank, as plaintiff's witness, and in view of the further fact that the check by which the payment was made was produced and identified by the said cashier as the check upon which such payment was made by him, we feel bound to assume that Allie Sands received this $6,500 as a payment made by Ross Gamble, in the absence of any evidence to the contrary, except such as shall now be described. To rebut the showing above noted the plaintiffs introduced in evidence a book of the Buffalo County National Bank showing its funds on hand before, on, and immediately following November 14, 1891. On each of these days the amount of currency was about $8,000. To show that the bank could not have made up for the payment of $6,500 by means of its deposits of November 14, 1891, the deposit slips of the bank for that day were offered in evidence. These were thirty-three in number. On the first of these there was an item, "checks, $1,810." If there was but one bank in Kearney it might be assumed that from this item the bank in question would probably have received no currency on that day. This assumption dissipates very much when it is remembered that the evidence shows the existence of three other banks, at least, at the time and place last indicated. Omitting mention

of all other of these slips, we need call attention to but one of a deposit by Ross Gamble of $6,655 in currency. Upon the inquiries of plaintiffs, Ross Gamble testified as to the source from whence this money came, as he remembered the transaction, and we are convinced that his explanation under the circumstances should be accepted as satisfactory. The evidence with reference to the existence of a full consideration is equally convincing in its nature. Ross Gamble introduced in evidence eight promissory notes made to him by Aaron Sands between September 2, 1891, and October 26, 1891. These had been stamped with the stamp of the above named bank as "paid." Mr. Gamble also introduced his checks in favor of Aaron Sands of dates between September 1, 1891, and October 26, 1891, by means of which $11,306.32 above loaned had been advanced to Sands. These checks were in like manner stamped "paid." Mr. Gamble also testified as to the remaining advances being made in cash by himself, and we find no reason for doubting his testimony on this point, and it was uncontradicted. The district court must have concluded that the transfer to Gamble was fraudulent, and on that account must have disallowed the claims for this money loaned, for, in view of the evidence, there is no room for doubt that the money was loaned by Gamble to Aaron Sands substantially as both testified it was. These amounts, added to that paid by Gamble to the bank, $10,100, and the $6,500 Allie Sands was paid, more than equal $26,000—the value of the goods at the date of the transfer as found by the district court. It cannot, therefore, be open to question that the consideration paid by Ross Gamble was fully equal to the value of the goods for which the consideration was paid. As regards Ross Gamble there was no ground in the evidence for more than a mere suspicion of an improper motive, and that is not sufficient to justify an adjudication that the transfer to him was void. (*Bank of Commerce v. Schlotfeldt*, 40 Neb., 212.)

As to whether or not Ross Gamble was aware that

Aaron Sands was indebted otherwise than to Mr. Gamble himself, or to the bank of which he was president, or to Allie Sands, plaintiffs were satisfied to rely solely upon the testimony of Mr. Gamble, called and examined as their own witness. His testimony was unequivocal that he knew of no indebtedness owing by said Sands, except as above indicated. This denial, therefore, cannot be accepted otherwise than as truthful. It has been held by this court that where a purchase of an entire stock of goods, books of account, and fixtures, was made from a merchant at a fair price and with no knowledge that such merchant was indebted to other parties, the purchase should not be declared void though the purpose of the purchaser was, in part, to secure payment of a debt due the bank of which he was at the time cashier. (*Goldsmith v. Erickson*, 48 Neb., 48.) Upon the proofs submitted to the district court we therefore conclude that the findings of that court above indicated were so unsupported by the evidence that they cannot stand. Accordingly its judgment must be, and is, reversed, and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

FRANK MORGAN ET AL. V. CHARLES L. MITCHELL.

FILED NOVEMBER 18, 1897. No. 7550.

1. **Admission of Evidence:** REVIEW: PRESUMPTIONS. Where the record does not disclose by whom certain evidence was offered or that any one objected thereto, it will not be assumed in the supreme court that such evidence was improperly considered.

2. **Res Judicata:** EVIDENCE. A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but, to this operation of the judgment, it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in a former suit.

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

Byron Clark, Beeson & Root, and *C. A. Rawls,* for plaintiffs in error.

Mack & Angleton and *I. H. Hatfield, contra.*

RYAN, C.

On June 9, 1894, Charles L. Mitchell filed with a justice of the peace of Lancaster county a bill of particulars in which he claimed judgment against Simon Mayer and Frank Morgan in the sum of $120.45. The cause of action in said bill of particulars was stated as follows: "For unlawfully assigning a claim held against plaintiffs by the defendants, with the intent to avoid the exemption laws of the state of Nebraska, of which state the plaintiff was a resident." There was a trial to the jury, which resulted in a verdict for defendants, and accordingly there was a judgment. For the purpose of reversing this judgment the plaintiff filed in the district court of Lancaster county his petition, to which was attached as an exhibit the docket entries of the justice of the peace and a bill of exceptions settled during the course of the trial above referred to. A motion to quash the bill of exceptions on various technical grounds was overruled, but this ruling, though duly excepted to, we do not consider of controlling importance, as will appear in the further consideration of this case. On the trial had before the district court, error was found to have been committed in allowing to be given in evidence a transcript of the record of a cause which had been tried and determined in the district court of Cass county, and accordingly the judgment of the justice of the peace was reversed. The bill of exceptions upon which we are asked to reverse the judgment of the district court of Lancaster county fails to show how, or by whom, the bill of exceptions signed by the justice of

the peace was offered in evidence. Instead of reciting that plaintiff, to maintain his cause of action, or that defendants, to establish their defense, offered the said bill in evidence, the recitation in the bill of exceptions settled by the district court of Lancaster county is, that the last named bill of exceptions "contains all of the testimony adduced or offered by plaintiff and defendant on the trial of said cause," and "the above named plaintiff and the above named defendant each, to maintain the issue of their respective parts, adduced testimony, and all of the objections, with the grounds therefor, with all the rulings of the court on such objections and all of the exceptions to such rulings made and taken at the time, * * * the said defendants ask that this their bill of exceptions may be settled, allowed, signed, sealed, and made a part of the record," etc. Of the two quotations just made the first is taken from the certificate, whereby the bill of exceptions was settled in the district court of Lancaster county; the last quotation is found in the caption with which said bill of exceptions begins. As there is no showing who offered in evidence the bill of exceptions settled by the justice of the peace, we cannot for the purpose of rebutting the presumption that the district court ruled properly, presume that this offer was by the plaintiff in error in that court and that the defendants objected thereto and upon their objections being overruled that they excepted to such ruling. We shall therefore without technical nicety consider the alleged error solely upon its merits.

The claim upon which judgment was sought in the court of the justice of the peace has already been described as fully as the same is disclosed by the record before us. The transcript admitted in evidence upon the trial contained copies of a petition and an answer followed by a journal entry in a cause purporting to have been tried in the district court of Cass county. The plaintiffs in the cause just referred to numbered twenty-seven persons, between whom there seems to have been no privity

or relationship except that they had a common desire that the defendants, twenty in number, entirely independent of each other, should be enjoined from prosecuting or aiding in the prosecution of any actions for the collection of claims from any of the plaintiffs. The grounds for immunity pleaded were that the plaintiffs were employes of the Chicago, Burlington and Quincy Railroad Company, owner and assignee of the Burlington and Missouri River Railroad Company, a corporation doing an interstate business between Nebraska (in which state plaintiffs as residents thereof were by law entitled to hold exempt certain wages) and Iowa, wherein one of the defendants as assignee of certain claims owned by his co-defendants by garnishment of the railroad company was seeking to subject such wages to the payment of debts alleged to be due from the several plaintiffs. The answer contained a denial of all the matters which constituted plaintiff's ground for praying the injunction. The issues thus joined were tried to the court, by which the existing injunction was dissolved and the costs were taxed to the plaintiffs. Subsequently, on motion of the defendants, the action was dismissed for want of equity. The introduction in evidence of this record on the trial before the justice of the peace must have been prejudicially erroneous. It is true that among the twenty-seven plaintiffs C. S. Mitchell was named, and that among the names in the list of defendants, Mayer & Morgan, a partnership, Simeon Mayer, Chas. Mayer, and Frank J. Morgan, appear as defendants, but, so far as the record shows, there was no proof of identity between the defendants just named and Frank Morgan and Simeon Morgan, the defendants in this case. If this matter depended upon inference, the variance by reason of the absence of an initial letter in the name of one defendant and of a want of uniformity in the spelling of the given name of the other could not be without significance. Again, the petition for the injunction was filed in the district court of Cass county September 27, 1892, and the final dismissal of that case

was a year and a day thereafter. As already stated, the action under consideration was begun June 9, 1894, and it thus appears that a period of more than eight months had intervened between the final disposition of the injunction action and the commencement of this suit. It was scarcely fair to submit to the jury evidence of the commencement of an action to enjoin the collection of a claim, and, in view of the fact that dispute had culminated in a suit with reference to a similar matter nearly two years afterwards, to ask such jury, in the absence of either pleading or proof to that effect, to assume that between these matters of litigation there was such a necessary connection that the fate of the later commenced case should be made dependent upon that of the earlier. The rule applicable is thus stated in the first paragraph of the syllabus of the case of *Wilch v. Phelps*, 16 Neb., 515: "A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment, it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit." No comment is necessary to make clear a fact which is perfectly obvious, and that is, that there was no such pleading or proof as to render the transcript of the record offered admissible in evidence. The judgment of the district court was correct and is therefore

AFFIRMED.

DEERE, WELLS & COMPANY V. PETER HEINTZ.

FILED NOVEMBER 18, 1897. No. 7571.

Instructions Foreign to Issues: SALES: REVIEW. An instruction which invited the attention of the jury to the assumed existence of a warranty in the sale of personal property not pleaded in the petition, and as to which no breach was alleged, *held* prejudicially erroneous.

ERROR from the district court of Hall county. Tried below before THOMPSON, J. *Reversed.*

M. T. Garlow, for plaintiff in error.

James H. Woolley, contra.

RYAN, C.

In his amended petition in the district court of Hall county Peter Heintz alleged that about January 13, 1892, he, as agent for Adam Windolph, had purchased a stock of plows from Deere, Wells & Co. for the spring trade of 1892, and that in said purchase were included two "New Deal Gang Plows," for which said Heintz as agent of Windolph paid the sum of $89.50. It was further averred in the petition that Deere, Wells & Co. represented in a written contract, upon which reliance was placed by Windolph in purchasing as aforesaid, that "All plows sold under said contract were suitable for spring plowing and the spring trade and perfectly fit and suitable for the purposes the said tools were sold, viz., plowing; and under said contract defendant agreed to be responsible for the performance and work of all said plows sold and especially the two in controversy in this case, excepting that the manufacturer shall not be held responsible for the performance of a plow after it has been heated or radically changed by anyone away from the factory." It was furthermore alleged that, "Said plows were not heated or radically changed in any manner whatever; that plaintiff gave both plows a fair and impartial trial in different kinds and conditions of soil during the spring and summer of 1892, and that said plows were worthless for the purpose sold, *i. e.*, plowing, or for any other or different purpose, and that they refused to work and did not work even in the hands of experts." The above quoted averments were followed by allegations of a return of the said plows to the defendant by direction of its general agent, an assignment by Windolph of his right of action to plaintiff

and of a demand of payment of the claim sued on and the continued refusal of defendant to make such payment. There was also a prayer for judgment in the sum of $89.50, with interest from September 12, 1892,—the date of the alleged assignment of the claim to Heintz. By the defendant's answer the averments of the petition were denied except that there were admissions of the refusal to pay and of the existence of the exception which exempted the defendant from liability if the plows were heated or radically changed. There were affirmative matters pleaded in the answer, but in the view we take of the case it is not necessary at this time that these should be considered. There was a verdict for the amount claimed by the plaintiff, on which verdict judgment was duly rendered, and for the reversal of this judgment Deere, Wells & Co. prosecute these error proceedings to this court.

From the description of the cause of action set out in the petition which has been already given it is clear that the warranty pleaded was that the two plows were suitable for spring trade, and were perfectly fit for the purpose for which they were sold, that is, for plowing, and that Deere, Wells & Co. agreed to be responsible for the performance and work of these plows. The breach of the above warranty alleged was that the plows were worthless for plowing and refused to work and did not work even in the hands of experts. Lest there may be a misapprehension of our meaning it is proper to say that we do not consider the averment that these plows were worthless for any other or different purpose than plowing, as at all material, for it is not within the scope of the warranty set out in the petition. As we view it, therefore, the breach of warranty upon which alone plaintiff in the district court was entitled to rely for a recovery was, that the plows would not work, and were worthless for plowing. There was given by the court the following instruction: "No. 10. The jury are instructed that the word 'workmanship' is defined and means that which is effected, made, or pro-

duced, manufactured, especially something made by manual labor; and, if you find from the evidence that the defendant Deere, Wells & Co. warranted the plows to be of good workmanship, then in that event, the said plows were warranted to be properly constructed, made, and produced, and fit for the purpose sold." Under the averments of the petition it was not a relevant inquiry as to whether or not the two plows were of good workmanship; neither was the right to a recovery in terms predicated upon an agreement that the plows were properly constructed, made, and produced. It was required to make out the breach of the warranty pleaded to show that the plows would not work or would not do good plowing, and it mattered not even though they might be awkward in design and unsymmetrical in proportion. By this instruction the attention of the jury was directed to an inquiry which was entirely foreign to the issues presented by the pleadings, and we cannot but think that in this misdirection there was prejudicial error. The judgment of the district court is therefore reversed.

REVERSED AND REMANDED.

TOOTLE, HOSEA & CO. ET AL. V. ROBERT E. SHIREY.

FILED NOVEMBER 18, 1897. No. 7584.

Time to Appeal: WAIVER OF DELAY. By section 592, Code of Civil Procedure, the jurisdiction of the supreme court is made dependent upon the commencement of error proceedings therein within one year after the date of the judgment sought to be reversed, and a waiver by consent is not effective to enlarge the time thus limited by statute.

ERROR from the district court of Webster county. Tried below before GASLIN, J. *Proceeding in error dismissed.*

George W. Barker, *J. S. Gilham*, and *W. K. James*, for plaintiffs in error.

James McNeny, *contra.*

RYAN, C.

The petition in error in this case was filed in this court March 15, 1895, together with a transcript of the proceedings of the district court of Webster county. This petition in error correctly recites that the judgment sought to be reversed was rendered October 15, 1891. The interval between the rendition of the judgment and the filing of the petition in error and transcript in this court was therefore three years and five months. The filing was therefore too late. (*Hollenbeck v. Tarkington*, 14 Neb., 430; *Phenix Ins. Co. v. Swantkowski*, 31 Neb., 245; *Chapman v. Allen*, 33 Neb., 129; *Sturtevant v. Wineland*, 22 Neb., 702; *Clark v. Morgan*, 21 Neb., 673; *Benson v. Michael*, 29 Neb., 131; *Patterson v. Woodland*, 28 Neb., 250; *Stull v. Cass County*, 51 Neb., 760.)

It seems that parties stipulated that, to subserve their own convenience, the record should be retained in Red Cloud until submission and that, meantime, such record should be regarded as having been filed. In so far as this is applicable to the facts of this case the provisions of section 592 of the Code of Civil Procedure, upon which depends the jurisdiction of this court, are as follows: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or making of the final order complained of." It is very clear that this express limitation of time cannot be enlarged by stipulation, for this would be violative of the rule that a waiver by consent cannot confer upon an appellate court jurisdiction of the subject-matter. (*Brondberg v. Babbott*, 14 Neb., 517; *Union P. R. Co. v. Ogilvy*, 18 Neb., 638.) The error proceedings are therefore

DISMISSED.

AMERICAN FIRE INSURANCE COMPANY OF NEW YORK V. BUCKSTAFF BROTHERS MANUFACTURING COMPANY.

FILED NOVEMBER 18, 1897. No. 7585.

Review: SPECIAL FINDING: INSUFFICIENCY OF EVIDENCE. The judgment in this case being dependent upon a special finding manifestly unsupported by the evidence is reversed.

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

Jacob Fawcett, Stevens & Cochran, Greene & Breckenridge, and *C. J. Greene,* for plaintiff in error.

Charles O. Whedon, contra.

RYAN, C.

The Buckstaff Brothers Manufacturing Company, a corporation, began this action in the district court of Lancaster county for the recovery of the amount of damage which it alleged it had sustained by the destruction by fire of certain property covered by two policies of insurance issued by the American Fire Insurance Company of New York. There was a verdict in accordance with the prayer of the petition and the insurance company prosecutes this proceeding in error to reverse the judgment thereon rendered. In the discussion of the case we shall designate the above named manufacturing company as plaintiff and the insurance company as defendant, conformably with their relations to the case at its inception.

The property insured was described in the policy under three items, upon each of which a certain amount of insurance was placed, as shown by the following language employed in both policies:

"$225 on its one-story gravel and board roof building, all adjoining and communicating, and occupied by the assured as a boiler and engine house, brick machinery room, clay-mixing rooms, and dry tunnels building.

"$75 on boilers, foundations, settings, and iron smokestack, engines, foundations, and settings, pumps and all their immediate connections while contained therein.

"$700 on fixed and movable machinery of all kinds (except engines, boilers, and pumps), shafting, belting, gearing, hangers, pulleys, conveyers, brick machines, clay crushers, pug mills, iron cars, trucks, tracks, pallets, blowers and fans, tools, implements, millwright work, steam and water pipes, while contained therein."

It was averred in the petition that the property insured was all real property, and at the date of the policies until the time of the fire was used in the process and business of manufacturing brick, and that said property constituted a brick manufactory at the time it was burned. The contentions in the case which we shall consider have reference to the above averments, that the property described in the three items noted in the policies was real property at the time of its destruction. To an understanding of the bearing of the claim of plaintiff that this property was realty, it is only necessary to quote three of the instructions given by the district court in the trial of the case, which instructions are as follows:

"7. A statute of this state provides that 'whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, * * * and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages.' This statute was enacted and based upon sound principles of public policy, and not upon consideration of possible benefits or disadvantages to any individual or corporation.

"8. The parties to an insurance contract are incompetent and incapable in law to make any stipulation or agreement in the policy, or to do any act or acts the effect of which is to annul or abrogate the provisions of this

statute. If, therefore, from the evidence in this case, under the principles of law stated in these instructions hereinafter, you shall find and determine that at the time said insurance contracts,—the policies sued on,—were entered into between plaintiff and defendant, and when the fire occurred, the property described and insured in said second and third items was, as a matter of fact, 'real property,' and was by said fire wholly destroyed within the meaning of said statute, then plaintiff is in this action entitled to recover the full amount of the insurance written on said items, irrespective of any qualifications thereof in the policies as 'personal property,' irrespective of the actual value of said property at the time of the fire, and notwithstanding the facts that plaintiff entered into an arbitration to ascertain the amount of actual loss on said second and third items, and that the award found that the actual damage sustained by plaintiff thereon from said fire to be less than the total insurance written on said property.

"9. Originally all the property described in said second and third items of said policies was 'personal property,'—that is, before the different articles therein named were by the owner made part of his brick manufactory, said articles were personal property because not connected with the real estate. Whether, at the time the policies sued on were issued, and when the fire occurred, said property described and insured in said second and third items of said policies was actually real or personal property, is a question of fact which the jury in this action must determine from the evidence touching that matter, applying thereto the principles of law now stated."

There was submitted to the jury certain questions, among which, with its answer constituting a special finding, was the following: "Under the law as stated by the court, and from the evidence in this case, what do you say and find the property described and insured in the second and third items of the policies was, when

insured, and at the time of the fire,—real property, or personal property? Answer: Real property."

The nature of a portion of the property included in the third item of the policy was described in the testimony of J. A. Buckstaff, president of plaintiff, as well as the original cost of each article. We have not been able to find in the bill of exceptions any basis established by the evidence of plaintiff as to the value of these articles more satisfactory than the original cost, and therefore, to illustrate our views, we shall make use of this class of evidence, unsatisfactory though it might be for other purposes. There were 22,000 pallets which cost 14 cents each, in all $3,080. These were wooden trays upon which unburned bricks were placed for convenience in handling them. There were 750 cars which cost $13.30 each, or a total of $9,975. There were 280 feet of manilla rope which cost $22.40. There were fifty-one iron tray wheelbarrows which cost $3.50 each, or in the aggregate $168.50. There was a schedule of tools, which in the bill of exceptions covers three pages. The total cost of these tools was $229.54. They consisted of saws, spirit levels, augers, drills, chisels, hammers, dies, monkey-wrenches, etc. The total cost of all the articles above indicated was $13,475.44. The verdict was for $2,234.50.

It appears that about the time this action was begun there were twenty-four other suits, instituted against as many different insurance companies, for the recovery of damages sustained by reason of the same fire which occasioned the damages sued for in this case, and that all these suits were tried on practically the same evidence. The above personal property was therefore but a comparatively small fraction of the property destroyed, and it is probably owing to this fact that the recovery was claimed under the statute as for the total destruction of real property. This case, however, comes before us unaccompanied by any other, and must be considered as though no other insurance on the property had ever existed. The result of this on one hand is, that as the

amount found by the jury was very much less than the finding of loss by the arbitrators, the questions presented with respect to this arbitration cannot profitably be considered. On the other hand, the cost of the property which we have above considered is disproportionately in excess of the verdict, from which it results that no remittitur can enable plaintiff to secure an affirmance of a portion of the judgment recovered in the district court. The special finding, that all the property included in the third item of the policies sued on was real property, was so manifestly unwarranted, that the general verdict founded thereon cannot be permitted to stand. The judgment of the district court is accordingly reversed.

REVERSED AND REMANDED.

SAMUEL HYDE ET AL. V. ANTON MICHELSON.

FILED NOVEMBER 18, 1897. No. 7553.

1. **Judgment Entry Nunc Pro Tunc:** TIME: NOTICE. If, in any proceeding pending in a court, a judgment is actually pronounced or an order actually made, and, if for any reason, such judgment or order is not recorded, then at any time afterward, upon proper notice being given to the parties interested and the facts being shown that such judgment was pronounced or such order made, the court may cause such order or judgment to be spread upon its records as of the date it was pronounced or made. *Van Etten v. Test*, 49 Neb., 725, followed.

2. ———. The provisions of section 609 of the Code of Civil Procedure are not applicable to a motion for an entry *nunc pro tunc* of a judgment or order.

3. ———: RIGHTS OF THIRD PERSONS. A party to an action cannot prevent the court from entering *nunc pro tunc* the judgment pronounced by it, by showing that some third person, not a party to said suit, has acquired an interest in the property involved in the litigation since the rendition of the judgment which it is sought to have spread upon the records.

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

John Lothrop, for plaintiffs in error.

Davis & Howell and *E. R. Duffie*, *contra*.

RAGAN, C.

On September 15, 1890, in the district court of Washington county, an action came on for trial wherein Anton Michelson was plaintiff and Samuel Hyde, Welcome Hyde, John Lothrop, and Hortense Lothrop were defendants. It appears that Michelson in his petition in that action alleged that Welcome Hyde was, on December 8, 1857, the owner of certain real estate in controversy in the case; that on said date the said Welcome Hyde attempted to constitute the said Samuel Hyde his attorney in fact to sell and convey said real estate, but that the power of attorney was, in some manner not disclosed by the record, defective; that Samuel Hyde as such attorney in fact had, however, sold and conveyed, or attempted to convey, the real estate to Michelson; that subsequently Welcome Hyde and wife by quitclaim deed conveyed the premises in controversy to the defendant John Lothrop, who entered into possession thereof. It seems that Michelson in his petition prayed that the quitclaim deed from Welcome Hyde to the Lothrops might be set aside; that the said Welcome Hyde might be ordered to execute and deliver to the said Samuel Hyde a valid power of attorney authorizing the latter to sell and convey the real estate in controversy, and that in default of his doing so within twenty days the court should enter a decree reforming said power of attorney; and Michelson also prayed that the title to the real estate in controversy might be quieted and confirmed in him. It seems that neither Samuel Hyde nor Welcome Hyde appeared at any time during the pendency of the action, but the Lothrops appeared and defended the same. The judgment or decree entered by the district court in the case is not in the record. On February 23, 1894, Michelson moved the district court to enter a judg-

ment, as of the date of September 15, 1890, dismissing his petition in said case in so far as it related to his prayer that his title to the real estate described therein might be quieted and confirmed in him. Due notice of this application was served upon the Lothrops, and they appeared and resisted the motion. The district court found—and the evidence sustains the finding—that at the time of the trial of the action in September, 1890, and before its final submission, Michelson in open court dismissed that part of his petition which prayed that the title to the real estate in controversy might be quieted and confirmed in him; that the court allowed such dismissal to be made and announced that it would be so entered upon the records, but such dismissal was not so entered. Whether, in the decree rendered in the action at that time and journalized, anything was said in reference to quieting and confirming in Michelson the title to the real estate in controversy, we have no means of knowing, since, as already stated, the decree actually journalized at that time is not in the record. The district court in February, 1894, sustained the motion of Michelson for the entry *nunc pro tunc* of the decree dismissing his action in relation to the matter already mentioned, and this order Lothrop brings here for review on error.

1. It is not an open question in this state that the district courts thereof are invested with authority to make their records disclose what actually transpired. If in any proceeding pending in a court a judgment is actually pronounced or an order actually made, and if for any reason such judgment or order is not recorded, then, at any time afterwards, upon proper notice being given to the parties interested and the facts being established that such judgment was pronounced or such order made, the court may cause such order or judgment to be spread upon its records as of the date it was pronounced or made. (*Van Etten v. Test*, 49 Neb., 725, and cases there cited.)

2. The *nunc pro tunc* entry of the judgment in the case at bar was made more than three years after the actual rendition of the judgment; and it is insisted by counsel for plaintiff in error that the court was without jurisdiction to make this entry by reason of this lapse of time. This contention of counsel is based upon their construction of section 609 of the Code of Civil Procedure. This section provides that a proceeding to vacate or modify a judgment on account of the mistake, neglect, or omission of the clerk, or irregularity in obtaining such judgment, shall be brought within three years after such judgment is pronounced. But this is not an action to vacate or modify a judgment rendered. It is a proceeding to have spread upon the records a judgment which was in fact rendered but not recorded, and section 609 has no application to such a proceeding as this.

3. It appears, from the evidence introduced on the hearing of the motion for the *nunc pro tunc* entry of the judgment, that since the final decree was rendered in the case the Lothrops have conveyed the real estate in controversy to a man named Gustin; and the argument is here made that it was error for the court to make the *nunc pro tunc* order, since it affected the rights of third parties to the property affected thereby. The answer to this contention is that Gustin is not a party to this suit nor a party to this application for the *nunc pro tunc* order. He has not intervened either in the action or in this proceeding and asked for the protection of the court. The Lothrops cannot prevent the court from having spread upon its records the judgment actually rendered in the suit to which they were defendants by insisting upon any rights which Gustin may have acquired to the property. In other words, Gustin is not before the court, and his rights, if he have any, are not adjudicated in this proceeding. The judgment of the district court is

AFFIRMED.

CULBERTSON IRRIGATING & WATER-POWER COMPANY V. A. B. COX.

FILED NOVEMBER 18, 1897. No. 7561.

1. **Pleading:** NEW MATTER: PAYMENT. Where a petition declares for a balance due upon a contract and the answer pleads payment, such plea is a material allegation of new matter within the meaning of section 134 of the Code of Civil Procedure.

2. ———: REPLY TO NEW MATTER. A reply must be made to all the material allegations of new matter contained in the answer or they will be taken as true.

3. ———: PAYMENT. Payment is a matter of defense, and, in order to enable a party to prove the same, he must plead it.

4. ———: MATERIAL ALLEGATIONS. A material allegation is one essential to a claim or defense which cannot be stricken from the pleading without leaving it insufficient. (Code of Civil Procedure, sec. 135.)

ERROR from the district court of Hitchcock county. Tried below before WELTY, J. *Reversed.*

F. I. Foss, L. H. Blackledge, and *W. R. Matson,* for plaintiff in error.

RAGAN, C.

The Culbertson Irrigating & Water-Power Company seeks by this proceeding in error to reverse a judgment of the district court of Hitchcock county rendered against it in favor of A. B. Cox. Cox sued the irrigating company for a balance due him on a contract for labor performed by him in constructing a ditch for said irrigating company. For a defense the irrigating company alleged that it had paid Cox for all labor performed by him under the contract sued on. There was no reply to this answer.

Section 134 of the Code of Civil Procedure, among other things, provides that every material allegation of new matter in the answer not controverted by the reply

shall, for the purposes of the action, be taken as true. The question presented is, where a petition declares for a balance due upon a contract and the answer pleads payment, whether such plea is a material allegation of new matter within the meaning of said section 134. In *McCann v. McLennan*, 2 Neb., 286, it was held that a reply was not necessary to new matter alleged in an answer unless the new matter constituted a counter-claim or set-off. This conclusion was reached by the court in construing the then section 108 of the Code of Civil Procedure in connection with section 109 of said Code as it then existed and section 134 as it exists at the present time. But the legislature of 1873 repealed section 108 of the Code of Civil Procedure and amended section 109 of said Code, which act of the legislature had the effect to destroy the force and effect of *McCann v. McLennan, supra*, as to the point under consideration. Since this legislation took effect the uniform holding of this court has been that a reply must be made to all material allegations of new matter contained in the answer or they would be taken as true. (*Dillon v. Russell*, 5 Neb., 484; *Williams v. Evans*, 6 Neb., 216; *Payne v. Briggs*, 8 Neb., 75; *Prall v. Peters*, 32 Neb., 832; *Bouscaren v. Brown*, 40 Neb., 722; *National Lumber Co. v. Ashby*, 41 Neb., 292; *Johnson v. Reed*, 47 Neb., 322; *Van Etten v. Kosters*, 48 Neb., 152; *Scofield v. Clark*, 48 Neb., 711.) Payment is a matter of defense which to be available the defendant is required to set up in his answer. (*Ashland Land & Live-Stock Co. v. May*, 51 Neb., 474.) In *Sharpless v. Giffen*, 47 Neb., 146, it was held that in an action on a promissory note want of consideration was new matter which must be specially pleaded and was not available as a defense under a general denial. We think, therefore, that when a petition declares for money due upon a contract an allegation of payment is a material one, and the defense of payment is new matter within the meaning of section 134 of the Code of Civil Procedure. Section 135 of the Code defines a material

allegation as one essential to the claim or defense which could not be stricken from the pleading without leaving it insufficient. In the case at bar the pleadings do not support the judgment rendered. It is accordingly reversed and the cause remanded with instructions to the district court to permit the plaintiff below, if he desires, to file a reply upon such terms as the district court may deem just.

REVERSED AND REMANDED.

JOHN LAVIGNE V. JOHN TOBIN ET AL.

FILED NOVEMBER 18, 1897. No. 7574.

1. **Creditor's Bill:** PLEADING: HUSBAND AND WIFE. A creditor's bill which seeks to have real estate conveyed to a wife by a stranger subjected to a judgment against the husband, which does not allege that the debt of the husband existed at the date of such conveyance, nor that the husband caused the conveyance to be made to his wife in expectation of becoming indebted, does not state a cause of action.
2. **Husband and Wife:** GIFTS TO WIFE. Except as against existing creditors and as against those to whom he contemplates becoming indebted, one may gratuitously convey his property to his wife.

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

John S. Stull and *C. P. Edwards,* for plaintiff in error.

Sloan & Moran, contra.

RAGAN, C.

John Lavigne brought a suit in equity in the district court of Nemaha county against John, Ida, and Thomas Tobin, Bernard A. Minnig, and Margaret A. Ferguson. The district court, after hearing the evidence of the plaintiff below, dismissed his petition and he brings that judgment here for review on petition in error.

In his petition Lavigne alleged that in October, 1890, he recovered a judgment against the defendant John Tobin for $561 and costs; that execution had been issued and returned wholly unsatisfied; that the judgment remained wholly unpaid and that Tobin was insolvent. The petition further alleged that in January, 1888, a man named Stevenson, for a valuable consideration, conveyed certain real estate to the defendant Ida Tobin, wife of John Tobin; that John Tobin paid Stevenson the consideration for this real estate and had it conveyed to Tobin's wife for the purpose of placing it beyond the reach of Tobin's creditors. The petition then alleged the conveyance by Ida Tobin and her husband of a part of this land to the defendant Thomas Tobin, and another portion of it to Minnig, and that these two last-named parties had mortgaged their respective pieces of land to the defendant Ferguson. The bill charged that all these conveyances were for the purpose of defrauding the creditors of John Tobin. The prayer was that the mortgage of Ferguson, the deeds of Thomas Tobin and Minnig might be set aside, and that the title to the real estate be declared held in trust by Ida Tobin for her husband, John Tobin, and sold to satisfy Lavigne's judgment.

We think the district court reached the correct conclusion from the evidence before it. We shall not restate this evidence, or any of it, but rest our affirmation of the judgment of the district court upon the ground that this petition does not state a cause of action. There is no allegation in the petition that at the time Stevenson conveyed this land to John Tobin's wife in 1888 John Tobin was then indebted to Lavigne. From aught that appears from the petition, Lavigne's debt was contracted more than two years after this conveyance was made. Nor does the petition allege that at the time Tobin caused Stevenson to convey this real estate to the former's wife he did so with the expectation of contracting the debt made the basis of this creditor's bill. If

Tobin, as the bill alleges, paid the consideration for the real estate conveyed to his wife by Stevenson, and if, at that time, he was not indebted to Lavigne and not expecting or intending to become indebted to him, then Lavigne has no ground of complaint. Except as against his then existing creditors, and except as against those to whom he contemplated becoming indebted, Tobin might have taken the title to this real estate in his name, and then gratuitously conveyed it through a trustee to his wife, and no creditor of his, whose debt was contracted subsequent to that time, could assail the conveyance or gift. (*Jansen v. Lewis*, 52 Neb., 556; *May v. Hoover*, 48 Neb., 199.) The judgment of the district court is

AFFIRMED.

JASPER HUFFMAN V. WILLIAM ELLIS.

FILED NOVEMBER 18, 1897. No. 7566.

Appeal from Justice of the Peace: ISSUES: JUDGMENT: RES JUDICATA. In a justice court plaintiff's bill of particulars contained two causes of action. The justice found for the defendant as to the first cause of action, and adjudged that he go hence without day, and against him on the second cause of action, and rendered a judgment against him for $——. The defendant alone appealed to the district court. *Held* (1) That the justice of the peace rendered, and could render, but one final judgment in the action; (2) that the appeal brought up the whole case; (3) that an answer which interposed in the district court the finding and judgment of the justice of the peace on such first cause of action as a plea of *res judicata* was a mere nullity.

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

G. W. Bemis, for plaintiff in error.

F. C. Power, contra.

RAGAN, C.

Before a justice of the peace of York county Jasper Huffman brought this suit against William Ellis. In his bill of particulars Huffman alleged for a first cause of action that Ellis, being the owner of a certain tract of land, employed Huffman to find a purchaser for the same at the price of $4,000 and agreed to pay him for such service $80; that he procured for Ellis a purchaser ready, willing, and able, who offered to take said land at said price, and that Huffman, acting as Ellis' agent, contracted to sell said land to said party at said price; but Ellis refused to convey the land. For a second cause of action Huffman alleged that Ellis, subsequent to the time he refused to convey said land, as already stated, employed Huffman to find a purchaser for the said real estate at the sum of $4,500, agreeing to pay him a commission therefor of $90; and that Huffman, acting as the agent of Ellis, contracted to sell said last-mentioned purchaser said land at said price of $4,500; and that Ellis refused to consummate the sale. There was a prayer for judgment against Ellis for $170.

From the transcript of the proceedings in the case had before the justice and certified to the district court the following appears: "I find in favor of the plaintiff as to the second cause of action in the bill of particulars; and as to the first cause of action * * * I find for the defendant. It is therefore considered that as to the said first cause of action the defendant go hence without day; and as to the said second cause of action plaintiff recover from the defendant the sum of $90 and costs." From the judgment rendered by the justice Ellis appealed to the district court. In that court the plaintiff filed a petition setting out the two causes of action that constituted his bill of particulars before the justice. To this petition Ellis, in addition to a general denial, set up in his answer the finding of the justice in his favor on the first cause of action as a defense in the nature of a

plea of *res judicata* to Huffman's first cause of action. To this Huffman filed a reply setting out the entire proceedings had before the justice, including the fact that from the judgment of the justice Ellis had appealed. The district court, on motion of Ellis, struck out all this reply except so much as amounted to a general denial of the allegations of Ellis' answer. By its instructions the district court confined the jury to a consideration of the second cause of action stated by Huffman in his petition. The trial resulted in a verdict and judgment in favor of Ellis and Huffman brings the case here for review.

The court did not err in sustaining the motion of Ellis to strike out the allegations of Huffman's reply, but did err in sustaining the so-called "plea of *res judicata.*" The answer of Ellis amounted to a general denial. All other averments of the answer were surplusage. There was pending before the justice of the peace but one action, and there was rendered and could be rendered by him in the case but one final judgment, and this had been vacated and set aside by Ellis' appeal therefrom; and after the appeal was duly docketed in the district court the action stood and was to be proceeded with there in all respects in the same manner as though it had been originally brought in the district court. (Code of Civil Procedure, sec. 1010.)

It seems to have been the opinion of the learned district court that because there were two causes of action in Huffman's bill of particulars filed with the justice, and that as to one of these causes of action the justice found in favor of Ellis, it was necessary for Huffman to appeal from that finding of the justice or the finding would be *res judicata.* The adoption of this practice would lead to a species of judicial hair-splitting not contemplated by the Code, and subversive of the ends of justice. In the case at bar the justice of the peace rendered only one final judgment. There being but one case pending, he could render but one final judgment, no matter how many causes of action or grounds of defense the

pleadings before him contained. Furthermore, the right of appeal from a judgment is a statutory right, and in the absence of an express law authorizing a party to appeal from a part of a judgment rendered an appeal, when taken, should be held to bring up the whole case. Certainly this was the understanding of the legislature when it adopted section 1010 of the Code of Civil Procedure. To sustain the action of the trial court in sustaining the plea of *res judicata* interposed by Ellis to Huffman's action we are cited to *Bates v. Stanley*, 51 Neb., 252. That was a replevin action brought in the county court which found for the plaintiff in an action as to certain of the goods taken, and found for the defendant as to the residue of said goods and rendered a judgment on each of said findings. The plaintiff in the action appealed to the district court. The defendant in the action took no appeal. When the case reached this court it was insisted that the judgment of the county court which found the right of possession of certain property to be in the plaintiff and awarded him a judgment therefor was *res judicata* as to the defendant who took no appeal from such judgment. But this court held, NORVAL, J., dissenting, that the judgment rendered by the county court was a single judgment and the appeal taken by the plaintiff in the action from that judgment brought up the whole case and that it stood for trial *de novo* in the district court. The case cited is an authority against the contention of defendant in error. The judgment of the district court is reversed and the cause remanded.

REVERSED.

L. C. FROST V. J. A. FALGETTER ET AL., IMPLEADED WITH HARRIET E. LOOMER, APPELLANT, AND THOMAS MADDEN ET AL., APPELLEES.

FILED NOVEMBER 18, 1897. No. 7618.

1. **Mechanics' Liens:** WAIVER: CONTRACT. Where a contractor agrees in writing with the owner of real estate to furnish the labor and material and erect thereon a building, and in payment for such services to accept a conveyance from such owner of certain real estate described in said contract, such contractor is not entitled to a lien on the real estate on which he erects the improvement, in the absence of fraud or a failure of the owner to make the conveyance promised.

2. ———: ———: SUBCONTRACTORS. In such case a subcontractor who has furnished labor or material to the contractor for such improvement cannot assert a lien against the owner's real estate.

3. ———: CONTRACTS: SUBCONTRACTORS. The relationship between a contractor and an owner rests in contract, express or implied, but there is no privity of contract between the subcontractor and the owner.

4. ———: ———: ———: CONSTRUCTION OF STATUTE. Section 2, article 1, chapter 54, Compiled Statutes, construed and *held* (1) to contemplate a contract between the owner of real estate and the contractor in and by which the former shall pay the latter money for erecting an improvement upon such real estate; (2) that the effect of a subcontractor complying with such statute is to garnish or impound money owing to him from the contractor in the hands of the owner; (3) that the statute then gives the subcontractor a lien to secure the payment of the money so garnished; (4) that, to entitle the subcontractor who has complied with the statute to a lien upon the owner's real estate, the owner must be indebted in money to the contractor and he must be indebted in money to the subcontractor, and unless these two facts exist the subcontractor is not entitled to a lien.

5. ———: ———: ———. Subcontractors are charged with notice of the terms of the contract existing between the owner and contractor, and when in such agreement the contractor stipulates for payment in something besides money subcontractors furnish him labor and material at their peril.

6. ———: ———: ———: LIABILITY OF OWNER: GARNISHMENT. Though a subcontractor may be entitled to assert a lien against an owner's real estate, he is not therefore entitled to a personal judgment against the owner for the amount due him from the contractor.

APPEAL from the district court of Dawes county. Heard below before KINKAID, J. *Reversed.*

C. H. Bane, for appellant.

Allen G. Fisher, D. B. Jenckes, and *C. Dana Sayrs, contra.*

RAGAN, C.

The district court of Dawes county rendered a decree giving Thomas Madden and Robert Hood subcontractors' liens against certain real estate of Harriet E. Loomer for the value of material and labor furnished by them to one Falgetter, who, in pursuance of a contract with Mrs. Loomer, was erecting an improvement upon said real estate. From this decree Mrs. Loomer appeals. Falgetter and Mrs. Loomer entered into a contract in writing in and by which Falgetter agreed to furnish the material, perform the labor, and build for Mrs. Loomer a dwelling-house upon her real estate. As full compensation for such labor and material Mrs. Loomer agreed, on completion of the improvement, to convey to Falgetter certain real estate described in the contract. The agreement is silent as to the contract price for the improvement and as to the value of the real estate. Falgetter began the performance of his contract, but before it was entirely completed abandoned it, and seems to have departed the realm. The appellee Hood furnished Falgetter part of the lumber and building material used by him in the construction of this improvement for Mrs. Loomer. Within sixty days after the date of the furnishing of the last item of material he filed a sworn statement of the amount due him from Falgetter for the material, together with a description of Mrs. Loomer's real estate, with the register of deeds of Dawes county, where the same was situate, and claimed a lien thereon for the amount due him from Falgetter. To the claims of Hood and Madden for subcontractors' liens on her premises Mrs. Loomer interposed, among other

defenses, the contract for the erection of the improvement existing between herself and her contractor, Falgetter, and, in effect, offered in her answer to convey said real estate to the subcontractors upon their completion of the building according to the contract existing between herself and Falgetter. The conclusion reached by us here as to the right of Hood to a lien disposes also of Madden's right to a lien.

1. Falgetter, the contractor, having in pursuance of an express contract with the owner of real estate furnished the labor and material for the erection of an improvement thereon, was, by section 1, article 1, chapter 54, Compiled Statutes, vested with a right to a lien upon said real estate to secure the payment of the contract price for erecting such improvement; but this right to a lien was one which the contractor might waive, and as he stipulated to take a certain piece of real estate in payment of his compensation for erecting such improvement, we think Falgetter waived his right to insist upon a lien against these premises, as it was not the intention of the parties that this real estate should be a security to insure Falgetter being recompensed for his services in erecting the improvement; but the real estate was to be Falgetter's entire recompense for his services in the premises. Certainly this is true in the absence of fraud or a failure or refusal of Mrs. Loomer to make the conveyance of the real estate as agreed. See *Dore v. Sellers*, 27 Cal., 588, in which a contractor agreed to furnish the material and construct a building in consideration of a debt then due from him to the owner, and it was held that the contractor had by the contract waived his right to a lien upon the premises upon which the improvement was erected. (See also *Bayard v. McGraw*, 1 Brad. [Ill. App.], 134; *Jones & Magee Lumber Co. v. Murphy*, 19 N. W. Rep. [Ia.], 898.)

2. But Falgetter has not attempted to assert a lien against the premises upon which this improvement was erected; and, since he waived his right to a lien and

agreed to accept the conveyance of certain real estate in compensation for erecting the improvement, the serious question is, whether the contract existing between the owner and the contractor is of such a nature as to deprive the subcontractors of a lien for the labor and material furnished by them to the contractor. The answer to this question depends upon the proper construction of section 2 of said chapter 54, which declares, in substance, that any subcontractor who shall furnish any labor or material to a contractor towards the erection of an improvement by him upon real estate may, within sixty days from the furnishing of such labor and material, file a sworn statement of the amount due him from the contractor, together with a description of the real estate upon which the improvement is erected, with the register of deeds where the real estate is situate; and if the contractor does not pay such subcontractor, the latter shall have a lien for the amount due him on the real estate, "from the same time and in the same manner as such original contractor." This section of the statute further provides that the risk of all payments made to the original contractor shall be upon the owner until the expiration of the said sixty days, and that "No owner shall be liable to any action by the contractor until the expiration of said sixty days, and such owner may pay such subcontractor * * * the amount due him from such contractor, * * * and the amount so paid shall be held and deemed a payment of such amount to the original contractor." This statute contemplates a contract between the owner of real estate and a contractor in and by which the owner shall pay the contractor money for erecting an improvement upon the real estate; and the statute, upon the subcontractor's complying with its terms, stops or impounds in the hands of the owner the money owing by him to the contractor for erecting the improvement to the extent of the debts of the contractor to the subcontractor. The effect of the subcontractor's compliance with the statute oper-

ates as a garnishment in the hands of the owner of the money owing to the subcontractor from the original contractor, and the lien given the subcontractor by this statute is to secure the payment of the money thus impounded or garnished in the hands of the owner. The right of the subcontractor to a lien rests, then, (1) upon the original contractor's money indebtedness to him; and (2) upon the owner's money indebtedness to the contractor, and these two things must exist or the subcontractor has no lien. At no time after this improvement was begun by Falgetter was the owner of the real estate indebted to him in any sum of money whatever; and, as she was not indebted to the contractor, the compliance by the subcontractor with the statute did not have the effect to invest such subcontractor with a lien upon the owner's real estate. (See *Blythe v. Poultney*, 31 Cal., 234; second point of syllabus in *Ripley v. Board of County Commissioners of Gage County*, 3 Neb., 397.) The reason for this rule and this construction is, that there is no privity of contract between a subcontractor and the owner; and the rights of a subcontractor to a lien against the premises of the owner, though conferred by statute, is in subordination to the contract existing between the owner and the contractor. All the authorities are agreed that a subcontractor is bound to take notice of the terms of the contract existing between the owner and the contractor, and if that contract is of such a nature as to preclude the contractor himself from asserting a lien, the subcontractor's right to a lien falls. (See the subject discussed generally in *Bowen v. Aubrey*, 22 Cal., 566; *Shaver v. Murdock*, 36 Cal., 293; *Henley v. Wadsworth*, 38 Cal., 356; *Dingley v. Greene*, 54 Cal., 333.) In *Jones v. Murphy*, 19 N. W. Rep. [Ia.], 898, the supreme court of that state, in discussing the question under consideration, said: "Now, while it may be that a mere stipulation on the part of a contractor not to claim a mechanic's lien would not preclude subcontractors from doing so, we think that they are precluded where the contractor

stipulates in the outset for a mode of payment inconsistent with a mechanic's lien. The contractor might stipulate for payment in labor, or some specific property other than money. If he should do so, such contract would be inconsistent with a mechanic's lien on the part of a subcontractor. * * * Subcontractors must take notice of the modes under which the contractor has a right to require the owner to discharge his liability under his contract, and must extend or withhold credit according as they see fit in view of the contract." In the case at bar the subcontractors knew, or were bound to know, that Falgetter had agreed to receive a conveyance of a certain described piece of real estate in full compensation for the labor and material he might furnish in the erection of this improvement. They knew, or were bound to know, that by the terms of this contract Mrs. Loomer would at no time be indebted to Falgetter in any sum of money. Knowing, or being charged with notice of, the terms of the contract between the owner and Falgetter, the subcontractors furnished the labor and material to the contractor at their peril; and because he has not paid them for the material furnished, the courts cannot set aside the contract existing between the owner and the contractor, make a new contract for these parties, and declare Mrs. Loomer indebted to Falgetter.

3. In the case at bar the district court not only gave Hood a lien upon Mrs. Loomer's real estate, but rendered a personal judgment in Hood's favor against Mrs. Loomer for the value of the materials which Hood had furnished Falgetter. If the subcontractor had been entitled to a lien against Loomer's real estate he would not have been entitled to this personal judgment. As already stated, there is no privity of contract between an owner and a subcontractor, and judgments in this class of cases are based always on a contract or the violation of a contract express or implied.

4. We must not be understood as deciding that be-

cause a contractor neglects or omits or stipulates not to claim a lien against real estate on which he erects an improvement in pursuance of a contract with the owner, or because of some default in the performance of his contract he has precluded himself from asserting a lien, that, therefore, a subcontractor, who has furnished labor or material to the contractor, is precluded from asserting a lien. What we do decide is that the right of a subcontractor to a lien against an owner's real estate depends upon the contractor's money indebtedness to the subcontractor for labor or material furnished and upon the indebtedness of the owner to the contractor for labor and material furnished towards the improvement.

The decree of the district court is reversed and the actions of Hood and Madden dismissed.

REVERSED AND DISMISSED.

RICHARDSON DRUG COMPANY ET AL. V. ALICE M. TEASDALL ET AL.

FILED NOVEMBER 18, 1897. No. 7595.

1. **Conditional Sales.** The contract between the parties set out in the opinion and *held* one of conditional sale.

2. ———: DELIVERY: RIGHT OF POSSESSION. Where property is sold and possession delivered to the vendee on condition that the title shall remain in the vendor until the purchase price is paid, a failure of the vendee to make payments of the purchase money according to the terms of the contract vests the vendor with the right of possession to the property conditionally sold.

3. ———: ACCESSION AND CONFUSION: REPLEVIN. The subject-matter of a conditional contract of sale was a stock of drugs which the vendee was, by the contract, required to dispose of at retail and not to deplete. He purchased and added to the original stock other goods, and then made default in payments of the purchase money promised, and the vendor seized on a writ of replevin both the original stock conditionally sold and the goods afterwards purchased and added to the stock by the vendee. *Held* (1) That the

vendor was entitled to a verdict only for such of the original stock conditionally sold as remained undisposed of; (2) that the vendee was entitled to a judgment for a return of such goods by the vendor as had been purchased and added to the original stock by the vendee after his conditional purchase thereof; (3) that the vendee's mixing of the goods absolutely purchased by him with the goods conditionally purchased was neither wrongful nor fraudulent. IRVINE, C., dissenting from first and second clauses of last syllabus.

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

Stevens & Cochran and *John P. Maule*, for plaintiffs in error.

Charles O. Whedon, contra.

RAGAN, C.

On January 27, 1892, the Richardson Drug Company and the Lincoln Paint & Color Company, hereinafter called the Drug Company, owned a stock of drugs, together with a lot of drug-store fixtures, including a soda fountain, then situate in a building in the city of Lincoln, and on said date, in consideration of $2,000 sold and delivered possession of said stock of goods to Alice M. and Thomas L. Teasdall, hereinafter called the Teasdalls. The contract of sale between said parties was evidenced by a writing of that date, which, so far as material here, was in words and figures as follows:

"That said parties of the second part [the Teasdalls] are to forthwith become the agents of the parties of the first part [the Drug Company] and as such shall at once take possession of all the stock of drugs, chemicals, paints, oils, merchandise, and all fixtures belonging to said stock at number 1843 O street, Lincoln, Nebraska, and shall, as such agents, sell such goods at retail in the ordinary course of business, and pay to the parties of the first part the sum of one hundred dollars in cash for each month for the first two months, and the sum of $150 per month thereafter until said parties of the second part

shall have paid to the said parties of the first part the total sum of two thousand ($2,000) dollars net, the monthly payments to be commenced promptly on March 15, 1892, and to be made on the 15th day of each and every month thereafter until the whole sum shall have been paid. And said parties of the second part shall receive no compensation for their services as such agents save the net profits of said business over, and in excess of, the said amounts to be paid to said parties of the first part. And said parties of the first part agree and guaranty that all said profits shall be made, and all payments agreed made, without in any degree depleting said stock of goods. Said $2,000 shall be applied as follows: Sixteen hundred dollars ($1,600) to the Richardson Drug Company and four hundred ($400) dollars to the Lincoln Paint & Color Company, and said monthly payments shall be made to the Richardson Drug Company and by them divided as follows: 80 per cent to be retained by the said Richardson Drug Company and 20 per cent to be turned over as paid to the Lincoln Paint & Color Company; and when the said two thousand ($2,000) dollars shall be paid, said parties of the first part shall transfer to said parties of the second part all their right, title, and interest in the said stock of drugs and fixtures; but until said sum of two thousand ($2,000) dollars shall have been fully paid the title to all said property shall be and remain in said parties of the first part. When said amount of two thousand ($2,000) dollars shall have been fully paid said parties of the first part shall release and deliver to the said parties of the second part all claims and evidences of indebtedness which they now hold against them."

The Teasdalls took possession of the property mentioned in this contract and made the monthly payments provided therefor for some months. During the time the Teasdalls were in possession they purchased a large quantity of druggist's goods and added them to the stock. They then failed to make a payment due under the con-

tract and the Drug Company replevied the entire stock of goods and fixtures, including the goods purchased and put into the stock by the Teasdalls after their taking possession under the contract. On the trial the district court directed a verdict for the defendants, upon which judgment was entered, to review which the Drug Company prosecutes here a petition in error.

1. The contract recited above evidenced a conditional sale of the property therein mentioned from the Drug Company to the Teasdalls. It vested the Teasdalls with the possession of the property embraced in said contract and reserved the title to said property in the Drug Company until the full payment of the purchase price of $2,000.

2. The first question presented is whether the default of the Teasdalls to make the monthly payments for the property purchased of itself conferred upon the Drug Company the right of possession of the property conditionally sold, the contract not specifying that in case such default occurred the Drug Company should be entitled to the possession of the property? The authorities constrain us to answer that it did, though the precise question does not appear to have been determined by this court. In *Aultman v. Mallory*, 5 Neb., 178, it was ruled: "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; and a vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods." The property involved in that case was a mowing machine, and the contract provided that the title should remain in Aultman, Miller & Co. until the purchase price was paid. The contract is not set out in the opinion, and we do not know whether it provided that, in case the purchaser of the machine made default in payment for the same, Aultman, Miller & Co. might retake possession thereof; nor does it appear whether the precise question under consideration here was pre-

sented. The Aultman case was followed in *McCormick v. Stevenson*, 13 Neb., 70. But the contract in that case expressly provided that the McCormick Company might take possession of the property sold if the vendee thereof made default in his contract. The doctrine of the Aultman case was again adhered to in *Albright v. Brown*, 23 Neb., 136, although that case was not referred to in the opinion. In *Norton v. Pilger*, 30 Neb., 860, the doctrine of the Aultman case was again affirmed; and in *Peterson v. Tufts*, 34 Neb., 8, the rule laid down in the Aultman case was once more reaffirmed. In the latter case the contract did not provide that the vendor should be entitled to the possession of the property conditionally sold if the vendee made default in his promises. But neither in that case nor in any of the other cases cited was the question presented whether the default itself of the vendee vested the vendor with the right to retake possession of the property conditionally sold.

Bradshaw v. Warner, 54 Ind., 58, and *Hodson v. Warner*, 60 Ind., 214, were actions of replevin brought by conditional vendors of a safe, the contract providing that the title should remain in the vendor until the safe was paid for; but the contract was silent as to whether, upon the vendee making default in his payments, the vendor should be entitled to retake possession of the property. The question seems to have been presented in the latter of those two cases whether in such case a replevin action would lie at the suit of the vendor, and the court held that it would. To the same effect see *Blanchard v. Cooke*, 144 Mass., 207, and *Salomon v. Hathaway*, 126 Mass., 482.

Wiggins v. Snow, 50 N. W. Rep. [Mich.], 991, was replevin by a vendor for property conditionally sold to a vendee, the latter having made default in payments promised, and the contract being silent as to whether, in case of such default, the vendor might retake possession or should become entitled to the possession of the property conditionally sold. One of the points presented to the court was that replevin would not lie at the suit of a

conditional vendor simply because the vendee had made default in the payments promised, in the absence of a provision in the contract that by reason of such default the vendor should be entitled to the possession of the property; but the court overruled the contention and held that the default of itself vested the vendor with the right to the possession of the property conditionally sold. It follows from what has been said that the district court erred in directing a verdict for the Teasdalls.

3. The contention of the Drug Company in the court below and here was and is that it was entitled to a verdict awarding it the possession, not only of all the goods remaining undisposed of which were embraced in its sale to the Teasdalls, but was likewise entitled to the possession of all the goods in the stock which had been purchased and placed therein by the Teasdalls after their purchase from the Drug Company. With this contention we do not agree. The contract does not provide that the Drug Company shall have the title to any goods which the Teasdalls might purchase and put into this stock. If the contention of counsel is correct, then the Drug Company is liable for all the goods purchased by the Teasdalls and added to this stock. Certainly the Teasdalls in buying goods and adding to this stock were acting for themselves, and not as agents for the Drug Company; and for the goods so purchased the latter is in nowise responsible. This precise question was before the supreme court of Michigan in *Wiggins v. Snow, supra.* The subject-matter of that contract was a whirligig, and the conditional vendee, after receiving the machine, supplied certain parts therefor. The vendor replevied the machine by reason of the vendee's default in making certain payments promised and took not only the machine actually sold to the vendee, but also took the parts of the machine supplied by the vendee himself. The court held that the vendee was entitled to a verdict for a return of the parts of the machine supplied by himself. Because it is inconvenient or difficult to separate the original

stock sold to the Teasdalls from that subsequently purchased by them and added is not an argument for reading into this contract an agreement between the parties which its language does not evidence. In construing this, as all other contracts, one inquiry is, What did the parties intend thereby? And it must suffice to say in this connection that by no possible construction of this agreement can it be held that the parties thereto intended the Drug Company should own any of the goods purchased and added to this stock by the Teasdalls. Possibly difficulties will arise in separating the original stock purchased by the Teasdalls of the Drug Company from the goods purchased by the Teasdalls and added to this stock; but that argument only tends to show that a stock of drugs should not be made the subject-matter of such a contract as this. The contract itself is a harsh one, but nevertheless the Drug Company is entitled to have it enforced; and by the terms of this contract, and by reason of the default of the Teasdalls to make the payments promised, and at the times promised, the Drug Company became entitled to the possession of all the goods undisposed of which it had conditionally sold to the Teasdalls; but it was not entitled to the possession of any of the goods in the stock which had been added thereto by the Teasdalls after their purchase from the Drug Company; and for such of these goods as the Drug Company seized on its replevin writ the Teasdalls were entitled to a return. In other words, the Drug Company is entitled to the "pound of flesh" named in its bond. "The court awards it, and the law doth give it;" but it is not entitled to anything more.

4. Another argument urged here by the Drug Company and insisted on in the court below is, that it was entitled to maintain its action in replevin for all the goods seized by it because the Teasdalls, of their own accord, had wrongfully mixed and mingled the goods purchased by them after the conditional sale with the goods conditionally purchased of the Drug Company.

To sustain this contention we are cited to *First Nat. Bank of Denver v. Scott*, 36 Neb., 607. But the case cited is not an authority for the contention of the plaintiff in error. The Teasdalls have not made any wrongful or fraudulent admixture of the goods purchased by them with the goods conditionally purchased of the Drug Company. By the contract between the parties the Teasdalls were required to at once take possession of the stock of drugs, to sell the goods at retail in the ordinary course of business, and not to deplete the stock. The contract then contemplated not only that the Teasdalls would sell at retail the goods conditionally purchased, but that they would go into the markets and buy other goods to take the place of those sold and at all times keep the stock up to what it was worth at the time it was originally purchased by them.

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

REVERSED AND REMANDED.

FRANCIS G. HAMER ET AL. V. MCKINLEY-LANNING LOAN & TRUST COMPANY.

FILED NOVEMBER 18, 1897. No. 7449.

1. **Hearing Upon Motions:** ORAL EVIDENCE. It is within the discretion of the district court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony. NORVAL, J., dissents.

2. ———: ———. *Held*, that under the facts of this case there was no abuse of discretion in refusing to hear oral testimony.

3. **Judicial Sales:** DEPUTY SHERIFF. A deputy sheriff may act for his principal in making a foreclosure sale. *Nebraska Loan & Building Ass'n v. Marshall*, 51 Neb., 534, followed.

4. ———: APPRAISEMENT. The failure to obtain certificates and deduct incumbrances in appraising land for the purpose of a foreclosure

sale is not prejudicial to the defendants, owners of the equity. *La Flume v. Jones*, 5 Neb., 257, followed.

5. ———: DESCRIPTION OF LAND: NOTICE. The omission of the word "north" after the number of the township, in describing land offered for sale under decree of foreclosure, does not invalidate the notice of sale, where the description is not thereby rendered ambiguous. (*Nebraska Land, Stock-Growing & Investment Co. v. Cutting*, 51 Neb., 647.)

6. Foreclosure: LIENS: MODIFICATION OF DECREE: APPEAL. Where liens are improperly decreed to exist, the remedy is by modification or vacation of the decree or appellate proceedings, and not by resistance to the confirmation of the sale.

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

F. G. Hamer, for plaintiffs in error.

William Gaslin, contra.

IRVINE, C.

This is a proceeding in error to review an order confirming a foreclosure sale. The defendants, before the sale, filed a motion to vacate the appraisement, alleging, among other things, that certain persons had conspired together and with the appraisers to bring about an unduly low appraisement. An application was made for a hearing of this motion on oral evidence, to be adduced before the court or a referee to be appointed for that purpose. This motion was overruled and the action of the court in that behalf is the ground of the most important assignment of error. Since the argument of this case it has been held (*Kountze v. Scott*, 52 Neb., 460) that the taking of testimony orally in court on a motion to discharge an attachment is a matter resting within the discretion of the trial court, and not a matter of right of the parties. While section 236 of the Code has special reference to evidence on motions to discharge attachments, and, therefore, to a large extent governed the decision of that case, still the inquiry there was whether

that special provision conferred the right to adduce oral testimony, and not whether by reason thereof such right, if it otherwise existed, was curtailed. The decision is, therefore, authority for holding in this case that the hearing of a motion to vacate an appraisement upon oral testimony rests within the discretion of the court and is not an absolute right of one or both of the parties. The long-established practice has been to prove facts necessary for the determination of motions by affidavit, and it would be somewhat remarkable, if the legislature had intended to establish a right to another method of proof, that it should not have expressly so enacted; yet, instead of so doing, it expressly enacted that affidavits might be used upon a motion. (Code of Civil Procedure, sec. 370.) It is with great force suggested that on such an issue as was here presented, where, if the charges were true, the proof would have to be extorted from the lips of reluctant witnesses, the method of proof by affidavit is manifestly inadequate. We have no doubt, however, of the power of the court in such cases to compel the attendance of witnesses, and to conduct a hearing orally, using all the usual means to ascertain the facts, including cross-examination. But it must also be remembered that wherever an affidavit may be used so may a deposition, including expressly among such cases the hearing of motions. (Code of Civil Procedure, sec. 372.) In this way unwilling witnesses may always be compelled to testify, and a cross-examination be secured. In view of these provisions we are quite sure that it is not only the law, but properly and safely the law, to repose in the trial court the discretion of determining whether a resort should be had to the adduction of oral testimony, or whether, on the other hand, the ordinary method of proof is sufficient. In the case before us we do not think that this discretion was abused. While quite serious charges of conspiracy were made, and supported by the affidavit of one of the defendants, the matters charged were of such a nature that they could not have been within his

personal knowledge. Indeed his affidavit discloses that they were in part at least made on information obtained from third persons. Each of the persons charged with participating in the conspiracy, by affidavit, squarely denied the charges and specifically traversed each detail thereof. The trial court was justified in believing that under the circumstances the further expenditure of time in pursuing the inquiry would be fruitless.

It is assigned as error that the appraisers were sworn to appraise, not the interest of the owner of the equity, but that of another defendant who had previously conveyed the property. This was not called to the attention of the district court either in the motion to vacate the appraisement or to set aside the sale, and we therefore cannot here consider it.

Another objection made was that the sale was made by a deputy, and not by the sheriff himself. The deputy may act for his principal in such matters. (*Nebraska Loan & Building Ass'n v. Marshall*, 51 Neb., 534.)

It is said that one of the certificates of incumbrances was made by the county clerk, whereas in Buffalo county there is a register of deeds who should have made it. The certificate itself appears to be by the register of deeds, and we can find no support in the record for this assignment, beyond the fact that in the printed form on which the appraisement was returned there appears a line for the insertion of liens shown by the county clerk's certificate, and this line even is left blank in the return.

Objection is made because no certificate was obtained from the treasurer of the city of Kearney. We can find no proof that the land sold is within the city, but if that be true the omission to procure certificates and deduct liens is not a matter of which the defendants can complain. (*La Flume v. Jones*, 5 Neb., 257; *Craig v. Stevenson*, 15 Neb., 362; *Smith v. Foxworthy*, 39 Neb., 214.)

It is contended that there is a variance in the description of the land as between the decree and the notice of sale. This consists merely in the designation "north"

after the number of the township, which appears in the decree and is omitted in the published notice. This is no variance. (*Nebraska Land, Stock-Growing & Investment Co. v. Cutting*, 51 Neb., 647.)

Next, it is said that the sheriff improperly undertook to apply a surplus remaining after the payment of plaintiff's debt to the discharge of a certain judgment, without proof that such a judgment existed or that the person to whom payment was made was the owner thereof, and furthermore, that such judgment, if it existed, had become dormant. Assuming that these would be reasons for setting aside the sale if well founded in fact, they cannot be urged here, for the decree adjudged this judgment to be a valid lien in favor of the party to whom it was paid. This was an adjudication which could only be set aside by appellate procedure from the decree itself, or by proper proceedings in the district court to modify the decree.

Other questions are raised, but they were all determined adversely to the plaintiffs in error in a recent case between practically the same parties. (*Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.*, 52 Neb., 410.) It is therefore unnecessary to restate them.

AFFIRMED.

MCKINLEY-LANNING LOAN & TRUST COMPANY, APPELLEE, v. FRANCIS G. HAMER ET AL., APPELLANTS.

FILED NOVEMBER 18, 1897. No. 7450.

Judicial Sales: CAVEAT EMPTOR: DECREE: APPRAISEMENT. **Purchasers** at judicial sales must take notice of the terms of the decree. Where that and an order of sale issued in pursuance thereof differ, the decree governs, and it will not be presumed that bidders were misled or prevented from bidding by the variance.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J. *Affirmed.*

Francis G. Hamer, for appellants.

William Gaslin, contra.

IRVINE, C.

This is an appeal from an order confirming a foreclosure sale. The first reason urged for setting aside the sale is that the decree finds the debt to be due from Francis G. Hamer alone, while the order of sale recites that it is due from Hamer and two other defendants. It is argued that this would mislead purchasers, inducing them to believe that as there were three debtors the chances of appeal would be three times as great as if there were one. It has often been said that the decree in such matter governs. Indeed the order of sale need not be issued. It confers no additional power on the officer, and seems to have been the invention of some astute clerk rather than a creature of the law. Purchasers are bound to take notice of the decree, and we cannot presume, at least in the absence of a showing to that effect, that the order of sale misled any one or operated to prevent bidding.

Complaint is made that the appraisers did not appraise the land on actual view thereof, and did not appraise it at what they considered its real value, but at what they thought the plaintiff would be willing to give for it. There is no proof of such facts in the record, although an affidavit of that character appears in the record of another case between the same parties decided herewith, and in that case the point was not suggested in the briefs. The two records seem to have become confused in the district court, because we do find in the bill of exceptions affidavits of the sheriff and both appraisers showing that the appraisement was on actual view and that it was for what they considered the land's full value.

The other questions presented are all decided in the recent cases of *Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.*, 52 Neb., 410, decided October 6, 1897, or *Hamer v. McKinley-Lanning Loan & Trust Co.*, decided herewith, and must be determined adversely to the appellants.

AFFIRMED.

E. I. COLE ET AL. V. WILLIAM F. EDWARDS ET AL.

FILED NOVEMBER 18, 1897. No. 7583.

1. **Trover and Conversion:** WRONGFUL LEVY: LIABILITY OF PLAINTIFF. Where an officer levies writs of attachment on the goods of a stranger, the plaintiffs in the attachment cases will be liable in trover jointly with the officer, not only when they directed the wrongful levy, but also where they subsequently adopted or ratified his acts.

2. ——: ——: ——: RATIFICATION. The plaintiff in an attachment suit has control of the writ and may require the release of the levy. Therefore, where the goods of a stranger have been levied upon, and the plaintiff with knowledge of that fact refuses on demand to release them, such refusal constitutes a ratification of the wrongful levy.

3. ——: ——: ——: ——. If in such case the plaintiff, with knowledge of the true ownership of the goods, buys them at the sale and converts them to his own use, this too will constitute a ratification.

4. ——: ——: ——: ——. If in such case the plaintiff, with knowledge of the true ownership, receives the proceeds of the sale, that fact will constitute a ratification.

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

John C. Hartigan, W. H. Barnes, and *Charles B. Rice,* for plaintiffs in error.

John Heasty and *J. H. Broady, contra.*

IRVINE, C.

William F. Edwards brought this action against the plaintiffs in error and A. Allen and Charles B. Rice, who are made defendants in error because they refused to join the plaintiffs in error in the proceeding. The petition charged the defendants below with the conversion of a quantity of chattels of the plaintiffs. The defendants all answered by general denials. There was a verdict against all the defendants except Rice. The plaintiffs in error were plaintiffs in sundry actions against one Laughlin, all begun at the same time and in each of which there was a writ of attachment issued and levied upon the chattels in controversy as the property of Laughlin. The writs were issued and levied at the same time, one attorney acting for all the plaintiffs. The levies were made by the defendants below and defendant in error Allen, as special constable. After the levies an attorney of Edwards notified the defendants that the goods belonged to Edwards and demanded that they be released from the levies; the defendants refused to release them, saying that they would fight it out. The goods were sold under the writs and the proceeds divided among the plaintiffs to the writs in the proportion of their several judgments. There is evidence that at the sale the goods were ostensibly bought by strangers, but that they were stored on the premises of some of the defendants; that after the sale they so remained in the custody of these defendants until again sold at public sale on behalf of the ostensible purchasers. From these facts and from the evident co-operation and common understanding of the plaintiffs in error throughout the progress of the attachment cases, there is room for the inference that the purchase at the attachment sale was on their behalf. There is no doubt that the goods belonged to Edwards, and indeed all the facts as we have stated them are proved without contradiction, and the only debatable point is as to whether the plaintiffs in error became purchasers at the sale.

Under this state of the proof the plaintiffs in error contend that the verdict is not sustained by the evidence. On the contrary, we think it is the only verdict the evidence would sustain. It is said that the defendants are sued jointly, the petition charging a conversion by all, and that under such allegations it became necessary for the plaintiff to prove that all had participated in the taking and conversion of the property. This is not the law. In tort all who contribute to the wrong are liable, and may be sued jointly, or the plaintiff may proceed against such as he sees fit. And particularly in actions against an officer for abuse of process, the plaintiffs to the writ are liable jointly with him if they direct the unlawful acts or subsequently adopt or ratify them. (*Taylor v. Ryan*, 15 Neb., 573; *Walker v. Wonderlick*, 33 Neb., 504; *Wonderlick v. Walker*, 41 Neb., 806; *Murray v. Mace*, 41 Neb., 60.) There is not in this case any evidence that the plaintiffs to the writ directed a levy on the property in controversy, but it does appear that before its sale they were notified of its ownership and requested to release it and they refused to do so. We have no doubt that this was an adoption and ratification of the constable's acts, and rendered them liable as trespassers *ab initio*. It is said that the goods were not then in the possession of the creditors, but in that of the constable, and that therefore it was not in their power to comply with the demand. But the plaintiff has control of such a writ and may require the officer to release his levy. To release the property of a stranger which has been seized under a writ does not even operate as a satisfaction. The creditor may require its release for his own protection without jeopardizing his judgment. (*Green v. Burke*, 23 Wend. [N. Y.], 490; *Bank of Tennessee v. Turney*, 7 Humph. [Tenn.], 271; *Black v. Nettles*, 25 Ark., 606.) The writ was, therefore, within their control, and they are chargeable with the consequences of their refusal to exercise that control in favor of the rightful owner of the goods. Moreover, after so learning of

plaintiffs' claim to the goods, it is inferable that they became purchasers at the sale, and then appropriated the goods to their own use by reselling. This would be a clear case of conversion, and as the question of their becoming purchasers was submitted to the jury by the instructions, we must assume that the verdict included a finding favorable to Edwards on that issue. Still further it appears that with knowledge of the true ownership they received the proceeds of the sale. It has been held that this would be sufficient to charge them. (*Hyde v. Cooper*, 26 Vt., 552.) In the case cited the court distinguished between such a case and one where the plaintiff was ignorant of the true ownership, and also one where the officer had been guilty merely of a mistake of law, although the plaintiff had knowledge thereof. *Heidenheimer v. Sides*, 67 Tex., 32, relied on by the plaintiffs in error on this point, merely holds that reception of the proceeds of a writ will not render the plaintiff thereto liable when he was ignorant of the abuse of process. *Evarts v. Hyde*, 51 Vt., 183, is to the same effect.

Error is assigned on the giving of one and the refusal of several instructions. As the court in giving and refusing these acted in accordance with the principles of law announced above as governing the case, there was no error in this respect.

Complaint is made of the admission in evidence of transcripts of the records of the justice of the peace in the attachment cases. It is said that they were incompetent and immaterial. No reason is given for saying that they were incompetent; they appear to be properly authenticated and we cannot see that they were not competent. They were material for the purpose of showing that Allen was acting in pursuance of writs sued out by plaintiffs in error and within their control, and that they received the proceeds.

AFFIRMED.

ARTHUR M. BARTLETT V. JOSEPH M. ROBINSON.

FILED NOVEMBER 18, 1897. No. 8628.

1. **Landlord and Tenant:** ACTION FOR RENT: DEFENSE. In an action for rent it is sufficient to show a contract with plaintiff and a holding under him. Plaintiff's title or right of possession is immaterial.

2. ——: ——: ——. To an action for rent upon a lease at will it is no defense to show that defendant was prevented from terminating the lease by legal proceedings to which plaintiff was not a party.

ERROR from the district court of Dawes county. Tried below before BARTOW, J. *Affirmed.*

Allen G. Fisher, for plaintiff in error.

Albert W. Crites, contra.

IRVINE, C.

This was an action for rent by Robinson against Bartlett. The former recovered judgment, and the case is submitted to this court on agreed printed abstracts. The first question presented is whether the petition states a cause of action. It alleges that on the 9th day of March, 1895, plaintiff by oral agreement leased to defendant certain premises for a term beginning on said day, defendant promising to pay therefor the sum of $20 per week; that on said day, under said contract, defendant took possession and remained in possession until July 6, a period of seventeen weeks, whereby he became indebted to plaintiff in the sum of $340, all of which remains unpaid and for which plaintiff prays judgment. The argument against the sufficiency of this petition is that it was incumbent upon the plaintiff to allege either that defendant received possession from the plaintiff or that it was plaintiff's land. We think the averments were sufficient. The action was on a

lease for the rent reserved. It was averred that the lease had been made and that the defendant took possession "under such contract." This being so the relationship of landlord and tenant arose and it was immaterial whether or not the plaintiff had title or even right of possession.

It is next urged that the plaintiff failed to show, by proof, a right to recover. The testimony on behalf of the plaintiff tended to show that prior to the making of the lease the premises had been in the possession of a receiver, who had leased the same to defendant, or at least that defendant had been occupying them. The defendant was sheriff and he had levied one or more writs on certain goods. His occupancy was by storing the goods on the premises. On the 9th of March, 1895, the receiver delivered at least constructive possession to plaintiff's agent, who then told the sheriff he must rent of plaintiff and pay rent to him or vacate the premises, and further, that plaintiff would not look to suitors for whom the sheriff was acting, but must have his personal promise to pay, and that defendant thereafter promised and agreed to pay rent at the rate alleged in the petition, and held possession until July 6. As we understand the position of defendant, it is that the proof failed because it showed that defendant had entered under a receiver and did not show any order of court terminating the receiver's authority. This would be immaterial under the other evidence. If the receiver surrendered to the plaintiff and the receiver's tenant attorned to the plaintiff, as the evidence tends to show that he did, the rightfulness of the receiver's acts or of plaintiff's possession or claim to the property is not involved. The defendant became plaintiff's tenant and is estopped to deny his title.

The remaining assignments go to the rulings on the evidence. Many of these are governed by the same considerations as the points already decided, and as the rulings were in accordance with the principles already

stated they will not be further noticed. The defendant offered in evidence a record for the purpose of showing that he had been enjoined by a stranger from removing the goods. This seems to have been offered on the theory that if defendant was so prevented from surrendering the premises, he was no longer liable for rent, the remedy being against the party so interfering. The nature of the injunction does not more fully appear, but it was not claimed that the plaintiff was a party to the proceedings, and the court could not have erred in excluding the record. If the injunction was rightly allowed, its tendency would be to show that it was defendant's duty to remain in possession and so could hardly avail him here. If it was wrongfully allowed, it would not affect the contract of plaintiff, who was not a party thereto, although in that case defendant would be indemnified by the bond in the injunction case against ultimate loss by reason of his enforced continued liability to plaintiff. No error is disclosed by the record and the judgment is

AFFIRMED.

JOHN E. BRYANT V. GRANT CUNNINGHAM ET AL.

FILED NOVEMBER 18, 1897. No. 7569.

1. **Bill of Exceptions:** AUTHENTICATION OF DOCUMENTS. To authenticate a document attached to a record as the original bill of exceptions or a copy thereof, a certificate of the clerk of the trial court to that effect is indispensable.

2. **Instructions:** REPETITIONS. Error cannot be predicated upon the refusal to give a requested instruction when its whole substance has been given in other parts of the charge.

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

George Arthur Murphy and *W. C. Le Hane,* for plaintiff in error.

Samuel Rinaker, R. S. Bibb, and *E. O. Kretsinger, contra.*

IRVINE, C.

This was an action by the plaintiff in error against the defendants in error on a promissory note. The defendants answered that the note was given in payment for a horse, pleading a warranty, a breach thereof, and a rescission and offer to return the horse. There was a general verdict for the defendants, and also special findings that the warranty had been given, that it had been broken, and that there had been an offer to return the horse within a reasonable time. There is no certificate of the clerk authenticating what is attached to the transcript as the bill of exceptions or a copy thereof; and we are for that reason precluded from an examination of the assignment that the verdict is not sustained by the evidence, as well as assignments attacking rulings upon the evidence and some going to the instructions where a question is raised as to their applicability to the evidence.

Complaint is made of the refusal to give an instruction stating that the rule of damages for breach of warranty is the difference between the actual value of the article at the time of sale and what it would have been worth if as warranted. This instruction was correct as applied to the case where the vendee retains the property and sues or sets off damages, but it neglected the contention in this case that there had been a rescission, which would constitute a complete defense to the note. Another instruction embodying this feature, and stating the rule of damages as contended for in case no seasonable offer to return was found to have been made, was given and at the request of plaintiff.

Complaint is made of the refusal to give another instruction, but an examination of the record discloses that every feature thereof was embraced in some part of the court's charge.

AFFIRMED.

BURLINGTON VOLUNTARY RELIEF DEPARTMENT OF THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. CHARITY E. MOORE, ADMINISTRATRIX OF THE ESTATE OF HARRY MOORE, DECEASED.

FILED NOVEMBER 18, 1897. No. 7522.

1. **Parties to Actions:** SUBSTITUTION. It is improper, unless in cases expressly provided by statute, to permit on motion, without consent of plaintiff, a new defendant to be substituted for the one originally sued.

2. ———: ———: ADMINISTRATRIX: BENEFICIARY: AMENDMENT. A suit having been begun by an administratrix on a contract of life insurance, the petition not showing who was the beneficiary, it was not error to permit plaintiff to amend by alleging that she was the beneficiary in her own right and by striking out the allegations of her representative capacity.

3. ———: ———: ———: ———. Such an amendment amounts to neither a substitution of parties plaintiff nor of causes of action.

4. **Pleading:** JURISDICTION: MISNOMER. Want of jurisdiction of the person of defendant, and misnomer, as well as matters in bar, must be pleaded by answer where not earlier appearing on the face of the record.

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

The opinion contains a statement of the case.

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

The court had no jurisdiction over the relief department, and erred in refusing to admit the railroad company to be the defendant as the real party in interest on its own motion. (*Chicago, B. & Q. R. Co. v. Bell*, 44 Neb., 44; *Burlington Voluntary Relief Department v. White*, 41 Neb., 551; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 650.)

The court erred in permitting the plaintiff below to file an amended petition changing the party plaintiff. (*Hurst v. Detroit City Railway*, 84 Mich., 544; *Liebmann v. McGraw*, 28 Pac. Rep. [Wash.], 1107; *Wilson v. Kiesel*,

35 Pac. Rep. [Utah], 488; *Bigelow v. Draper*, 69 N. W. Rep. [N. Dak.], 571; *Miles v. Strong*, 60 Conn., 399; *St. Louis, A. & T. R. Co. v. State*, 19 S. W. Rep. [Ark.], 572; *Otis v. Thorne*, 18 Ala., 395; *Davis Avenue R. Co. v. Mallon*, 57 Ala., 168; *Dubbers v. Goux*, 51 Cal., 154; *State v. Rottaken*, 34 Ark., 144; *Phillips v. Melville*, 10 Hun [N. Y.], 212; *New York State Monitor Milk Pan Ass'n v. Remington Agricultural Works*, 89 N. Y., 22; *Davis v. Mayor of New York*, 14 N. Y., 526; *Chouteau v. Hewitt*, 10 Mo., 131; *Rockwell v. Holcomb*, 31 Pac. Rep. [Colo.], 944; *Marsh River Lodge v. Brooks*, 61 Me., 585; *Elliott v. Clark*, 18 N. H., 421; *Emerson v. Wilson*, 11 Vt., 357; *Final v. Backus*, 18 Mich., 229; *Carmichael v. Dolen*, 25 Neb., 338; *Commercial Bank of Omaha v. Gibson*, 37 Neb., 750.)

William Leese, contra.

IRVINE, C.

In the district court there was a judgment in favor of the plaintiff, the reversal whereof is sought by the defendant below. For a proper understanding of the case as here presented a statement of the nature of the pleadings and history of the case is essential. The original petition alleged that the defendant is a mutual insurance company doing business in Nebraska for the purpose of insuring the employes of the Chicago, Burlington & Quincy Railroad Company; that one Harry Moore was in the employ of that company and had made application and been accepted into membership by the defendant, and had been thereby insured in the sum of $500; that he had paid the premiums required and had otherwise performed the obligations imposed upon him by the contract of membership; that he was thereafter killed while in the discharge of his duties as an employe of the railroad company, through the negligence of that company; that the plaintiff was thereafter duly appointed and qualified as administratrix of his estate. There were other averments not material to the present inquiries,

but there was no averment that by the terms of the contract the insurance was payable to Moore's personal representative. The petition in this respect failed to state a cause of action. After the return of the summons there was filed what purports to be a special appearance of T. M. Marquett and J. W. Deweese, apparently in their own right or as *amici curiæ*, objecting to the jurisdiction of the court because no summons had been served on the defendant according to law, and because the defendant named is not a corporation, company, or person, and has no legal existence, and is incapable of being sued. This was supported by an affidavit as general in its terms as the appearance itself, except that it further avers that the relief association is merely "a department, as its name indicates, of the Chicago, Burlington & Quincy Railroad Company." The objection to the jurisdiction was overruled, whereupon the Chicago, Burlington & Quincy Railroad Company filed a motion asking that it be substituted for the relief department for the same reasons. This motion was overruled, and the defendant answered setting up the contract of insurance *in extenso* and pleading among other things the matter already urged by the special appearance, and also that by the terms of the contract no recovery could be had thereon where an action had been previously brought against the railroad company because of the same injury. to the employe, and prosecuted to judgment, and that plaintiff had previously sued the railroad company, recovered judgment against it, and received full payment of that judgment. This was followed by an order permitting the plaintiff to amend her petition, and an amended petition was filed, setting out the contract in more detail than before and alleging that the insurance was payable to the plaintiff, the mother of the deceased, as the beneficiary by him designated in pursuance of the rules of the department. Defendant moved to strike this amended petition from the files because not an amendment in effect but a substitution of a new plain-

tiff and new cause of action. This motion was overruled and the case came on for trial without any answer or further appearance to the amended petition. At the opening of the trial the defendant objected to the introduction of any evidence in support of the amended petition on the same grounds as the last motion, and because it had not been served with any summons thereon, or appeared thereto. This objection was overruled, the case tried to the court and special findings entered, followed by a judgment for plaintiff. The order containing the judgment, and in fact all the entries in the case, run, so far as the caption is concerned, in the name of Charity E. Moore as administratrix, and the judgment is in favor of "the plaintiff," without designating her by name.

On this record the plaintiff in error argues four principal propositions: First, that the relief department has no independent existence, and that there was, and could be, no proper service of summons upon it; that therefore the court should have sustained the objection to the jurisdiction; second, that the relief department being, as it contends, merely a bureau of the railroad company, the court should have permitted the latter to be substituted as defendant; third, that the amended petition made a complete change of party plaintiff and cause of action, and was not an amendment, and should have been stricken from the record; and fourth, that by the terms of the contract the action and recovery against the railroad company, under Lord Campbell's Act, barred a recovery of the insurance. For reasons which will soon become obvious we shall not consider these questions in the order in which they are presented by the briefs or by the historical progress of the case, but shall first consider the second, and then the third.

The court certainly did not err in refusing to permit the railroad company to be substituted as the sole party defendant. The plaintiff had the absolute right to determine for herself whom she would sue. If she mistook her remedy, so much the worse for her on a trial of issues

properly framed, but the defendant she selected cannot complain because a stranger was not permitted, without plaintiff's consent, to take its place. It is true that in some cases, as where goods have been replevied from a sheriff, who has seized them upon execution, the Code expressly permits the plaintiff to the writ to be substituted for the officer, and it is also true that in some cases a stranger may be let in to defend,—as for instance a warrantor; but in the first class of cases the right is derived from an express and special statutory provision, and in the second the right is not to be substituted for the defendant, but merely to be let in to defend for, or with, him. In general, the plaintiff has the right to try conclusions with any defendant he may see fit to sue, at the peril of an absolute defeat if he selects one not legally liable. The peculiar reason given as ground for the motion in this case makes it possible that the case was treated as involving merely a misnomer of the defendant, but regarded in that light it should have been presented by answer, and no answer was made to the amended petition. This suggestion brings us to a consideration of the action of the court in refusing to strike the amended petition from the record and in proceeding with the case thereon.

It is no doubt true that it is improper, where no cause of action has been stated or proved in the original plaintiff, to permit, by amendment, the substitution of another plaintiff in whose favor a cause of action was stated and proved. (*Commercial State Bank of Crawford v. Ketcham*, 46 Neb., 568; *Flanders v. Lyon & Healey*, 51 Neb., 102.) But did the amended petition here work such a substitution? The original petition stated no cause of action in favor of the plaintiff, either in her own right or as administratrix, because it nowhere alleged that in either behalf had she been designated as the beneficiary. The only material amendments made were in alleging that she, in her own right, had been so designated, and in omitting from the caption her designation as adminis-

tratrix. It could hardly be doubted that an amendment by alleging insurance in favor of Moore's personal representative would have been a true amendment and not a change in the general scope and meaning of the petition. So, too, if the petition had stated in the first place that the plaintiff, in her own right, was the beneficiary, the description of her representative character in the caption would not be fatal. Such superadded words would be treated as *descriptio personæ,* and not as an essential traversable averment. (*Thomas v. Carson,* 46 Neb., 765; *Andres v. Kridler,* 47 Neb., 585.) It seems to be in accordance with the decided weight of authority to permit amendments under similar circumstances. In *Payne v. Furlow,* 29 La. Ann., 160, it was held that where one sued as a liquidating partner he might amend by claiming in his own right. So, too, where a suit was brought by plaintiff as executor, but the declaration averred a promise to the plaintiff personally, it was held a proper case for amendment. (*Bragdon v. Harmon,* 69 Me., 29.) One who sues as administrator of A may amend by alleging instead that he is administrator of B. (*Harkness v. Julian,* 53 Mo., 238. Where the defendant is sued in his capacity of administrator, plaintiff may amend by charging him individually, and this although the case was one where he was liable in either capacity at the election of plaintiff, the designation in the first petition not constituting a binding election. (*Becker v. Walworth,* 45 O. St., 169.) And where condemnation proceedings were brought in the name of the receivers of a railroad and it was held that they should be in the name of the corporation, it was deemed proper after verdict to permit the corporation to be added as a party plaintiff. (*Bigelow v. Draper,* 69 N. W. Rep. [N. Dak.], 570.) Nearly all the cases cited by the plaintiff in error are cases where there was an attempt to substitute an entirely different party, and the others are not like this in principle. Thus, *Hurst v. Detroit City R. Co.,* 84 Mich., 539, arose by reason of two statutes, the one being Lord Campbell's Act, and

the other providing that an action for personal injuries should survive. It was held, and with undoubted correctness, that the two causes of action were entirely distinct and that by amendment one could not be transformed into the other. This was not by raising a fiction whereby the administrator was considered different persons for the purposes of the two actions, but upon the ground of the real and necessary distinction between the objects and results of the two actions. *Miles v. Strong*, 60 Conn., 393, was in the first place a proceeding by an executor to obtain a construction of a will. It was sought by amendment to make it an action by the same person, but in his capacity of trustee, to quiet title to certain real estate. It is true that in the opinion it is said that the law regards the executor and the trustee as different persons, but that this fictitious difference did not control the decision is evident from the further statement that if A sue B, and it turns out that a cause of action is stated in C but not in A, C may be substituted,—a conclusion we are not prepared to indorse, but which took all force from the remark about the legal distinction in persons. The case really went upon the ground that the causes of action, not the parties, were different. In *Phillips v. Melville*, 10 Hun [N. Y.], 211, A in his lifetime had brought ejectment. He died and his widow was substituted by revivor. It turned out that the title had not been in her husband at all but in herself. Under these circumstances it was held that she could not amend by claiming in her own right. The right at the commencement of the action was the issue, and to permit her to come in after the accident of the original plaintiff's death had happened to unite both rights in the same individual, would be to permit the substitution of an entirely new cause of action. We should not unnecessarily create legal fictions. Charity E. Moore was not two persons because she had become the representative of a decedent. The change was not a substitution of plaintiffs, it was merely a change in the description of the capacity in

which the plaintiff claimed to be suing. Nor was the cause of action changed. The object of each petition was to recover upon the same contract of insurance. The change in this respect was merely in alleging to whom the insurance was payable, the original containing no allegation on the subject. We hold, therefore, that the amendment was such as our practice permits, and in such cases the allowance of amendments being largely in the discretion of the trial court, and no abuse of discretion appearing, that the assignment of error on this subject is not well taken.

The case having then properly been presented upon the amended petition, to which the defendant did not in any manner plead, the other questions argued cannot be considered. As to the objection to the jurisdiction, the facts upon which it was based did not appear from the petition, the summons, or the return. Treated as matter going to the jurisdiction of the person of the defendant, as plaintiff in error has apparently throughout treated it, it should have been raised by answer. (*Hurlburt v. Palmer*, 39 Neb., 158; *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb., 897; *Herbert v. Wortendyke*, 49 Neb., 182.) Treated as a plea of misnomer or in bar the same would be true. And so, too, of the defense arising by reason of the suit and recovery under Lord Campbell's Act. This was matter in bar by way of confession and avoidance, and required affirmative pleading by answer to present it. The plaintiff in error is in the attitude of having permitted the case to go by default after the petition was amended, staking the result upon the propriety of the amendment.

AFFIRMED.

WILLIAM C. REAM V. STATE OF NEBRASKA.

FILED DECEMBER 9, 1897. No. 9165.

1. **Receiving Stolen Cattle:** INDICTMENT. The buying or receiving of cattle knowing them to have been stolen is, by statute in this state, made an independent substantive crime, hence it is not essential in an indictment therefor that the name of the original thief be alleged.

2. ——: VALIDITY OF STATUTE: TITLE. The act of 1895 (Session Laws, ch. 77), entitled "An act to punish cattle stealing, and to punish persons receiving or buying stolen cattle, and to punish all persons harboring or concealing cattle thieves," embraces a single subject of legislation and the same is with sufficient clearness expressed in the title. (*Granger v. State*, 52 Neb., 352.)

3. **Trial:** PROOF: ORDER OF INTRODUCTION. The order of the introduction of proof is within the discretion of the trial court.

ERROR to the district court for Cuming county. Tried below before EVANS, J. *Affirmed.*

Mell C. Jay and *T. M. Franse*, for plaintiff in error.

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

POST, C. J.

The plaintiff in error William C. Ream was by information in the district court for Thurston county, in separate counts, charged (1) with stealing cattle; (2) with receiving the cattle in question, knowing them to have been stolen. A change of venue was allowed on motion of the plaintiff in error, and the cause removed to Cuming county, where a trial was had resulting in an acquittal as to the charge of cattle stealing and a conviction upon the charge of receiving said cattle knowing them to have been stolen, and which is presented for review by means of the petition in error in this case.

Counsel argue, first, that it was necessary for the state to allege and prove the conviction of the person by whom

the cattle were originally stolen, and that the information was, in the absence of such an averment, fatally defective. That such was the rule under the former practice may be conceded, since one guilty of receiving and concealing stolen property is, at common law, treated as an accessory after the fact. But in this state the offense charged is an independent substantive crime and the conviction of one charged therewith is in nowise dependent upon the prosecution of the original thief. (*Engster v. State*, 11 Neb., 539; *Levi v. State*, 14 Neb., 1; *Granger v. State*, 52 Neb., 352; *Shriedley v. State*, 23 O. St., 130.)

It is next contended that the statute under which the plaintiff in error was prosecuted, to-wit, section 117*a*, Criminal Code, edition 1897, being an act approved April 8, 1895, entitled "An act to punish cattle stealing, and to punish persons guilty of receiving or buying stolen cattle and to punish all persons harboring cattle thieves," is unconstitutional and void for the reason that the provisions thereof are not within the scope of the title employed. But that question was determined adversely to the contention of plaintiff in error in *Granger v. State*, *supra*, and to the conclusion there announced we are satisfied to adhere.

Finally, it is urged that the court erred in permitting the state to introduce evidence in chief in connection with its testimony in rebuttal. The order of proof, it has been often held, is within the discretion of the trial court, which may, in a proper case, permit the introduction of original evidence, even after both parties have rested. (*Tomer v. Densmore*, 8 Neb., 384; *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb., 592.)

We discover no error in the record.

JUDGMENT AFFIRMED.

CARL W. ECKLUND, ADMINISTRATOR, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

FILED DECEMBER 9, 1897. No. 7381.

1. **Negligence:** DEATH OF EMPLOYE: DIRECTING VERDICT FOR DEFENDANT. Where in an action to recover for the alleged negligent acts of the defendant the undisputed evidence, when construed most favorably to the plaintiff, is sufficient to warrant the inference of negligence, it is the duty of the court to direct a verdict for the defendant.

2. ———: ———: ———: EVIDENCE. *Held*, from a consideration of the evidence, that the plaintiff was not entitled to recover on the cause of action alleged and that the district court did not err in directing a verdict for the defendant.

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

Ed P. Smith and *J. B. Sheean*, for plaintiff in error.

William B. Sterling and *Benjamin T. White*, *contra.*

POST, C. J.

This was an action below in the district court for Douglas county by the plaintiff in error as administrator of the estate of Olaus E. Olson, deceased, suing to recover on account of the negligence of the defendant, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, resulting, as alleged, in the death of said deceased. There was a trial below, which resulted in a verdict for the defendant company, under the direction of the court, upon which judgment was subsequently entered, and which is presented for review by means of this proceeding.

The facts essential to an understanding of the controlling question are as follows: On the morning of October 11, 1892, a mixed train, consisting of fifteen cars, had been made up by the defendant company and was standing at its depot platform in the city of Omaha pre-

paratory to its departure for the north, in which direction it was headed. Attached to said train were two locomotives, or engines, as described in the record in the order here mentioned, viz., No. 106, in charge of engineer Clark, and No. 105, in charge of engineer Harrington. While said train was awaiting the signal to start, the deceased, who was employed as an inspector and repairer of cars and engines, approached from the south or rear end of the train, and directed engineer Harrington to apply the air for the purpose of ascertaining if it worked satisfactorily throughout the train. Being satisfied apparently with the test made under his direction, the deceased announced, "All right." Shortly thereafter he said, addressing engineer Clark, who stood on the ground or platform near his cab door, "Be careful, I have some work to do back here," without indicating in any manner the nature of the work referred to, or where it was to be done. Clark, who denies hearing the cautionary direction of the deceased, within a minute or two thereafter, stepped back to a point opposite Harrington's engine and requested the latter to again apply the air, which was immediately done. Deceased had, it appears, without further warning to Clark or Harrington, and without the knowledge of either, gone beneath the second car from the engine, where he was injured by the movement of the air brake machinery, his head being struck or caught by the levers, and which, as contended, was the proximate cause of his death. It is conclusively shown by the evidence that the car in question, to-wit, a Burton horse car, was equipped with the usual appliances for cutting out or disconnecting the air from the piston or lever employed in the operation of the air brake. Such appliances consisted in a stop-cock, or cut-off, under the car, and accessible from the nearest side without going between the rails of the track, also an angle-cock at either end of the car, so that deceased might without difficulty, before going under the car, have protected himself against the possibility of danger from the application of the air. It further ap-

pears from the testimony of plaintiff's witnesses, as well as from those of the defendant company, that it is the duty of an inspector before going under the car to which an engine is attached to shut off the air.

The evidence adduced, so far as it relates to the duty of deceased upon going under the car, is fairly illustrated by the cross-examination of J. R. Lawson, a practical car inspector, who was called as a witness in behalf of the plaintiff, to-wit:

Q. I am asking you now as to this Burton car,—whether it had such a device [referring to a stop-cock]?

A. There was a stop-cock on the car.

Q. What was the object of that stop-cock,—what was it placed there for?

A. It was put there so you can cut the air out on that particular car.

Q. What do you mean by cutting the air out?

A. So that the air cannot be used on that particular car.

Q. State whether or not that is placed there for the purpose of rendering it safe to the inspector when he goes under there by turning off the air.

A. Yes, sir; it is for that purpose.

Q. If the car inspector had given the direction to the engineer or engineers in regard to the working of the air and notified the engineer or engineers that he was about to go under the car, what then, if anything, would be the duty of the inspector before going under the car?

A. It would be the duty of the inspector every time to cut off, or turn, this stop-cock and cut out the air on the car he was going under to repair the brake.

Q. If he did that what would be the effect upon that car?

A. The air could not be used on that particular car.

The judgment complained of is defended upon three grounds, viz.: (1) The evidence fails to disclose any actionable negligence on the part of the defendant company. (2) Deceased was guilty of negligence in failing to shut off

the air before going under the car. (3) The alleged negligent act was that of a fellow-servant while engaged with deceased in the discharge of a joint duty with respect to the train of defendant company.

It will, in view of the conclusion we are constrained to adopt respecting the first proposition, be unnecessary to examine the others, except in so far as the alleged negligent acts of the defendant may incidentally involve the question of contributory negligence on the part of the deceased. We assume for the purpose of this discussion, as doubtless did the district court, that the cautionary remark of the deceased was heard by engineer Clark, notwithstanding the explicit denial of the latter. Such direction, it is argued, amounted to notice that deceased was about to go under the cars or to engage in work thereon equally perilous, and that negligence is, in a legal sense, fairly inferable from the act of applying the air under the circumstances in evidence. But the vice in the reasoning thus employed lies in the omission therefrom of any reference to the fact that deceased had already signified his satisfaction with the working of the air brake machinery. The engineers might, and we think naturally would, assume from the remark of the deceased at the conclusion of the test made under his direction that no further work was necessary upon the air brake equipment, and that the subsequent caution, "Be careful, I have some work to do back here," referred to another of the many duties with which he was charged in his capacity as car inspector. The utmost that can be claimed for that direction is, in view of the previous announcement, that it indicated an intention on the part of the deceased to inspect the other machinery or equipments of the cars before the train was set in motion. Such is not only the logical and necessary conclusion from the admitted facts, but is strongly supported by the testimony of the plaintiff's witnesses. For instance, Mr. Turner, a practical inspector, who was called in behalf of the plaintiff, testified on cross-examination as follows:

Q. Is it very dangerous to go under there without notice?

A. Yes, sir.

Q. This notice that is given to the engineer, then, is to prevent him from moving the train?

A. Yes, sir.

Q. I understand you to say that it is the duty of the car inspector to notify the engineer having charge of the train that he is going under there that the engineer may not move the train?

A. That he may not move the car that he is operating or working under.

Q. And that order and direction does not go further than that, simply to the movement of the train?

A. That is all.

And on his redirect examination said witness testified:

Q. "By moving the train" you mean in moving the air brakes as well as moving the whole car?

A. Oh, no.

Q. How is that?

A. I do not mean it that way, just simply moving the train.

We are not unmindful of the rule often asserted in this class of cases that where from the undisputed facts different minds may reasonably draw different inferences touching point at issue, the question of negligence is one of fact for the consideration of the jury. We are, however, as already intimated, unable to perceive that the inference of negligence in the testing by the engineer of the air brake machinery is, upon the evidence adduced, warrantable even upon plaintiff's theory of the facts. It follows that the judgment is right and should be

AFFIRMED.

SAMUEL HAWVER, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED DECEMBER 9, 1897. No. 7440.

Eminent Domain: DAMAGES: INJUNCTION: ELECTION OF REMEDIES: ESTOPPEL. The city of O., claiming to act under and by virtue of condemnation proceedings previously had, took possession of and dedicated and improved as a public street property of the defendant, who, in an action against the city, recovered the value of the property appropriated on the ground that the attempted condemnation was void for want of jurisdiction. Subsequently the city, by proceedings in due form, assessed plaintiff's abutting property, together with other lots similarly situated, with half the cost of grading and improving said street, whereupon the latter sought to restrain the collection of such assessment, alleging as ground therefor the invalidity of the condemnation proceeding. *Held*, That by electing to pursue his remedy for the value of the property appropriated he had recognized the easement of the public therein, and is now estopped to call in question the title of the city to said street.

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

W. J. Connell, for appellant.

Alfred Pizey and *Leavitt Burnham*, *contra.*

POST, C. J.

This was a proceeding by the plaintiff Samuel Hawver, in the district court for Douglas county, to restrain the collection of a certain special tax or assessment to cover one-half the cost of grading Sixth street in the city of Omaha from a point 500 feet south of Credit Foncier Addition to Bancroft street. The plaintiff is, according to the allegations of his petition, the owner of tax lot No. 11, section 26, town 15, range 13 east, in Douglas county, of which the defendant city, on the 19th day of November, 1888, for the purpose of extending Sixth street from the point above mentioned, took possession

and appropriated a strip 60 feet in width by 1,287 feet in length; that in appropriating said property the city assumed and claimed to act under and by virtue of a certain pretended ordinance, but that said ordinance is, in so far as it applies to plaintiff's property, without authority and void, for reasons particularly alleged. It further appears that in the year 1892 an ordinance was duly passed and approved "for the grading of Sixth street from the south line of Credit Foncier Addition * * * and directing the board of public works to take the necessary steps to cause said work to be done," pursuant to which the city, by its agents and servants, entered upon plaintiff's premises within the limits of the strip above described "and within the lines of Sixth street so pretended to be opened and extended, and dug, tore up, excavated, and removed a large quantity of earth from the plaintiff's said land;" that said acts of the defendant city were wholly unauthorized by the plaintiff and amounted to a trespass on the part of said defendant. Thereafter, in the year 1893, an ordinance was enacted and approved "levying a special tax and assessment on certain lots and real estate in the city of Omaha to cover one-half the cost of grading Sixth street from 500 feet south of Credit Foncier Addition to Bancroft street," whereby the sum of $3,571.09 was assessed and levied against the plaintiff's said property, but which assessment is illegal and void for reasons hereinbefore stated. An answer was filed admitting, in effect, the allegations of the petition, except so far as they relate to plaintiff's title, and the alleged invalidity of the condemnation proceeding by the city of the right of way through the plaintiff's property. Subsequently, by leave of court, an amended answer was filed in the following words:

"The said defendant for a further defense herein alleges that on the 19th day of October, 1892, the said plaintiff commenced a certain action in said district court of Douglas county, Nebraska, wherein he, the said Samuel Hawver, plaintiff, was plaintiff, and the city of Omaha,

defendant, was defendant, alleging and setting forth in his said petition filed in said action that the city of Omaha, on the 19th day of November, 1888, did enter upon and take possession and appropriate to its use for the purpose of the extension, opening, and creating of Sixth street from the south line of Credit Foncier Addition to Bancroft street, the certain strip, piece, and parcel of ground in plaintiff's petition filed in this action described, and in said petition did declare the value of said strip or piece of ground to be of the sum of eight thousand dollars ($8,000), and in said petition did pray for a judgment for said sum with interest from said 19th day of November, 1888. The said defendant further says that the said plaintiff at the time the said defendant entered upon said strip or piece of ground did elect to allow the said defendant to hold and retain the same as a public street, as it has ever since done, and did subsequently elect, to-wit, October 19th, 1892, to bring his action for damages to recover the value of said strip of ground on the claim that the same had been appropriated by said defendant for the purpose aforesaid. And this defendant further says that after the answer had been filed in said action commenced October 19, 1892, the said cause came on to be heard before said district court and was tried to a jury in said court and a verdict was rendered in favor of said plaintiff and against said defendant for the sum of eight hundred dollars ($800), on which verdict a judgment was duly entered by said court in favor of said plaintiff and against said defendant, which judgment remains in full force and effect. And this defendant further alleges and claims that said plaintiff by reason of the premises is estopped from claiming that said strip of ground so entered upon and appropriated as aforesaid was not a part of a public street which said defendant had a right to improve by grading or otherwise."

To the foregoing amended answer the plaintiff failed to reply, thus admitting the truth of the allegations thereof

so far as material to the controversy. A trial of the issues joined resulted in a finding and decree for the plaintiff in accordance with the prayer of the petition and from which the city has prosecuted an appeal to this court.

It will be observed from the foregoing statement, first, that the alleged vice of the assessment pertains to the condemnation proceeding instituted by the city in order to acquire the right of way through the plaintiff's property; second, that the plaintiff, at and subsequent to the entry by the defendant upon the strip of land here in controversy, elected to allow the defendant "to hold and retain the same as a public street," and that he subsequently, in an action pending in the district court for Douglas county, recovered judgment against the defendant in the sum of $800, being the value of the land appropriated by the latter. It is upon the foregoing facts argued that the plaintiff is now estopped to deny the defendant's title to the street, or to call in question the regularity of the proceedings antecedent to the assessment here involved. We entertain no doubt of the soundness of that proposition. The plaintiff, by knowingly permitting the city to grade and use the property appropriated as a public street under a claim of right, and by prosecuting to judgment his remedy for damage, must be held to have waived any irregularity in the condemnation proceedings, and should not at this time be heard to assail the title of the city in order to evade payment of the assessment complained of. It is a well established and salutory rule which requires an election between two inconsistent remedies, and by which the voluntarily pursuing of one will be construed as a waiver of the other. (2 Pomeroy, Equity & Jurisprudence, 965. See, also, *Foley v. Holtry*, 41 Neb., 563; *First Nat. Bank of Chadron v. McKinney*, 47 Neb., 149; *Building & Loan Ass'n of Dakota v. Cameron*, 48 Neb., 124; *American Building & Loan Ass'n v. Rainbolt*, 48 Neb., 434.) The foregoing observations render unnecessary an examination of the

other questions discussed in the briefs submitted by counsel. The decree will be reversed and the cause dismissed.

REVERSED.

DOLLY A. SMITH ET AL., EXECUTORS, V. HARRIET A. PERRY ET AL.

FILED DECEMBER 9, 1897. No. 7633.

1. **Witnesses:** INTEREST IN SUIT: TRANSACTIONS WITH DECEASED PERSON. One who has a direct legal interest in the result of an action in which the adverse party is the representative of a deceased person is not a competent witness therein except as provided by statute. Liability for costs in the suit is a direct legal interest. (*Wylie v. Charlton*, 43 Neb., 840; *Taylor v. Ainsworth*, 49 Neb., 696.)

2. ———: ———: ———. The word "transaction," as used in section 329 of the Code of Civil Procedure, embraces every variety of affairs the subject of negotiations, actions, or contracts between parties. (*Kroh v. Heins*, 48 Neb., 691.)

3. ———: ———: ———: LETTERS. Copies of letters and letters which passed between parties in the course of a business transaction, and which contain the contract, the result of the negotiations, not otherwise identified than by a witness who has a direct legal interest in the result of the suit, are incompetent as evidence in an action arising from the subject-matter of such contract, if one of the parties to such contract has deceased and one of the adverse parties to the action is the personal representative of the deceased.

4. **Review:** TRIAL TO COURT: ADMISSION OF INCOMPETENT EVIDENCE. In an equity case removed to this court by petition in error to secure a review of the proceedings during a trial in the district court without a jury, in which it is complained that the findings and the decree based thereon are not sustained by sufficient competent evidence, it will be assumed that the trial court considered only competent evidence in the determination of the issues; and this court will consider none but the competent evidence in the record, and disregard that which is incompetent, and this regardless of whether the views of this court relative to the competency of any of the evidence apparently conflict with the view which was entertained by the trial court in regard to such evidence. If, so treated, the record does not contain sufficient competent evidence to support the findings and the decree, the decree will be reversed.

5. **Equity:** TRIAL OF ISSUES. The issues in equity causes are as a rule triable to the court without a jury. (Code, sec. 281.)

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

Marston & Nevius, for plaintiffs in error.

Wharton & Baird and *Dryden & Main, contra.*

HARRISON, J.

It appears herein that on February 12, 1889, Harriet A Perry and S. F. Perry, of defendants in this action, executed and delivered to Fred Y. Robertson, also of defendants, four promissory notes, three in the sum of $1,000 each and one in the sum of $3,500, and to secure the payment of the $1,000 notes and the interest executed and delivered to the payee thereof a mortgage on certain real property in the city of Kearney, Nebraska, and at the same time and place executed and delivered to Fred Y. Robertson a mortgage on the same property to secure the payment of the $3,500 note and its interest. Both mortgages were filed for record on the one date and at the one time. The note for $3,500 and its accompanying mortgage were sold and delivered to Sarah J. Barry, of defendants in the action, and two of the $1,000 notes and the mortgage securing their payment were sold and assigned to Leander Smith, who subsequently died, and the plaintiffs were duly appointed his executors. The payment of each note was by an indorsement on the back guarantied by the payee, Fred Y. Robertson. It was alleged in the petition in the action, as a part of the cause as against Fred Y. Robertson, that subsequent to the sale of the two $1,000 notes and the mortgage given to secure their payment he had instituted an action of foreclosure of the mortgage, and secured a decree to be entered therein, by which such mortgage was declared a first lien on the property described therein; that he afterwards, in a purposed sale of the property under the decree, procured a fraudulent appraisal thereof to be

made, by which it was shown that there was a prior incumbrance of the property in the sum of $3,970; that such was not the fact, and that Fred Y. Robertson, at the time he commenced and prosecuted said action, was not the owner or interested in the two $1,000 notes, the payment of which was secured by the mortgage, or of the mortgage of which a decree of foreclosure was therein obtained. It was also pleaded that he was not in any manner authorized to bring the suit. It was prayed in the case at bar that the decree in the suit prosecuted by Fred Y. Robertson be set aside or modified to conform to the facts, and the appraisement of the property be canceled. The further portions of the prayer need not be noticed here. In the case at bar findings were made and reduced to writing and appear with the decree in the record. The mortgage given to secure the payment of the note of $3,500 was by the decree accorded priority over the one declared upon by the plaintiffs in the action, and they have removed the cause to this court for review.

During the progress of the trial Fred Y. Robertson was called as a witness, and, over the objections of the plaintiffs generally that the evidence was immaterial, irrelevant, and incompetent, gave evidence by which copies of letters written by him to Leander Smith, whom the plaintiffs represented as executors, were identified, such letters containing a proposition to sell to Leander Smith the two notes for $1,000 each and the accompanying mortgage, also information relative to the position of the mortgage as an incumbrance, or lien, etc.; also identified some letters in his possession as received from the other party to the negotiations, the entire correspondence constituting the transaction by which the sale of the notes and mortgage was effectuated. When the copies and letters were offered in evidence the counsel for plaintiffs interposed the same general objection, coupled with the specific one that the witness was "a party in interest and called to testify to a transaction with a deceased person,

in an action by executors as personal representatives." This was overruled. The complaint of plaintiffs now is that there was not sufficient competent evidence to support the finding and decree in its assignment of the mortgages relative to the question of priority as liens on the property involved; that the evidence of Fred Y. Robertson, and the copies of letters identified thereby, were all the evidence bearing on this point, and it was incompetent, and should have been discarded and disregarded by the trial court. The trial was, of course, to the court without a jury.

The question presented is whether the witness had a direct legal interest in the result of the action, or was the evidence within the prohibition of section 329 of the Code, which is as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

The first point for discussion in the determination of the foregoing question hinges on the legal interest, or lack of legal interest, of the witness, in the result of the action. In the body of the opinion in the case, *Wamsley v. Crook*, 3 Neb., 344, it was said by this court with reference to section 329 of the Code: "The language of the statute is imperative. If a person has a direct legal interest in the result of the cause, when the adverse party is the legal representative of the deceased, he shall

not be a competent witness. Whatever may be the ground of his claim, he is excluded as a witness in the case; hence the court did not err in sustaining the motion to suppress the testimony of defendants." And in *Ransom v. Schmela*, 13 Neb., 73, it was decided that "One who has a direct legal interest in the result of a cause in which the adverse party is administrator of a deceased person, is not a competent witness therein. Liability for the costs of the action is such an interest;" and further stated: "As to the witness Herman, the exclusion of whose testimony is assigned for error, he was clearly incompetent. He was the original party defendant, and, notwithstanding his disclaimer, was interested at least to the extent of the costs that might be adjudged against him. In the language of the statute, he had a direct legal right in the result of the cause, and the adverse party was an administrator of a deceased person." The witness Fred Y. Robertson was interested in the result of the present action, at least to the extent of the costs for which judgment might be rendered against him, and by an application of the rule announced in *Ransom v. Schmela, supra,* was incompetent to testify in this case relative to any of the matters within the prohibition of the section of the Code we have quoted.

Of the findings of the trial court were the following: "(3.) That afterwards the said defendant F. Y. Robertson sold, assigned, and delivered each of the $1,000 bonds, with coupons attached, with the mortgage securing the same, to the said Leander Smith, the plaintiff's decedent, and guarantied the payment of the said bonds by his written indorsement thereon, and sold, assigned, and delivered the said bond for $3,500, with the mortgage securing it, to the cross-petitioner Sarah J. Barry. (4.) That from the oral testimony and evidence in the case it appears that the said defendant F. Y. Robertson sold, and the plaintiffs' decedent took, the said mortgage securing the said three one thousand dollar bonds as a second and junior mortgage upon the premises therein

described, to the said mortgage securing the said thirty-five hundred dollar bond assigned to the cross-petitioner Sarah J. Barry, to which finding of the court the plaintiffs except and their exceptions are allowed." The decree ordered payment of the sums adjudged due on the notes and mortgages and, in case of failure thereof, a sale of the property, the proceeds, after payment of certain costs, to be applied in payment of the mortgages in the order of priority indicated in the findings of the decree. The matter of the copies of letters and letters introduced in evidence was of the terms, etc., of the transaction of sale of the notes and mortgage to Leander Smith, and furnished the only evidence in the record in support of the finding of the trial court in relation to the rank of the mortgages as liens. That letters in which an agreement of the nature of the one in question in this case come within the definition of the term "transaction" as used in section 329 of the Code, see *Kroh v. Heins*, 48 Neb., 691. The copies and letters were not competent until properly identified, and, as we have seen, the witness who identified them was incompetent to testify, or disqualified; and his evidence could not be received, or if received, could have no effect in the determination of the issues.

This is an equity case and the issues subject to trial by the court. (See sections 279-281, Code of Civil Procedure.) "Where incompetent testimony is given on the trial of an equity case this court, in reviewing such case on an appeal, will presume that such testimony was not considered by the district court." (*Buckingham v. Roar*, 45 Neb., 244.) "Where the trial is by the court acting without a jury, it will be presumed on appeal to have acted only on the legal testimony adduced." (2 Ency. Pl. & Pr., 474.) In the opinion in the case of *Willard v. Foster*, 24 Neb., 213, it was observed: "The cause was tried to the court without the intervention of a jury. In causes thus tried, it has been often held by this as well as other courts that error for the admission of im-

proper evidence would not lie. The court must necessarily have an opportunity to examine each article of evidence offered, even for the purpose of rejecting it; and so the duty of acting and deciding the cause, upon the legal and relevant evidence selected from the mass that may have been introduced, may be as well discharged by the court upon the final consideration of the cause, as to pause in the course of the trial to pass upon the admissibility of the several matters offered in evidence." "In trials of fact without the aid of a jury the question of the admissibility of evidence, strictly speaking, can seldom be raised; since whatever be the ground of objection the evidence objected to must, of necessity, be read or heard by the judge, in order to determine its character and value." (1 Greenleaf, Evidence, sec. 49.)

We are required to assume that the trial judge rejected all incompetent evidence and allowed and gave weight to none but competent evidence on the final hearing, or in the consideration and determination of the issues. It follows that we must consider only competent evidence and disregard that which is incompetent, and, if there is sufficient competent evidence in the record to support the finding and decree, affirm it; if not, reverse it; and this regardless of whether our views relative to the competency of any of the evidence apparently agrees or disagrees with the view of the trial court as to the competency of the evidence at the hearing in the district court. We have determined that the portions of the evidence under discussion were incompetent as herein introduced and as, with these thus eliminated from the record, the finding and resultant decree are not sustained by the evidence, the decree must be reversed.

It is argued by the counsel for plaintiffs that if the decree is reversed, inasmuch as the mortgages were executed and also recorded simultaneously, and the question of priority of lien is one of the intention of the parties, usually expressed in some agreement, written or verbal, the record in this case disclosing no indications of the

intention, we must be governed by the facts that the mortgage given to secure the $3,500 note had a longer time to run,—it was due in five years from date,—than the other, the three notes whose payments were secured by it being due respectively in one, two, and three years after date, and presume that the latter, being made to mature the sooner, was intended to be the prior lien; and asks us to give ear to this view and render a decree here in accordance therewith. We do not think these facts afford the true, or any index to the, intention of the parties in regard to the priority of either of the liens; hence must decline to follow the view advanced, or give it force. We deem it proper that the cause be returned to the lower court for further proceedings.

REVERSED AND REMANDED.

HANOVER FIRE INSURANCE COMPANY ET AL. V. AMERICA STODDARD ET AL.

FILED DECEMBER 9, 1897. No. 7623.

1. **Pleading:** AMENDMENT. In a proper case the court may permit a pleading to be amended to conform to the proof.

2. **Insurance:** VIOLATION OF POLICY: STORAGE OF GASOLINE. Evidence on the subject of the storage of gasoline on insured premises *held* insufficient to show that a clause of the insurance policy in regard to such storage had been violated.

3. **Instructions:** ASSIGNMENTS OF ERROR. Alleged errors in giving instructions should be separately assigned in the motion for a new trial as well as in the petition in error.

4. ——: HARMLESS ERROR. An instruction in a party's favor, though erroneous, is not ground for reversing a judgment against him. (*Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 543.)

5. ——: CHARGE FOREIGN TO ISSUES. A refusal to give requested instructions which are not pertinent to any of the issues on trial is not error.

6. ——: REQUESTS: REVIEW. It is the duty of a trial court to instruct

a jury on the law of the case whether requested by counsel to do so or not; and a request that the court will charge the jury on the issues of law between the parties or to charge the jury on all material questions at issue adds no force to the general obligation; and where the court has given instructions, which, whether erroneous or not, cannot be regularly reviewed because of the lack of proper specific assignments of objections or exceptions thereto, their quality will not be examined or determined under an assignment which alleges a refusal of the general requests to charge the jury on the issues of law or to charge the jury on all material questions in the case.

7. **Review:** INADMISSIBLE EVIDENCE: HARMLESS ERROR. The admission of incompetent or immaterial testimony is not ground for the reversal of a judgment if the same was not prejudicial to the rights of the complaining party. (*Graham v. Frazier*, 49 Neb., 50; *Rightmire v. Hautman*, 42 Neb., 119.)

8. ———: ———: ———. "The admission of incompetent testimony to prove a fact is a harmless error, where such fact is established by other sufficient uncontradicted evidence." *Lamb v. State*, 40 Neb., 312, followed.

9. **Evidence:** OFFER OF COMPROMISE. An offer of compromise made by one party to an action and not accepted by the other is not generally admissible in evidence.

10. **Review:** INADMISSIBLE EVIDENCE: OBJECTIONS. A judgment will not be reversed for the erroneous admission of testimony if the same testimony, or ample testimony of the same nature, was admitted without objection.

11. **Evidence of Agency.** The evidence on the point of the authority of certain parties to act as agents of some of the parties to the action examined and *held* sufficient to establish that they were such agents.

12. **Insurance:** VALUE OF PERSONALTY: EVIDENCE. Testimony in regard to value of the insured personal property destroyed by a fire *held* sufficient to sustain the finding of the jury as to such value.

13. ———: ALLOWANCE OF ATTORNEY'S FEE: REVIEW. An assignment of error of the trial court's action in assessing the amount and allowing the recovery of an attorney's fee against a party *held* without avail, for the reason that the record presented here does not disclose the allowance of such a recovery.

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

C. C. Flansburg, for plaintiffs in error.

R. L. Keester, *contra.*

HARRISON, J.

In this action, instituted in the district court of Harlan county by the defendants in error, it was pleaded in the petition, after a statement of the corporate character of the plaintiffs in error, the insurance companies, and their manner of conducting the business, etc., that on March 29, 1890, America Stoddard was the owner of a residence building in Republican City, Nebraska, also of some household goods and other personal property then in said building, and all of which was, on said date, for the consideration of the sum of $27 then paid by her, insured by plaintiffs in error against loss by fire, etc.,—the building in the sum of $1,500, and the personal property in the sum of $300; that there was issued to her a policy evidencing such contract of insurance, which she lost, and on February 12, 1892, in consideration of the surrender of the rights of defendant in error under the lost policy, there was issued by the companies, in lieu thereof, another policy evidencing the insurance of the same properties and in similar sums as had been of the terms of the lost policy. The defendant in error Brown Gifford, it was pleaded, was interested in the real property as a mortgagee thereof, and the contract of insurance contained a clause by which any loss was payable to him to the extent of his interest. It was also complained that the insured properties were totally destroyed by fire May 30, 1892, and that the companies had failed and refused to pay the loss after full performance by defendants in error of all the conditions of the policy on their part required by its terms to be performed. The answer consisted of a general denial of each and every allegation of the petition and an affirmative statement that on May 30, 1892, America Stoddard, of defendants in error, was the owner of a dwelling house in Republican City, Nebraska, which was occupied by herself, her husband, and their family as their homestead; that on said date America Stoddard and the family, except the husband, were ab-

sent from Republican City, and the home was under the care and control of the husband and actually occupied by a tenant and his family. There were further statements by which the origin of the fire by which the properties were destroyed was attributed to some act of J. D. Stoddard, and within the knowledge at the time of America Stoddard. The reply contained admissions of some of the statements of the answer and explanations of the absence of the Stoddard family from the former home, but was in the main a general denial of the new matter set up in the answer. A trial resulted adversely to the companies and the cause has been for them removed to this court by error proceedings.

On April 3, 1894,—the day of the trial,—the plaintiffs in error, on application therefor, were granted leave to amend their answer to conform to the facts. Pursuant to such permission the following was added to the answer: "That by the terms of the said policy, it was agreed that the same should become void and of no force and effect in case the assured should have or should keep upon the said premises, at any time during the continuance of said policy, gasoline in quantities to exceed five gallons at any one time, whether the loss originated therefrom or otherwise; that, after obtaining the policy sued upon, the plaintiffs kept upon the said premises large quantities of gasoline, to-wit, a barrel of gasoline, in violation of the terms of the said policy, increasing the risk under the said policy, of which these defendants had no knowledge or notice, and to which these defendants never consented, thereby releasing these defendants from any and all liability under the said policy." It is asserted in the argument in the brief for defendants in error that this portion of the answer cannot be considered; that it was not of the issues in the trial court, etc. The record, as we have before stated, discloses that on the day of the trial leave was granted to amend the answer to conform to the proofs. This must have been after the introduction of the evidence, the purport of

which prompted the action on the part of counsel for the companies, which resulted in the allowance of the amendment. The amended answer was filed May 25, 1894,—more than a month after the rendition of the judgment. It was entirely competent and proper for the trial court, in its discretion and within certain limits, to allow the amendment of the pleading to conform to the proofs. (*Scroggin v. Johnston*, 45 Neb., 714; *Barr v. City of Omaha*, 42 Neb., 341.)

In the body of the policy of insurance was the following clause: "Gasoline Stove Permit. Permission is hereby given for the using of a gasoline stove; the reservoir to be filled by daylight only, and when the stove is not in use. Warranted by the assured that no artificial light be permitted in the room when the reservoir is being filled and no gasoline, except that contained in said reservoir, shall be kept within the building, and not more than five gallons, in a tight and entirely closed metallic can, free from leak, on the premises adjacent thereto." This is clearly a warranty or an agreement that no gasoline except that in the reservoir of the stove shall be kept in the building, and "not more than five gallons, in a tight and entirely closed metallic can, free from leak," on the premises and adjacent to the building. "Adjacent" here is used, we presume, in the sense of "near," "close," "in proximity," and applied to the can and its position relatively to the building. During the examination in chief of America Stoddard she testified that among the articles destroyed by the fire was what she styled an "oil pump." On cross-examination the attorney for the companies drew out some additional facts in regard to this pump and its use, which formed the basis for the amendment to the answer and their claim that the policy had been avoided by the use or storage of gasoline on the insured premises in a manner prohibited by the terms of the policy.

Under an assignment that the verdict was not sustained by the evidence, our attention is directed in the

argument to the evidence in regard to gasoline and whether it was shown to have "been kept on the insured premises and if so, when, where, and how it was stored." The entire evidence on this subject contained in the record was as follows:

Q. State if you had an oil pump in the house.

A. Yes, sir.

Q. What was it used for?

A. Used for pumping gasoline.

Q. State to the jury how it was used and how you came to have a pump of this kind.

A. We got gasoline by the barrel and put the barrel in the ground and used the pump for pumping it out of the barrel.

Q. What was the value of the oil pump?

A. I think it was four dollars. * * *

Q. You say you had an oil pump that you used for pumping gasoline?

A. Yes, sir.

Q. Where did you get this gasoline?

A. We had not used it or the gasoline stove for quite a while. We used wood.

Q. Where was this pump at that time?

A. In the basement.

Q. Wasn't it being used?

A. Not at that time.

Q. It was not part of your useful household furniture?

A. We intended to use it.

Q. You were not using it at that time?

A. No, sir.

Q. How long since you had used it?

A. I don't remember.

Q. Well, about how long?

A. I don't remember.

Q. Six months?

A. Perhaps.

Q. Where had you had this barrel of gasoline buried in the dirt?

A. We had it when we lived on the farm and when we came to town it was not all used out.

Q. You had it back of the house somewhere?

A. Between the basement and the creek.

Q. You think it was six months before this you had used the pump?

A. I can't just say.

It is clear that this does not disclose that the gasoline was stored on the insured premises, or if so, that it was adjacent, near, or close to the building or within the time of the existence of the policy in suit. There was nothing in the evidence to call for the avoiding of the contract of insurance if it be conceded—which we do not decide—that if a use or storage of the gasoline had appeared not allowable under the terms of the contract, this, in and of itself, would have rendered the policy void. The evidence was too indefinite and uncertain to warrant even an inference or an assumption that the clause of the policy which we have quoted had been violated and to demand its enforcement; hence this assignment is without avail.

Error in the instructions numbered 1, 3, 6, 7, 9, and 10, given at request of defendants in error, are argued separately in the brief. The only assignment of error in the motion for a new trial which refers in any manner to the instructions prepared and asked for defendants in error reads as follows: "9. The court erred in giving instructions numbered ——, given by the court at the request of and upon the motion of the plaintiffs, to which defendants excepted at the time." This does not designate any particular instruction,—is too indefinite; hence the assignments of error specifically in the petition in error in regard to the instructions requested by defendants in error cannot be considered. (*Bankers Life Ass'n v. Lisco*, 47 Neb., 345; *Hamilton v. Goff*, 45 Neb., 340.)

Complaint is made in separate assignments in the petition in error of instructions numbered 14, 15, and 16, given by the court on its own motion. These were

grouped in a single assignment of the motion for a new trial. The one numbered 15 submitted an issue not raised by the answer and presented a defense for the consideration of the jury which the companies had no right to have submitted. The instruction may have been faulty. This we will not now discuss or decide, but its effect, if any, could but be favorable to plaintiffs in error; certainly not unfavorable or prejudicial to their rights. An instruction in a party's favor is not ground for reversing a judgment against him. (*Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 543.) The one instruction of the three which were grouped not being open to the objection urged, the assignment need not be further considered, and will be overruled. (*Stoppert v. Nierle*, 45 Neb., 105; *Schelly v. Schwank*, 44 Neb., 504; *Jenkins v. Mitchell*, 40 Neb., 664.)

At the close of the introduction of testimony, counsel for plaintiffs in error requested the court "to prepare written instructions for the jury in this case, instructing them upon the issues of law between the two parties." This was followed by three special requests. These were not numbered; but, passing over any matters of mere proper form which were lacking, neither in its subject-matter was directed to any issue which at the time the requests were made was mentioned in the pleadings; hence the court did not err in refusing to charge as requested in the three special requests. At the close of the special requests this appeared: "Defendants [plaintiffs in error] ask the court to prepare and give to the jury written instructions on his own motion covering all the material questions." It may be said of the two general requests, the language of which we have quoted, that it was the duty of the court "to instruct the jury upon the law of the case whether requested by counsel to do so or not" (*York Park Building Ass'n v. Barnes*, 39 Neb., 834); and the general requests added no force to the obligation which rested on the court to perform its duty in this particular as in all respects. The trial court

gave 16 instructions in which, no doubt, it attempted to fairly submit the issues to the jury. Whether it succeeded or not might have been reviewed had there been proper assignments in the motion for a new trial of complaints in relation to the instructions. That they, or some one or more of them, may have been erroneous cannot be raised or determined under an alleged refusal of the trial court of a request to charge the jury on the issues of law between the parties or to charge the jury on all the material questions.

No available errors have been indicated under the assignment in relation to the trial court's refusal to instruct; hence the assignment must be overruled.

Error was assigned of the reception of certain exhibits by which it was sought to establish that the party who had signed the policy as local agent of plaintiffs in error was in fact such agent; also oral evidence introduced of the same fact. The plaintiffs in error in their amended answer pleaded the existence of the policy and invoked the aid of one of its stipulations, and in so doing recognized that it had been properly issued and by one possessing the full authority to act for them in its issuance. Whether the evidence objected to was competent or not to prove the authority of the party who had acted as local agent, can make no difference since the fact was for the purposes of this suit admitted and the reception of the evidence was in no degree prejudicial.

It is contended that the trial court erred in receiving in evidence the charter of each of the companies; that the same was immaterial. It may be conceded, without an examination or decision of the question of whether the evidential matters referred to were competent for their intended purpose, that, as the issues were presented by the pleadings as they now stand in the record, they were wholly immaterial as evidence. But we cannot say their reception was prejudicially erroneous; hence the assignments directed against the court's actions in their admissions as evidence will be overruled.

It is argued that there were errors committed in the admission of evidence relative to what occurred between the attorney for defendants in error, who, prior to the institution of this suit, was representing them in the collection of the claims under the policy, and the state or special agent of plaintiffs in error, who called at the office of the attorney for the purpose of talking over the matter of the loss. It is asserted that this state or special agent had no authority to state what the evidence disclosed he did in regard to a settlement of the loss, as it was not shown that he had been authorized or had any authority to adjust this loss or losses in general. On the back of the policy in suit appears what is there styled a "stipulation," of which the following is a portion: "In case of loss, the assured shall forthwith give notice thereof to the general agent of these companies in the city of New York;" and the policy conveys the information in relation to the identity of the general agent, his office, etc., in the following, printed on it: "Alexander Stoddard, General Agent, Office No. 34 Nassau Street, New York." The evidence shows that immediately after the fire the local agent at Republican City sent a telegram to this general agent in New York city and received in response thereto a letter in which it was stated that the telegram had been received "in regard to the loss under this policy" and the state agent at Omaha, Mr. Fisher, had been notified to take charge of the matter. It was Mr. Fisher, the state agent, who appeared at Republican City and had the interview with the attorney for the defendants in error. We think his authority to act in the matter of the loss under the policy and its adjustment was sufficiently established. In detailing the conversation between him and Mr. Fisher relative to the loss, the witness was allowed to state over the objection of counsel for plaintiffs in error that Mr. Fisher offered to pay $900 in settlement of the loss,—in effect, a compromise of the claims. This, it is asserted, was an error, as the companies had a right to

buy their peace,—to effect a compromise if they could,—and the substance of any offers of compromise or settlement made by them and unaccepted could not be given in evidence to prejudice their plea of nonliability. This contention is correct. The offer of compromise was not admissible (2 Wharton, Evidence, sec. 1090; *Kierstead v. Brown*, 23 Neb., 595; *Eldridge v. Hargreaves*, 30 Neb., 638); but its erroneous admission did not prejudice the plaintiffs in error, as evidence of practically the same offer of compromise was allowed to be given without objection. The fact would have appeared to the jury if this portion of the evidence now under consideration had been rejected, as properly it ought to have been.

America Stoddard testified that she had a conversation in the office of the local agent of the companies with George T. Higgins, who appeared as their representative or agent, in which he offered to pay her $900 in full settlement of the claims for loss, and raised the offer to $1,300. It is claimed that there was no evidence that Mr. Higgins was an agent of the company, or had any authority to act in the matter; and further that such evidence as was received of his authority was incompetent. Mrs. Stoddard and the local agent for the companies were allowed to give testimony on the subject of the agency of Mr. Higgins, which was probably incompetent; but that this was done was not prejudicial for the reason that Mr. Fisher whom, it will be remembered, the general agent of the companies had stated in response to the telegram informing him of the loss, he would put in charge of the matter, and who appeared at Republican City and investigated the loss, stated while there to the attorney for defendants in error that Mr. Higgins "would call in a short time and see about the matter." It further appeared in evidence that George T. Higgins was a traveling agent in this state for the companies at the time and did go to Republican City and there represented the plaintiffs in error in an attempted settlement of the claims arising under the

policy in suit. We think his authority was sufficiently proven. The testimony of the offer to compromise was incompetent, but to it there was no objection. There was an objection to the question in answer to which this piece of testimony was given, but the objection was not pertinent to the question and was properly overruled. The testimony of the offer to settle the claims was not responsive to the question, but it was not objected to nor was a motion made to strike it out. The error of its admission is not presented by the record.

It is assigned for error that the trial court allowed a witness to testify what companies composed the New York Underwriters. We cannot discover wherein this testimony was material under the issues. It should probably have been excluded, but its admission was entirely without prejudice to the rights of the complaining party; hence the error, if any, does not call for a reversal of the judgment.

Of the assignments of error is one directed against the action of the trial court in admitting in evidence a photograph of the insured building as it existed at the time of the issuance of the policy, and up to the time of its destruction by fire. This was introduced in connection with the testimony of the value of the building. It is argued that inasmuch as the loss of the building was total and under the provisions of our law the recovery, if any, must be for the value stated in the policy, this testimony was wholly without force and should not have been admitted; that its tendency was to confuse and mislead the jury, to enlist the sympathies of the jury in favor of America Stoddard because of her loss of such a house and home as was shown in the photograph, and thus prejudice the rights of plaintiffs in error. Suffice it to say of this portion of the evidence, that if its reception was erroneous it was for the reason that it was immaterial, and we are satisfied it was not hurtful to the rights of plaintiffs in error; hence the assignment must be overruled.

During the introduction of the rebuttal evidence there was offered and received for defendants in error a letter and the envelope in which it had been inclosed. It bore a postmark by which it appeared to have been mailed at Valley Falls, Kansas, May 28, 1892, and the impress of the stamp of the receiving office was of Republican City, this state, May 29, 1892. This letter was of date May 28, 1892, and was shown to have been written by Daisy Stoddard, a daughter of America and J. D. Stoddard, of date May 28, 1892, and was written and addressed to the latter at Republican City, where he then was. Objection was made to the admission of this letter, which was overruled, and the alleged error in such action is now pressed in argument. That this letter was received of the date shown and conveyed the information which it did were facts directly contradictory of portions of the testimony of witnesses on the part of plaintiffs in error; hence its admission was not erroneous. On the back of the envelope to which we have just referred, as it appears in the record now, there is penciled some poetry which, in its role of testimony, is the subject of a somewhat vigorous attack by counsel for plaintiffs in error. It is asserted by counsel for defendants in error that this was not on the envelope at the time of the latter's reception in evidence. However this may be, we cannot see wherein the poetry, if received, could have been harmful to the rights of the complainants in a degree which calls for a reversal of the judgment.

Under the assignment that the verdict was not sustained by the evidence, it is urged that the amount assessed by the jury as the value of the personal property destroyed by fire was too large, and, to the amount of $40, unsupported by any evidence. An examination of the evidence bearing on this point discloses sufficient to sustain the finding of the jury in the particular under consideration.

One assignment of error refers to the actions of the trial court of and concerning assessment of an attorney's

fee against the plaintiffs in error. The record as presented here does not show that the trial court allowed the recovery of an attorney's fee against and of the plaintiffs in error; hence this assignment fails.

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

AFFIRMED.

NYE & SCHNEIDER COMPANY, APPELLANT, V. FRED BERGER ET AL., APPELLEES.

FILED DECEMBER 9, 1897. No. 7606.

1. **Mechanics' Liens**: CLAIM: ITEMS: CONTRACT. All the materials for which there are charges in a claim for a mechanics' lien must have been furnished as parts of one transaction or under one contract for a building or job of work.

2. ———: ———: ———: ———. Whether all the items of charges for materials were so furnished under a single contract or some items arising under separate and independent transactions or contracts have been included in the claim of lien, are questions of fact for the jury or for the court if the case is tried to the court without a jury.

3. ———: ———: TIME. To perfect a mechanic's lien a duly verified claim must be filed in the proper office within four months from the date of the last article of material furnished or the last labor performed under the contract out of which the account arises.

4. ———: EVIDENCE. The finding and judgment of the trial court in this cause *held* supported by the evidence.

APPEAL from the district court of Stanton county. Hear below before NORRIS, J. *Affirmed.*

Munger & Courtright, for appellant.

P. M. Moodie and *C. C. McNish, contra.*

HARRISON, J.

In this, an action by the company to foreclose a mechanic's lien against a lot in the village of Pilger, Stan-

ton county, it was determined in the district court, as a result of a trial of the cause, that the lien had not been filed within the time required by law, hence could not be enforced, and judgment was rendered in accordance with the finding. The company has perfected an appeal to this court.

It appears that during the year 1892, Fred Berger, of appellees, had erected on the lot in question, he then being its owner, a "store building," for which, at the request of Berger, the appellant company furnished the lumber at such times during the progress of the building toward completion as the lumber was required and applied for at the company's yard. The duly verified itemized account or claim of lien was filed August 5, 1893. Appellees asserted in the trial court, and now assert, that the last material was furnished by the company and the building was completed December 17, 1892. Of the claim of the company there was a charge for material furnished January 12 and 26, 1893; April 13 and 27, 1893, and June 17 and 24, 1893. It is contended for the company that the furnishing of the material was, though at different dates, all under one continuing contract, or a contract to furnish the material which would be required from time to time in the erection of the building, the agreement providing no specific amount of material and no time within which it was to be furnished; that the items set forth in the charges in the claim of lien of dates subsequent to that of December 17, 1892, at which the appellees contend that the building was completed, though possibly used for purposes and for constructions not within the contemplation of the party for whom the building was erected when the contract was made, must be treated as furnished for the building and under the contract, so that a verified claim filed within four months after the date of the last charge would perfect a lien. The lumber obtained in January, 1893, was to build a partition, or an inclosure, around the portion of the storeroom where stood the desk, to make what was called

the office. That obtained in April was used in putting up or on a front to the building some show windows. The proprietor stated in his evidence that, as the building had been planned and completed, the dust accumulated on the goods and he had these windows, or this front, made to obviate the trouble, annoyance, and loss caused by the dust.

In support of the contention for the appellant, our attention is directed to the decision in the case of *Nichols v. Culver*, 51 Conn., 177, to which one of the headnotes is the following: "The plaintiff substantially completed the house on the 6th of August and the defendant went into possession during that month. Some time in September the plaintiff furnished and hung blinds, and on the 22d of November, at the request of the defendant, he furnished materials and did final work to the amount of $14. This work was necessary to the comfortable use of the house in winter. No rights of third parties had intervened. Held that the final work was to be regarded as sufficient to preserve the lien." The findings of facts, as stated in the decision, on this point were as follows: "The house was substantially completed on the 6th day of August of the same year, and the respondent entered into it during the month of August of the same year, and has ever since lived in the same; that, on the 25th day of September, 1875, the petitioner furnished and put on some base knobs, for which he charged one dollar, and some time during the same month, the exact date of which cannot be ascertained, he furnished and hung the blinds for the house, making an item of $90.65; that on the 22d day of November of the same year the petitioner, at the request of the respondent, furnished materials of the value of $8.18 and performed labor of the value of $5.95 in final work upon the house, such as making a frame for an inside cellar door, putting glass into the cellar windows, putting up clothes hooks, brackets, and a shelf." After commenting on the facts and an announcement of its conclusions therefrom, the

court further observed: "We think, therefore, the case is clearly within the principles established by this court in *Cole v. Uhl*, 46 Conn., 296." In *Cole v. Uhl*, to which the court referred in the foregoing, it was announced: "The petitioner contracted to build a house for the respondent, to be completed on the 15th of November, 1876. The work was completed by that time, except the putting of a pump into the basement, which was done on the 1st of December, 1876, and making a well curb and plastering around a mantel, which was done on the 27th of February, 1877. This work was necessary to the completion of the job contracted for and was delayed at the request of the respondent, and no other parties before the court claimed any equities. Held that the work was to be regarded as completed at the date last mentioned, and that a lien filed within sixty days thereafter was good." It will no doubt have been noticed that in *Nichols v. Culver* the finding was to the effect that the material and labor for which the last charges in the account were made were "in final work upon the house;" and in *Cole v. Uhl, supra*, it is stated of the work for which appeared the final items of charge in the account or claim of lien, "This work was necessary to the completion of the job contracted for." In both of these cases it is clearly indicated that the items of charges particularly in question were connected with and contemplated in the original contract of building and necessary for its completion. In the decision in the case of *Frankoviz v. Ireland*, 26 N. W. Rep. [Minn.], 225, cited for appellees, the rule is stated as follows: "In a claim for a mechanic's lien, which includes different items of material delivered at different times, the account is to be treated as a unit, and the time within which the account and affidavit must be filed for record begins to run from the date of the last item, providing they were all delivered for the same job of work; as for constructing the building, if that was the job in hand, or for doing the same job of repairing. But if some of them were delivered for

some other work,—as where the construction is completed, and afterwards some further thing to be done is determined on,—the furnishing of such items cannot suspend the running of the time for filing as to the account for constructing. Whether an item belongs in such account is a question of fact for the jury." In the body of the opinion appears this statement: "In this case the contractors had in hand the constructing of the building. If the items in the bill of particulars to and including that of March 18 completed the work, and the item of June 4 was an afterthought,—something determined upon after the construction was completed,—then that item is independent of the others, is no part of the account to which they belong, and cannot affect the right to a lien for that account. The lapse of so long a time between the items of March 18 and June 4, unexplained, would be evidence, more or less strong according to the circumstances, that the two items did not belong to the same account, that they were not furnished for the same job, and that the latter item was upon an afterthought. But it is a question of fact for the jury." In support of the doctrine of the opinion from which we have just quoted, see, also, Phillips, Mechanics' Liens, secs. 229, 230; *Harmon's Appeal*, 124 Pa. St., 624; *Central Loan & Trust Co. v. O'Sullivan*, 44 Neb., 834; *Hansen v. Kinney*, 46 Neb., 207; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207.

In the case at bar the question of whether the final charges in the account were for material furnished for use in the completion of the building for purposes contemplated when it was commenced or during the course of its erection, or were for repairs or additions to the building after it had been completed and independent of the original contract, was for the jury to answer, or the court, if the cause was tried to the court, and on this subject the evidence was conflicting; but the finding of the court that the items were for matters independent of the original contract was amply supported by

the evidence, and must be affirmed. It follows that the claim of lien was not filed in time. The decree of the district court was right and is

AFFIRMED.

ARTHUR W. WALKER, APPELLEE, V. J. T. PATCH ET AL., APPELLANTS.

FILED DECEMBER 9, 1897. No. 7666.

Judicial Sales: COPY OF APPRAISEMENT. In conducting a sale of real estate under the provisons of title 14, chapter 1, of the Code (sec. 476 *et seq.*), the officer must deposit in the office of the clerk of the court from which the writ or order under which he is proceeding issued, a copy of the appraisement and other papers mentioned and required in section 491*d* of the Code, prior to the advertisement of the notice of sale. (*Burkett v. Clark*, 46 Neb., 466.)

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

J. T. Patch, for appellants.

McCoy & Olmsted, contra.

HARRISON, J.

In this, an appeal to this court from a decree of the district court of Douglas county of confirmation of a sale of real estate, it appears that no copy of the appraisement of the property had been filed in the office of the clerk of the district court prior to the advertisement of the property for sale. A copy of an appraisement was deposited with the clerk after the first publication of the notice of sale, and the appraisement evidenced by such copy was, on motion, set aside and a new one ordered, which was made and a copy thereof filed on the Saturday preceding the Monday, at 10 o'clock A. M., of which the sale was advertised to be, and was, made. In the matter of appraisement there was a noncompli-

ance with the requirements of the statute (Code, sec. 491*d*), and, in accordance with the rule announced in *Burkett v. Clark*, 46 Neb., 466, the sale was not proper and its confirmation must be set aside. The decree confirming the sale is reversed, the sale set aside, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN W. MAYER, JR., ET AL. V. STATE OF NEBRASKA, EX REL. R. G. WILKINSON ET AL.

FILED DECEMBER 9, 1897. No. 7487.

1. **Mandamus:** PLACE OF TRIAL. In an application for a writ of *mandamus* where issues of fact are presented for trial, a judge of the district court cannot allow a peremptory writ at chambers in vacation. The trial of such issues must be at a session of court in the home forum or place of the litigation.

2. ——— JURY TRIAL. The trial of issues of fact on an application for a *mandamus* is not one in which a jury may be demanded as a matter of right.

ERROR from the district court of Nemaha county. Tried below before BUSH, J. *Reversed.*

G. W. Cornell and *W. H. Kelligar*, for plaintiffs in error.

G. B. Beveridge, contra.

HARRISON, J.

It appears herein that on April 19, 1894, John W. Mayer, Jr., filed with the city clerk of the city of Auburn, this state, an application for license to sell intoxicating liquors in said city. May 19, 1894, a remonstrance against the granting of the license was filed, and June 5, 1894, the matter was heard, and as results of the hearing the remonstrance was overruled and an order made

by which the license was granted. The remonstrators gave due notice of an appeal and on the 16th of June filed a transcript of the proceedings of the city council at the hearing on the remonstrance, in the district court and perfected an appeal. On the same day, June 16, John W. Mayer, Jr., paid to the proper officer of the city the license fee and received his license. On the same day the mayor and council were notified of the perfection of the appeal and a demand was made of them to revoke or recall the license, pending the disposition of the appeal. On July 2, 1894, the city council held a session at which the demand for the recall of the license was considered and denied. On July 6, 1894, this action was instituted in the district court of Nemaha county, the relief asked being that a writ of *mandamus* issue to the city council of Auburn commanding it to revoke or recall the license issued to John W. Mayer, Jr. On the succeeding day, at chambers, the judge of the district court allowed an alternative writ, which was issued, and on the 17th of the same month the respondents filed returns or answers to the writ. A hearing was had before the judge at chambers, resulting in a peremptory writ being ordered and issued. The respondents have prosecuted error proceedings to this court.

At the time of the hearing the respondents challenged the jurisdiction of the judge to hear or try the cause at chambers on the ground that issues of fact were presented by the pleadings and were not triable by a judge at chambers and in a county of the judicial district other than the one in which the cause of action arose and suit was instituted. This was overruled and the ruling is the subject-matter of one of the assignments of error herein. There were allegations of facts which for their existence depended on proofs to be introduced on the hearing or trial. This being true, did the judge err in hearing the cause at chambers? In section 39 of chapter 19, Compiled Statutes, entitled "Courts," it is stated that "A judge of the district court may sit at chambers

anywhere within his district for the purpose of * * * hearing an application for *mandamus* or *habeas corpus*." In the case of *State v. Pierce County*, 10 Neb., 476, this section was under consideration, and it was said: "Judges of the district courts have no jurisdiction in vacation to award writs of *mandamus*." In 1881, what now appears as section 57 of the same chapter was passed by the legislature, in which it is provided that a judge of the district court may act at chambers at any time and place within his judicial district, and while so sitting shall have the power "to hear and determine application for writ of *mandamus*." This court construing this in connection with the provisions of section 648 of the Code of Civil Procedure wherein it is stated: "When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it, a peremptory *mandamus* may be allowed in the first instance. In all other cases the alternative writ must first be issued," has held that a judge of the district court may at chambers grant or order a peremptory writ of *mandamus*, but this only when the right is clear and not when there are issues of fact for trial. (*American Water-Works Co. v. State*, 31 Neb., 445; *Byrum v. Peterson*, 34 Neb., 237.) Under the rule enunciated in the decisions cited the judge erred in holding that he had jurisdiction to try this cause in vacation at chambers. There being issues of fact, the cause should have been tried in open court at its home forum.

As a branch of the demand that the cause be tried in a session of the court a request or demand for trial by jury was made. The denial of this is assigned for error. In section 653 of the Code of Civil Procedure it is said of proceedings on an application for *mandamus*: "No other pleading or written allegation is allowed than the writ and answer. These are the pleadings in the case, and have the same effect and are to be construed and may be amended in the same manner as pleadings in a civil action; and the issues thereby joined must be tried, and

the further proceedings thereon had, in the same manner as in a civil action." In sections 279-281 it is provided:

"Section 279. A trial is a judicial examination of the issues, whether of law or of fact, in an action.

"Sec. 280. Issues of law must be tried by the court, unless referred as provided in section 298. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered as hereinafter provided.

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

It is apparent that under the provisions of the sections of the Code quoted the trial by jury in the present action was one which could not be demanded as a matter of right; hence the judge did not err in his ruling relative to the demand for a jury trial. The provisions of these sections of the Code are not in conflict with the constitutional provision in regard to right of trial by jury. "The constitutional provision is that the right of trial by jury shall remain inviolate (Constitution, art. 1, sec. 6); but this does not mean that in all cases a party has a right to have the facts determined by a jury. The provision preserves the right to jury trial as it existed when it was adopted, but it does not create or extend such right." (*Sharmer v. McIntosh*, 43 Neb., 509.)

It follows from the conclusions we have reached that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

NORVAL, J., took no part in the foregoing decision.

MARY F. BOURKE, APPELLANT, V. HELEN E. FALCK, APPELLEE.

FILED DECEMBER 9, 1897. No. 7645.

Pleading: VERIFICATION: EVIDENCE. An answer verified on belief is not substantive evidence of the allegations of facts therein set forth, and is not admissible as such in favor of the pleading party. If so received in evidence, and it is the only evidence on which a judgment in the cause is based, the judgment will be reversed as not sustained by the evidence.

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

Charles A. Goss, for appellant.

Wharton & Baird, contra.

HARRISON, J.

The appellant herein instituted this action December 3, 1892, in the district court of Douglas county to foreclose a real estate mortgage given by Charles Falck and Helen E. Falck to secure the payment of a promissory note by them executed and delivered to appellant of date July 9, 1891. Charles Falck did not appear. Helen E. Falck answered and also filed an amendment to her original answer. The plea was of her coverture; that, as the wife of Charles Falck, she had signed the note and mortgage; that they were not given with reference to or for the benefit of her separate estate, and that she received none of the proceeds or the money loaned, of which transaction the note was evidence; nor did she derive any benefits therefrom. She further pleaded that, at the time of the execution of the mortgage, she was the owner in fee of the real estate mortgaged and was then occupying it as a homestead. To the answer, inclusive of the amendment, a reply was filed, which generally denied the allegations thereof and also contained

some affirmative statements in regard to the loan which need no further notice at this time. When the cause was called for trial there was no appearance on the part of the answering defendant, Helen E. Falck, and as a result of the proofs introduced on behalf of the appellant a decree of foreclosure was entered, one of the findings as set forth in the journal entry of the decree being that there was due the plaintiff (appellant) from the defendants Helen E. Falck and Charles Falck the amount of the note and accrued interest. An order of sale issued, a sale was made, and a report thereof presented to the court; and, after the application of the proceeds of the sale in the manner ordered by the court, a motion was made for a deficiency judgment in favor of appellant in the amount then remaining due her and unpaid. Attorneys for Helen E. Falck appeared in opposition to this motion, and as evidence of the facts therein stated offered in evidence the portion of the answer of Helen E. Falck, which was entitled "Amendment to Answer of Helen E. Falck to the Plaintiff's Petition." This, over the objection of appellant's counsel, was received and was all the evidence offered or introduced of the coverture of Helen E. Falck or any of the facts set up in her plea. On this evidence the trial court based a denial of the appellant's motion for a deficiency judgment against Helen E. Falck. This amendment to the answer was verified on belief and was not substantive evidence of the matters therein stated. (*Johnson v. First Nat. Bank*, 28 Neb., 792.) It furnished no basis for the finding of the court. The finding had no evidence to support it, and the resultant judgment in favor of Helen E. Falck must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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

FILED DECEMBER 9, 1897. No. 9249.

1. **Pleading:** DEMURRER. On demurrer judgment should go against the party whose pleading was first defective in substance.

2. **Office of Mayor.** The office of mayor of a city of the metropolitan class is an office of profit and trust under the laws of this state.

3. **Title to Witness Fees in Hands of Clerk.** Unclaimed witness fees and costs remaining in the hands of the clerk of the district court are not public moneys; and the legislation of this state, in so far as it attempts to divest the persons for whose benefit such fees and costs are paid of title thereto, is unconstitutional and void.

4. **Clerk District Court:** FINES AND PENALTIES: CONSTITUTIONAL LAW. A clerk of the district court, as to moneys received by him in payment of fines and penalties imposed in his court, is a collector and custodian of public money within the meaning of section 2, article 14, of the constitution. HARRISON, J., and IRVINE and RAGAN, CC., dissenting.

5. **Constitutional Law:** OFFICERS: DEFAULT. The term "default," as used in said section of the constitution, implies more than a mere civil liability. There must exist a willful omission to account and pay over, with a corrupt intention, or such a flagrant disregard of duty as to fairly justify the inference that his conduct was willful and corrupt. Per NORVAL, J.; POST, C. J., and RYAN, C., concurring; RAGAN, C., dissenting.

6. **Officers:** ELIGIBILITY. The word "eligible" relates to the capacity to be elected or chosen to office, as well as to hold office. Per NORVAL, J., and RAGAN, C.; POST, C. J., and RYAN, C., concurring.

7. **Quo Warranto:** SUFFICIENCY OF INFORMATION. *Held*, That the information states a cause of action. HARRISON, J., IRVINE and RAGAN, CC., dissenting.

8. ———: ANSWER. The answer of the respondent avers sufficient matters, if true, to constitute a defense. Per NORVAL, J.; POST, C. J., and RYAN, C., concurring.

ORIGINAL action in the nature of *quo warranto* to oust respondent from the office of mayor of the city of Omaha. Heard on general demurrer to answer of respondent. *Demurrer overruled.*

The opinion by NORVAL, J., contains a statement of the issues.

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

It is the duty of a clerk of the district court to pay within ten days, without demand, to the county treasurer all moneys received as fines. (Constitution, art. 8, sec. 5; Criminal Code, secs. 533, 534; Compiled Statutes, ch. 80, art. 2, sec. 2; *Hazelet v. Holt County,* 51 Neb., 716.)

The word "eligible" as used in the Constitution and in chapter 26, section 64, Compiled Statutes, means "capable of being elected," and refers to the time of election, and not to the time of entering upon the discharge of the duties of the office. (*State v. McMillen,* 23 Neb., 385; *Thayer v. Boyd,* 31 Neb., 682; *Parker v. Smith,* 3 Minn., 164; *Taylor v. Sullivan,* 45 Minn., 309; *Searcy v. Grow,* 15 Cal., 118; *State v. Clarke,* 3 Nev., 566.)

Section 2, article 14, of the constitution, providing that a person who is in default as collector and custodian of public money or property shall not be eligible to any office of trust or profit, applies to the office of mayor of the city of Omaha. (*Douglas County v. Timme,* 32 Neb., 272; *People v. Hurlbut,* 24 Mich., 47; *Attorney General v. Common Council,* 70 N. W. Rep. [Mich.], 450; *Montgomery v. State,* 107 Ala., 380; *Chambers v. State,* 127 Ind., 365; *Burch v. Hardwicke,* 30 Grat. [Va.], 24; *State v. Valle,* 41 Mo., 29; *Shell v. Cousins,* 77 Va., 328.)

Respondent was "in default" within the meaning of the constitution. (*Williams v. Stern,* 5 Q. B. Div. [Eng.], 409.)

Relator may test the title of respondent to the office before the latter has been convicted of an offense. (*Pucket v. Bean,* 58 Tenn., 600; *Brady v. Howe,* 50 Miss., 607; *Hoskins v. Brantley,* 57 Miss., 814; *Taylor v. Governor,* 1 Ark., 21.)

Mistake or ignorance of a clerk in charging and col-

lecting illegal fees, though there is no evil intent, is not a defense to an action for the penalty. (*Cobbey v. Burks*, 11 Neb., 157; *Phœnix Ins. Co. v. Bohman*, 28 Neb., 253.)

Wharton & Baird and *J. J. Boucher, contra:*

The words of the constitution, "Any office of trust or profit under the constitution or laws of this state," are not applicable to the office of mayor of the city of Omaha. (*Santo v. State*, 2 Ia., 166; *Waldo v. Wallace*, 12 Ind., 584; *Attorney General v. Connors*, 27 Fla., 337; *State v. Wilmington*, 3 Harr. [Del.], 294; *Britton v. Steber*, 62 Mo., 370; *State v. McKee*, 69 Mo., 507; *State v. Smith*, 35 Neb., 13; *Respublica v. Dallas*, 3 Yeates [Pa.], 300; *People v. Henry*, 62 Cal., 557; *People v. Proomes*, 34 Cal., 520; *State v. Kirk*, 44 Ind., 401; *Mohan v. Jackson*, 52 Ind., 599; *Dorsey v. Vaughan*, 5 La. Ann., 155; *State v. Montgomery*, 25 La. Ann., 138; *State v. Taylor*, 11 So. Rep. [La.], 132; *Carpenter v. People*, 8 Colo., 129.)

The statutory provisions whereunder it is claimed to be the duty of the clerk of the district court to pay over, for the use of the school fund, all witness fees and costs remaining uncalled for, are unconstitutional and void. (*Kuntz v. Sumption*, 117 Ind., 1; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37; *Good v. Zercher*, 12 O., 368; *St. Anthony Co. v. Greely*, 11 Minn., 321; *Baker v. Kelley*, 11 Minn., 480; *Marshall v. McDaniel*, 12 Bush [Ky.], 378; *Gilman v. Tucker*, 128 N. Y., 190; *Colon v. Lisk*, 43 N. Y. Supp., 364; *Cromwell v. MacLean*, 123 N. Y., 474; *Ames v. Port Huron Boom Co.*, 11 Mich., 139; *Rockwell v. Nearing*, 35 N. Y., 307; *Nynehamer v. People*, 13 N. Y., 395; *Campbell v. Evans*, 45 N. Y., 356; *Cook v. Gregg*, 46 N. Y., 439; *Turner v. Althaus*, 6 Neb., 54; *Parsons v. Russell*, 11 Mich., 113; *Varden v. Mount*, 78 Ky., 86; *Chicago, B. & Q. R. Co. v. City of Chicago*, 17 Sup. Ct. Rep., 581; *Peterkin v. Inloes*, 4 Ind., 175; *Scott v. McNeall*, 14 Sup. Ct. Rep., 1108; *Hughes v. State*, 41 Tex., 19; *Groesbeck v. Seeley*, 13 Mich., 329; *McGavock v. City of Omaha*, 40 Neb., 75; *Denny v. Mattoon*, 2 Allen [Mass.], 381; *Johnson v. Hudson*, 96

Tenn., 630; *Bank of Louisville v. Board of Trustees*, 83 Ky., 219.)

References as to question of default: *People v. Hamilton*, 24 Ill. App., 613; *State v. Hastings*, 37 Neb., 97; *State v. Kountz*, 12 Mo. App., 511; *State v. Hunnicut*, 34 Ark., 564.

NORVAL, J.

This was an application by the state, on the relation of William J. Broatch, for a writ of *quo warranto* against Frank E. Moores to test the right of the respondent to hold the office of mayor of the city of Omaha. The averments of the application or information, so far as they are material to an understanding of the questions involved, may be summarized as follows:

1. That at an election duly held in the city of Omaha in November, 1895, relator, being qualified and eligible thereto under the constitution and laws of the state, was elected mayor of said city for the term of two years commencing on the first Tuesday in January, 1896, and until his successor was elected and qualified; that he duly qualified and entered upon the duties of the office, and has since discharged the functions thereof.

2. That under and by virtue of an act of the legislature of 1897, being chapter 12*a*, Compiled Statutes, 1897, at an election held in said city on the 20th day of April last, the respondent received a majority of the votes cast thereat for the said office of mayor, and the canvassing board declared him elected for the term of three years from and after the 10th day of May, 1897; that respondent thereupon qualified by giving the bond, and taking and subscribing the oath of office as required by said law, and claims the right, authority, and power to exercise and discharge the duties of mayor of said city, and is usurping and invading the functions of said office.

3. That for eight years ending in January, 1896, respondent was the duly elected, qualified, and acting clerk of the district court of Douglas county, and as

such clerk, during said period, he collected and received in fines and penalties imposed by said court upon divers persons aggregating the amount of $2,061.20, which, prior to May 9, 1897, he had failed and refused to account for and pay over to his successor in office, or to the county treasurer, but applied the same to his own use and benefit; that on said day respondent paid to the county treasurer of said amount the sum of $1,818.83, but has neglected and refused to pay at any time the remaining sum of $242.37.

4. That respondent as such clerk collected in cases pending or disposed of in said court certain witness fees aggregating $7,283.35, which remained in his hands for six months uncalled for, and likewise collected certain advance fees and lower court costs in the aggregate sum of $2,363.45, which remained in his hands for two years after the payment thereof uncalled for; that he has failed, neglected, and refused to pay the last two amounts, or any part thereof, to his successor in office, to the treasurer of Douglas county, or to any other person, but has converted the same to his own use; that by reason of the facts above set forth respondent was in default as collector and custodian of public money, which rendered him ineligible to the office of mayor, and his election thereto is null and void, and that he is wrongfully usurping and invading said office.

5. That respondent took possession of the office of mayor against the protest of the relator, and that the latter has not abandoned said office or any claim thereto.

The answer filed to the information, after admitting the election and qualification of the relator and respondent, respectively, to the office of mayor as above set forth, and that respondent was clerk of the district court of Douglas county from January, 1888, to January, 1896, denies that respondent is unlawfully usurping the office of mayor, or that as collector and custodian of public funds he was in default or is ineligible to said office; and alleges, substantially, that during his incumbency

of the office of clerk of the district court he collected altogether, in fines and penalties, the sum of $6,027.56, and has paid over to the county treasurer the entire amount thereof; that it was his *bona fide* intention and purpose at all times to pay all the fines and penalties by him collected within a reasonable time thereafter to the proper officer, and accordingly did, from time to time, pay to the county treasurer amounts aggregating the sum of $4,208.73; and as an excuse for not paying to said treasurer before the expiration of respondent's term as clerk of the district court, the difference between said amounts, to-wit, the sum of $1,818.83, the answer avers, in effect, that the items aggregating the sum of $364 in docket 7, at pages 115, 183, 185, and 186, were collected, if at all, by respondent's deputy without respondent's knowledge, and he has no record whatever of said money other than unsigned receipts upon the docket in the handwriting of said deputy, and is of the opinion and firmly believes, and has always believed, and so alleges the fact to be, that he never received said sum or any part thereof; that the items aggregating the sum of $200 in docket 32, page 226, were paid to such deputy during a serious illness of respondent in the month of April, 1895, the same being the last year of his term of district clerk; that his attention was at no time called to said sums, nor did he know that the same, or any part thereof, had ever been paid into his office; that if he had known of same being paid he would have turned the money into the county treasury; that as to the sum of $500, being payment of fine as shown in docket 46, page 232, respondent alleges he was notified by the proper officers and attorney of the city of Omaha, and of the board of education, not to pay said fine to the county treasurer, but to hold the same for said board, and was likewise notified by the county attorney of Douglas county not to pay the amount of said fine to the city treasurer, but to hold the same for the school fund of said county, and in pursuance of and in accordance with

the agreement of the respective attorneys representing, and authorized to represent, the said county, the city of Omaha, and the board of education, respondent held said money until about the 9th day of May, 1897; when he was released from said obligation to hold said fine or to pay the same to the city treasurer by the attorney representing said city and board of education in said matter. Whereupon respondent forthwith paid the full amount of said fine to the county treasurer, as he was at all times ready and willing to do, but for the contentions and agreements of said parties; that the various other items of fines which go to make up the sum of $1,818.83 were paid to respondent on different dates in small amounts, none larger than $100, which were receipted for by him upon the appearance docket; that from time to time he made report to the county commissioners of moneys collected by him for the county, and paid the same to the county treasurer, and intended to include all of those sums, but the same were overlooked and could not with reasonable diligence have been discovered prior to about the date of the payment thereof to the county treasurer; that during the last year of his term as clerk of the district court he had constantly in his employ a person whom he supposed to be a skilled accountant, whose sole duty it was to check up all the dockets and records of said office and report to respondent all moneys received by the latter for the county and for individuals, which had not theretofore been paid over; that during said year respondent made payments of various sums on account of fines as reported by accountant; that at the close of respondent's term said accountant made a purported final tabulated report, which, upon examination, was found to be so imperfect, incorrect, and unreliable that it was put aside as worthless, and a second accountant was engaged to prepare a correct statement; that in accordance with his report respondent, on the 9th day of May, 1897, paid to said treasurer said sum of $1,818.83, which included

all the fines collected and not paid over during his said term; that the duties of clerk of the district court required the keeping of a large number of accounts and extensive records, the handling of large sums of money, and press of business caused the said items to be overlooked; that respondent has had at all times the necessary funds, and has been ready, willing, and able to pay over to the county treasurer said moneys, and did pay the same as rapidly as the same could be ascertained. Denies that at any time he willfully, knowingly, or unlawfully withheld any part of said funds or converted the same to his own use. The answer admits the collection and retention of certain unclaimed witness fees and costs, and avers as a justification for his failure to turn the same into the treasury of the county that the law requiring such payment to be made is unconstitutional and void. To the answer a general demurrer has been interposed by relator, and the cause has been submitted for determination.,

The respondent insists that the information does not state sufficient facts to authorize the issuance of a writ of ouster against him, which proposition we are called upon to consider, since it is a well settled rule of pleading in this state that a demurrer to an answer searches the entire record, and judgment should go against the party whose pleading was first defective in substance. (*Hower v. Aultman*, 27 Neb., 251; *Oakley v. Valley County*, 40 Neb., 400; *Hawthorne v. State*, 45 Neb., 871; *West Point Water-Power & Land Improvement Co. v. State*, 49 Neb., 223.) Under and by virtue of section 11, chapter 12*a*, Compiled Statutes, 1895, a person elected mayor of a city of the metropolitan class is entitled to the office during the term for which he was chosen, "and until his successor shall be elected and qualified." Substantially the same provision is contained in chapter 10, Laws, 1897. The relator contends that under section 2, article 14, of the state constitution, respondent was ineligible to the office of mayor of the city of Omaha, and hence his

election was void, and that by force of the statutes relator is entitled to hold over, by reason of the non-election of a successor, and to discharge the duties and receive the emoluments of said office. Said section of the constitution declares: "Any person who is in default as collector and custodian of public money or property shall not be eligible to any office of trust or profit under the constitution or laws of this state; nor shall any person convicted of felony be eligible to office unless he shall have been restored to civil rights." It is strenuously urged by respondent that the inhibition against holding office contained in the first clause of the foregoing provision is not applicable to the office of mayor of the city of Omaha for the reason such position is not an office of trust or profit under the constitution or laws of the state. It is perfectly plain that the argument adduced in support of this contention is fallacious. It is true the office of mayor is not created by the constitution, and it is likewise obvious that the section of that instrument already quoted does not confine the disqualification from holding office to constitutional officers alone, but such inhibition extends as well to every office of profit and trust created by the state legislature. That the office of mayor of the city of Omaha is one of profit and trust there is no room to doubt. By law such officer is given a salary of $2,500 per annum, a sum equal to that received by a single judge of this court, besides he is authorized to receive an additional compensation of $800 as *ex officio* member and chairman of the board of fire and police commissioners of the city. The salary attached to the office, in connection with the numerous important duties and powers which the law confers upon the mayor of such city, unquestionably constitutes the mayoralty an office of trust and profit. Such office is not created by federal law, or any municipal ordinance, but was established and brought into existence solely by an act of the state legislature, which declares the term of office, designates the amount of salary, and prescribes

the powers and duties of the position. Giving the language of the constitution its plain and ordinary meaning, it is very clear that the office of mayor of the city of Omaha is an office of profit and trust under the laws of the state.

But the contention of respondent, if we correctly understand his counsel, is that the constitutional provision invoked by relator embraces merely state officers or "offices under the state." To so construe the fundamental law is to ignore not only the grammatical construction of the language used by the framers, but as well the plain and ordinary signification of the words. The office of mayor of the city of Omaha is an office under the state. The duties of such officer are not merely municipal, but the law creating the position has imposed upon him many duties and functions which pertain to state affairs, and the enforcement of the general laws of the commonwealth, many instances of which are pointed out on page 10 of relator's brief, such as the mayor is made conservator of the peace, has the power to issue a *posse comitatus*, to order the suppression of riots and breaches of the peace, to remit fines and costs imposed by the police judge for offenses arising under the laws of the state, and, in cases of urgency or necessity, to exercise the functions of an examining or committing magistrate. Such powers derived from a positive state statute, although also clothed with municipal functions, constitute the office of mayor of a metropolitan city an office under the state. An able and exhaustive opinion upon the question was recently rendered by the supreme court of Michigan in *Attorney General v. Common Council*, 70 N. W. Rep. [Mich.], 450, where, after a review of the authorities upon the subject, it was held that the office of mayor of the city of Detroit is an office under the state, within section 15, article 5, of the constitution, which declares: "No member of congress, nor any other person holding office under the United States or this state, shall execute the office of governor." To the same

purport are *Montgomery v. State*, 107 Ala., 372; *Shelby v. Alcorn*, 36 Miss., 273; *State v. Valle*, 41 Mo., 31; *State v. Stanley*, 66 N. Car., 59; *Ogden v. Raymond*, 22 Conn., 379; *Chambers v. State*, 127 Ind., 365; *Burch v. Hardwicke*, 30 Gratt. [Va.], 24. Many other authorities might be added in line with those cited if it were deemed necessary. There are likewise decisions which seemingly lay down a contrary doctrine; some of them are mentioned in the brief of respondent.

A mere reading of section 2, article 14, of the constitution, in connection with the act creating metropolitan cities, leaves no doubt that the office of mayor of the city of Omaha is an office under the laws of the state, since the officer derives his powers solely from, and exercises them in obedience to, a state statute, which imposes duties upon such officer in relation to state affairs, as contradistinguishable from municipal functions. The inhibition against holding public office contained in the first clause of the section of the constitution under consideration extends to "any person who is in default as collector and custodian of public money and property." The question arises whether the respondent, under this provision, was disqualified from being elected to, or holding the office of, mayor. The information charges, and the answer admits to be true, that as clerk of the district court he received certain moneys in payment of witness fees, advanced and lower court costs, which he has failed to pay over to his successor in office or the county treasurer, although the same remained uncalled for in his hands for more than two years from such payment. Relator insists that it was the duty of the respondent to pay to the county treasurer all such unclaimed fees and costs, and this contention is predicated upon plain and positive statutory requirements. By section 39, chapter 28, Compiled Statutes, it is made the duty of each clerk of the district court, county judge, and justice of the peace to report to the county commissioners of the respective counties quarterly all witness fees which

have been received in their, or either of their, hands uncalled for by the parties thereto for the period of six months after the same have been paid; and within twenty days after the filing of such report the county commissioners are required to publish a notice thereof for two weeks in a weekly newspaper of general circulation published in the county. Section 40 declares: "All fees remaining in the hands of such district clerk, county judge, or justice of the peace for the period of six months after the same has been reported by them to the county commissioners shall be paid over to the treasurer of the county, who shall receipt in duplicate for the same, one of which receipts shall be filed with the county clerk, and all such fees shall be credited to the common school fund of the county." Section 1, article 2, chapter 80, Compiled Statutes, provides: "That all unclaimed fees and costs which have been paid and not demanded for two years shall be paid in by the justice or clerk of any court under whose control such unclaimed fees and costs may be to the school fund of the respective county where such money belongs." Under the provisions of the foregoing sections, if they are valid and binding, it was the bounden duty of the respondent to pay to the county treasurer all unclaimed witness fees and costs in his hands for the benefit of the school fund. It is argued that said sections of the statute are inimical to sections 3 and 21 of article 1 of the constitution, which are as follows:

"Section 3. No person shall be deprived of life, liberty, or property without due process of law.

"Section 21. The property of no person shall be taken or damaged for public use without just compensation therefor."

That the unclaimed witness fees and costs retained by the respondent are property, in a legal and constitutional sense, every one must admit, and the fundamental law, therefore, forbids that the witness or person for whose benefit such fees and costs were paid shall be

deprived of his right to the same except by due process of law, or that such fees or costs should be appropriated by the public without adequate compensation therefor being made. The legislature, in violation of the foregoing provisions of the Bill of Rights, has arbitrarily, without a hearing, or the making of any provision for one, and without any remuneration whatever, attempted to appropriate all unclaimed witness fees and costs to the support of the common schools. This cannot be lawfully done, no more than the legislature could by statute require the payment into the county treasury, for the use of the school fund, all moneys received by the clerk of the district court upon judgments which have not been demanded of such clerk within a specified period, and no person would have the temerity to contend that such a law would be valid. The statute before us might be upheld had it merely made provision for the payment into the county treasury for safe-keeping the unclaimed fees and costs until such time as the same shall be demanded by the parties to whom the same are due. But no provision whatever is made in the law for the recovery of the funds by the person entitled thereto. The legislature has attempted, in violation of the constitution, to appropriate to the use of the public without compensation all unclaimed costs and fees. Such legislation is clearly obnoxious to sections 3 and 21 of the bill of rights, and therefore is unconstitutional and void. This conclusion is sustained by the principle underlying the following authorities, and no case sustaining a contrary doctrine has come under the observation of the writer. (*Turner v. Althaus*, 6 Neb., 54; *Johnson v. Hudson*, 96 Tenn., 630; *Bank of Louisville v. Board of Trustees of Public Schools*, 83 Ky., 219; *Varden v. Mount*, 78 Ky., 86; *Marshall v. McDaniel*, 12 Bush [Ky.], 378; *Gilman v. Tucker*, 128 N. Y., 190; *Ames v. Port Huron Log Driving & Booming Co.*, 11 Mich., 139; *Rockwell v. Nearing*, 35 N. Y., 302.) The legislation in question being invalid, the moneys received by the respondent on account of

fees and costs are not public funds, and he was not required to pay the same to the treasurer of Douglas county. Had he done so, it would not have exonerated him from personal liability to pay the same to the various witnesses or persons lawfully entitled thereto. The failure of the respondent to pay to the county the unclaimed fees and costs did not render him ineligible to the office of mayor.

In the foregoing discussion we have not overlooked sections 28 and 29, chapter 28, Compiled Statutes. They authorize the taxation as costs of a jury fee of $6 in each case of a conviction in a criminal prosecution, and in civil cases a jury fee of $5, and a fee of $1 for each trial by the court, and all of which items of costs, when collected, are required to be paid into the county treasury for the use of the county. Unquestionably costs taxed and collected under the provisions of said sections are public moneys within the purview of the constitution. But those sections have no application here, inasmuch as the information does not allege that the respondent has collected and retained any funds whatever on account of jury or trial fees, while, on the other hand, it is specifically charged that certain unclaimed witness fees, advanced and lower court costs have been received by the respondent and converted to his own use. Whether a clerk of the district court, as to fines received by him in satisfaction of sentences imposed in his court, is a collector and custodian of public money in a constitutional sense is not raised in the answer of the respondent, nor discussed in the briefs, hence we would be justified in ignoring the question at this time, but we shall not do so. The word "collector" is defined in the Standard Dictionary as "an official who collects or receives taxes, duties, or other public revenues." To constitute an official a collector he need not possess the power to enforce payment by legal process. It is sufficient if he is authorized by law to receive the money for and on behalf of the public. A "collector and custodian," within the

meaning of the section of the constitution under consideration, embraces every person who is given the legal power to collect, demand, or receive taxes or other public dues or moneys, and retain the same in his possession for any time however short or long. And this definition is sufficiently comprehensive to include the clerk of the district court as to moneys paid him on account of fines. This court has held, independent of any statutory provision, that a clerk of the district court is authorized to receive moneys upon a judgment in his office, and that a payment to him will bind the judgment creditor. (*McDonald v. Atkins*, 13 Neb., 568; *Moore v. Boyer*, 52 Neb., 446.) By section 533 of the Criminal Code all moneys due upon any judgment for fines, costs, or forfeited recognizance are required to be paid to the magistrate or clerk of the court where the judgment is rendered. And the next section requires that such magistrate or clerk of court shall pay such money to the county treasurer, except as otherwise expressly provided, within ten days from the time of receiving the same. All fines and penalties imposed under the general laws of the state, by section 5, article 8, of the constitution, are declared to belong to the county school fund, and are required to be paid to the county where the same were imposed. That the fines and penalties collected by the respondent were and are public moneys cannot be successfully disputed, and it is just as plain that it was his duty to receive and pay the same over to the proper officer. He was a collector of the money in a constitutional sense, and when he received it he was the legal custodian thereof, at least for the period of ten days, in case he desired to retain possession of the money for that length of time. It was the intention of the framers of the constitution, and it is with sufficient clearness so expressed in the instrument, that every person who by virtue of law collects or receives public funds of whatever character and makes default in paying the same over to the proper authorities should be ineligible to any office

created by the constitution or statutes of this state. The provision is a wholesome one, and should be enforced in no captious spirit.

The information discloses that the respondent as clerk of the district court collected and received in fines and penalties, which he retained in his hands for more than one year after his term of said office expired, and had failed to pay the same to the officer entitled thereto at the date of his election as mayor, the sum of $2,061.20, and that $242.37 of said amount yet remains unpaid, and has been by the respondent converted to his own use. The information therefore shows that he is at this time in default as collector and custodian of public funds, at least to the amount last named, and if the matters pleaded therein are true, he is ineligible to the office of mayor of the city of Omaha. This much as regards the sufficiency of the information. It states a cause of action.

It remains to be seen whether the facts set up in the answer relating to the moneys received by the respondent from fines and penalties constitute a defense to this proceeding. It avers that every dollar received by him from that source has been fully accounted for and paid over to the county treasurer, and all excepting the sum of $1,818.83 was so paid prior to respondent's election as mayor, and the last named amount was paid by him before entering into the duties of said office. If the term "eligible," as used in section 2, article 14, of the constitution, refers alone to the capacity to hold, and not to be elected and chosen to, an office, it is obvious that respondent does not come within the inhibition of said provision of the constitution. But respondent has not contended that if he was a defaulter at the time of his election he is eligible to hold the office in question, though all arrears were paid before he assumed the duties of mayor. Doubtless, the reason he has made no such contention here is that he regarded the question foreclosed against him by the decisions in *State v. McMil-*

lcn, 23 Neb., 385; *State v. Boyd*, 31 Neb., 682. In each of those cases it was ruled that the word "eligible" referred to the time of election, and not to the period of entering upon the office. Perhaps those decisions may be explained away and distinguished upon the ground that they were based upon provisions unlike the section of the constitution now under consideration; but to hold that the disqualification has reference alone to the time of assuming the duties of public office is to disregard the etymology of the word "eligible." The definition given it in the Standard Dictionary is "Capable of being chosen; qualified for selection or election. Fit for or worthy of choice or adoption." The word is similarly defined in the Century and other dictionaries. The term "eligible," as employed in the constitution, should be given its plain and ordinary signification, and when so construed there is no escaping the conclusion that it means capable of being elected or chosen. Neither the framers of the constitution, nor the people in adopting it, intended to permit a person to be elected to a public office who, at the time, was disqualified from entering upon the duties thereof, and run the risk of the removal of the disability between the day of election and the commencement of the official term. One who is in default as collector and custodian of public money or property is disqualified from being legally elected to any office of profit or trust under the constitution or laws of the state. This is the plain and natural construction of the language of the constitution. These views find abundant support in the authorities. (See *Territory v. Smith*, 3 Minn., 240; *Taylor v. Sullivan*, 45 Minn., 309; *State v. Clarke*, 3 Nev., 566; *Searcy v. Grow*, 15 Cal., 117; *People v. Leonard*, 73 Cal., 230; *Drew v. Rogers*, 34 Pac. Rep. [Cal.], 1081; *In re Corliss*, 11 R. I., 638; *Carson v. McPhetridge*, 15 Ind., 327; *Jeffries v. Rowe*, 63 Ind., 592; *Hill v. Territory*, 7 Pac. Rep. [Wash.], 63.) There is a division in the authorities upon the subject, but the ones cited above and those in line therewith, are believed to

be sustained by the better logic. If respondent were in default at the time of his election as mayor, his disability to hold the office was not removed merely by the subsequent payment of the money into the county treasury. The sufficiency of the answer therefore, to a considerable extent, must depend upon the construction that shall be placed upon the word "default" employed in said section 2, article 14, of the constitution. More than one definition is given the word "default" in the dictionaries. Thus, in the Standard it is defined as "1. A failure in the performance or fulfillment of an obligation; neglect or omission of a legal requirement. * * * 3. A wrong action; fault; transgression." While in Anderson's Law Dictionary the same word is defined as "Something wrongful; some omission to do that which ought to have been done. Nonperformance of a duty; as, the nonpayment of money due." And the same authority gives this definition to the word "defaulter": "One whose peculations have brought him within the cognizance of the law, to the extent, at least, of excluding him from a public trust."

Counsel for relator argued that the mere failure of the respondent to pay money at the time required by law constituted a default, whatever may have been the reasons for nonpayment. In one sense this is true. Good motives, intentions, or purposes most certainly would not exonerate him from a civil liability on his bond. But that is not the test to be applied here. The provision of the constitution is penal in its nature, and it was not intended by the framers thereof that a person should be disqualified from holding a public office merely because he might, through no fault of his own, be liable in a civil action as a collector and custodian of public funds. To render one ineligible there must have existed such willful conduct, omission of duty, or wrongful action, that the intent to misappropriate money or property belonging to the public is fairly inferable therefrom. If a civil liability is the crucial cri-

terion to be applied here, then every county treasurer comes within the inhibition of the constitution who has failed to pay over public money of which he has been robbed, or which while in his hands was destroyed by fire, or who failed to pay to his successor the true amount with which he was chargeable on account of an error or mistake accidently made by his deputy in adding a column of figures. In each of the supposed cases the treasurer would be liable in a civil action for the money, but that would not necessarily render him in default in a constitutional sense. "In the constitutional disqualification to hold office is the idea not only of debt, but with default with dishonor—not only that the collector owes, but that he owes the money collected and in his hands—not only that he is a debtor, but defaulter. * * * The evident object and dominant idea of the framers of the Constitution was to exclude from office defaulting tax collectors and other public functionaries; they had no purpose or intention of making the eligibility of the citizen to hold office depend upon mere pecuniary liability to the state." (*State v. Sheriff*, 45 La. Ann., 163.)

In *State v. Kountze*, 12 Mo. App., 511, the defendant was convicted of the offense of publishing a libel in these words: "Captain John was elected harbor-master of St. Louis, and could not qualify because he was a defaulter." The court, in the opinion, used the following apposite language: "It is objected that the word 'defaulter' has many meanings which impute nothing criminal, and that, therefore, the indictment is defective in not showing, by innuendo or otherwise, that the word was used and understood in a sense implying crime. There are many words in our language which may convey crime, or something very different, according to the connection in which they appear. 'You have stolen my heart;' implies nothing more than a certain ascendency acquired over the speaker's affections, while, 'You have stolen my purse;' as clearly imputes a larceny. When the term

defaulter is employed to explain a disqualification for holding a public office, but one meaning can attach to it in the minds of all persons of ordinary intelligence, who have a common familiarity with the English language and its most popular idioms. No one will naturally connect it with a mere delinquency as to minor social obligations, or the payment of ordinary debts. The universal application of the word in that connection is matter for judicial notice. It describes one whose peculations have brought him within the cognizance of the law, to the extent, at least, of excluding him from a public trust. So to describe a citizen who is free from that stigma, is libelous."

People v. Hamilton, 24 Ill. App., 609, is quite in point here. That was an information in the nature of *quo warranto* to test the right of the respondents Hamilton and Grogan, respectively, to hold the office of trustee of the village of Ashland. Each at the time of his election owed a village tax, which fact it was claimed constituted a disqualification to hold the office, under a statute providing that "no person shall be eligible to the office of Alderman unless * * *; nor shall he be eligible if he is in arrears in the payment of any tax or liability to the city." Hamilton paid $1.44, the amount of his tax, after his election and before assuming the duties of the office. Grogan owed the sum of 44 cents for village tax, which was not paid until after he had entered upon the office. Prior to his election, however, he wrote to the sheriff, as tax collector of the county, requesting the amount of his taxes, who in reply sent a statement which did not include said 44 cents for taxes on personal property. Grogan paid the sum stated by the sheriff prior to the election, and was unaware of the amount of said personal tax before election else he would have paid it with the other. The court held Grogan was not in arrears within the meaning of the law, saying: "It was never intended that the accidental omission to pay the trifling sum of less than a half dollar, where there had

been an honest intent and effort to pay all that was due, should exclude a citizen who was the choice of the people from holding the position to which he was elected. Such a case is not within the spirit, and hardly within the letter, of the law."

The section of the constitution under consideration has made two classes ineligible to public office under the constitution or laws. Those who are defaulters, or in default as collector and custodian of public money or property, and those who have been convicted of a felony, but have not been restored to civil rights. As to the first class, the disability to hold office is not made permanent, but is temporary, so long merely as the person remains a defaulter, and ceases the moment he has fully accounted for and paid over the public funds or delivered the property. To render one in that class ineligible it is not essential that it should have been judicially ascertained that he was in default. But there must exist, in addition to a liability in a civil action, a willful omission to account and pay over with a corrupt intention, or such a flagrant disregard of duty as to justify the inference that his conduct was willful and corrupt. Testing the answer by this rule, do the averments therein contained, if true, disclose that in a constitutional sense respondent was a defaulter at the date of his election to the office of mayor? The statute requires him to account for and pay over to the county all fines within ten days from his receipt thereof. This provision is mandatory, and that respondent did not comply therewith is admitted. But that alone did not render him ineligible to office, although such fact may be properly considered in determining whether the intention to misappropriate the funds existed. If the constitution permanently disqualifies the defaulter from holding office, then the willful failure to pay over the money within the time designated by law would render him ineligible to the office of mayor. But, as we have already seen, one may purge himself of the default at any

time by making payment, and the authorities cited in the brief of relator so hold. The answer discloses that prior to respondent's election he had paid to the county treasurer all the fines and penalties received by him, except the sum of $1,818.83. If this last named amount, or any portion thereof, was intentionally, willfully, or corruptly retained by respondent, he was ineligible to the office in question. Of the items which go to make up the said sum, the answer states, in effect, that $364 were never received by respondent or his deputy; that the item of $200 was paid during the serious illness of respondent to his deputy, and that the principal was unaware of such payment, or the money would have been covered into the treasury; and that the further sum of $500 was retained and held upon the agreement, request, and demand of the county attorney and the attorney for the city of Omaha and the board of education that the same be held pending a controversy over the ownership of the money, and that respondent was at all times ready and willing to pay the same to the county, and would have done so but for such contention and agreement. Those matters pleaded were sufficient to relieve him from being a defaulter as to such items. It is undoubtedly true that the alleged agreement for the detention of the said sum of $500 would not have constituted a defense to a civil action brought for the recovery of the money, but that is not the test for determining whether respondent was a defaulter or not. If in good faith he retained the $500 under the circumstances pleaded, and did not convert the same to his own use, then it cannot be said that he acted corruptly in not paying the same over to the county treasurer.

The only doubt the writer has entertained as to the sufficiency of this answer has been with reference to the excuse set up for not having paid over before election the remainder of said sum of $1,818.83, to-wit, $754.83. It is admitted that the items which go to make up said sum were paid to the respondent personally in sums not

exceeding $100, and that he overlooked such payments until after the expiration of his term, and with reasonable diligence the same could not have been discovered by him prior to the date of the payment thereof to the county. If there were no other averments contained in the answer we should hesitate before deciding that the pleading is sufficient. But as it is positively alleged, and by the demurrer admitted to be true, that it was never the intention of the respondent to, and he did not in fact, appropriate any portion of the funds collected to his own use, and that he did not willfully or knowingly withold any portion thereof, but paid the same to the county treasurer as rapidly and as soon as he was cognizant that he had received the money, we are constrained to the opinion that the demurrer to the answer should be overruled, with leave to the relator to reply, as he has signified a desire so to do.

DEMURRER TO ANSWER OVERRULED.

POST, C. J., and RYAN, C., concurring.

HARRISON, J.

I concur in the views expressed by Judge NORVAL in the opinion of the court and which are stated by Commissioner RAGAN relative to certain of the questions presented for discussion and decision in this action. The conclusions to which I agree are stated by Judge NORVAL:

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

"Unclaimed witness fees and costs remaining in the hands of the clerk of the district court are not public moneys; and the legislation of this state, in so far as it attempts to divest the persons for whose benefit such fees and costs are paid of title thereto, is unconstitutional and void."

A proper interpretation of the terms of the section of the constitution invoked herein by the relator in connection with the law which prescribes the duties of a clerk of the district court in regard to fines and penalties leads me to conclude that while it may be possible that he has been made a collector, he is not a custodian. He cannot be charged as the latter under a fair reading and rendering of the law. The language of the section of the constitution is "collector and custodian." (Constitution, art. 14, sec. 2.) Of this every word must remain as written by the constitution makers and adopted by the people and be allowed its ordinary accepted signification. To drop from the phrase the word "and" and insert in its place "or," as has been suggested in argument should be done, would be to change and do violence to both the letter and the spirit or intent. If the respondent, as clerk, was not a custodian of the fines and penalties, it follows from the effect of this and the other conclusions to which I agree that the relation or information herein did not state a cause of action. The demurrer to the answer searches the record, and is fatal to the first defective pleading in order of filing,—the relation,—and the judgment must be against the relator. A dismissal of the action should be entered. This would dispose of the cause and render unnecessary a discussion of some other questions which were argued, and I prefer to express no opinion on such further questions.

RAGAN, C., dissenting from the order of the court.

The questions presented by this record must be answered by construction of section 2, article 14, of the constitution, which is as follows: "Any person who is in default as collector and custodian of public money or property shall not be eligible to any office of trust or profit under the constitution or laws of this state." The questions involved are: (1) Is the office of mayor of the city of Omaha an "office of trust or profit," within the meaning of this section of the constitution? (2) What

is the meaning of the word "eligible," found in said section? (3) Do witness fees remaining in the hands of a clerk of a district court unclaimed and uncalled for, for more than one year, become public funds? (4) What is the meaning of the term "in default" in said section of the constitution? (5) Is a clerk of a district court a "collector and custodian" of public funds within the meaning of said section of the constitution?

Is the office of mayor of the city of Omaha an office of trust or profit under the constitution or laws of the state of Nebraska within the meaning of said section? By the law under which the city of Omaha is created its mayor is made its chief executive officer. He is conservator of the peace, and invested with power to appoint and dismiss policemen, with the consent of the board of fire and police commission. He is invested with authority, and it is made his duty, to enforce the quarantine and health regulations of the city. By virtue of his office he is chairman and a member of the board of fire and police commission. He is invested with the power to suppress riots and disturbances of the peace. He is invested with the executive power to remit fines and penalties imposed by the police judge for offenses against the ordinances of the city and the laws of the state. By the statute he is also invested with certain of the judicial powers of a justice of the peace; and generally it is made his duty to see to it that the laws of the state as well as the ordinances of the city of Omaha are obeyed and enforced within the limits of said city. The city of which he is mayor is one of the agencies of the state created for the purpose of carrying on and maintaining the state government; and while it is true that the city of which he is the chief officer is a municipal corporation, it is in no sense a private corporation. The word "office," as used in this constitution, means a public political office, and the office of mayor of Omaha is such an office. It is a public office. It is of a political nature, and the purpose for which it exists is a public purpose,—

a purpose in connection with the operation and administration of the state government. That it is an office of dignity and trust and great responsibility is readily apparent from the nature of its functions; and if such an office must yield a pecuniary compensation to its occupant in order to make it an office of profit, then it is such an office, as the salary or compensation paid its occupant is $3,300 per year. We have no doubt but that the office of mayor of the city of Omaha is an office of trust or profit within the meaning of said section 2, article 14, of the constitution.

2. What is the meaning of the word "eligible" found in said section of the constitution? The rule is that in the construction of a statute or constitution the cardinal object is to ascertain and give effect to the intention of its framers; and, to enable the courts to ascertain the intention of the law makers, the words should be given their ordinary signification. Webster defines the word "eligible" as follows: "Proper to be chosen; qualified to be elected; legally qualified; as eligible to office." The Standard Dictionary's definition of the word is: "1. Capable of being chosen; qualified for selection or election. 2. Fit or worthy of choice or adoption; suitable." The definition given of the word in Anderson's Law Dictionary is: "Relates to capability of holding as well as of being elected to an office."

The constitution of the state of California provided (art. 4, sec. 20): "No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state." One Grow was a postmaster in California, and while holding that office was elected sheriff of his county. After his election, and before his induction into the office of sheriff, he resigned as postmaster. His right to the office was contested on the ground that at the time he was elected he was ineligible under the provision of the statute just quoted. Baldwin, J., in *Searcy v. Grow*, 15 Cal., 118, speaking for the supreme court of California,

said: "Counsel for the appellant contends that the true meaning of the constitution is that the person holding the federal office * * * is forbidden to take a civil state office while so holding the other; but that he is capable of receiving votes cast for him, so as to give him a right to take the state office upon or after resigning the federal office. But we think the plain meaning of the words quoted is the opposite of this construction. The language is not that the federal officer shall not hold a state office while he is such federal officer, but that he shall not, while in such federal office, be eligible to the state office. We understand the word "eligible" to mean capable of being chosen,—the subject of selection or choice. The people in this case were clothed with this power of choice. Their selection of the candidate gave him all the claim to the office which he has. His title to the office comes from their designation of him as sheriff. But they could not designate or choose a man not eligible,—*i. e.* not capable of being selected. They might select any man they choose, subject only to this exception: that the man they selected was capable of taking what they had the power to give. We do not see how the fact that he became capable of taking the office, after they had exhausted their power, can avail the appellant. If he was not eligible at the time the votes were cast for him, the election failed. We do not see how it can be argued that, by the act of the candidate, the votes which, when cast, were ineffectual because not given for a qualified candidate, became effectual to elect him to office." This section of the California constitution was construed by the supreme court of that state as late as 1887 in *People v. Leonard*, 14 Pac. Rep., 853; and it was held that the constitutional provision should be construed to mean eligible to hold office as well as to be elected to office; and hence, where one was elected a state supervisor, and was eligible at the time, but after his election accepted and entered upon the office and duties of a federal appointment, that his

acceptance of the latter office disqualified him from holding the state office.

The constitution of Indiana provided (section 176): "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office." Wallace was mayor of the city of Indianapolis and some of the duties devolving upon him as such mayor were judicial in their nature. He was elected mayor for two years and within the two years resigned his office of mayor, was a candidate for and elected sheriff of his county, and the court held that under the constitution of the state of Indiana he was not eligible for election as sheriff. (See *Waldo v. Wallace*, 12 Ind., 569. To the same effect see *Gulick v. New*, 14 Ind., 93; *Howard v. Shoemaker*, 35 Ind., 111.) The constitution of 1851 of the state of Indiana provided (art. 6, sec. 2.): "No person shall be eligible to the office of clerk, recorder, or auditor more than eight years, in any period of twelve years." One McPhetridge was elected circuit clerk in 1845 for a term of seven years. In October, 1852, he was re-elected for four years. At the October election in 1856 he was again elected for four years. His last term would expire in 1860. At the October election in 1859 Carson was voted for, for clerk, and claimed to be entitled to the office as the successor of McPhetridge. Carson's contention was that under the constitution of 1851 McPhetridge could not hold the office of clerk longer than eight years from November 1, 1851, and that by reason of said constitution, became disqualified to hold the office of clerk after November, 1859. This contention the supreme court in a *quo warranto* proceeding sustained. In the opinion the court said: "The term 'eligible,' as used in our constitution, relates to capacity of holding, as well as capacity of being elected to, an office." (See *Carson v. McPhetridge*, 15 Ind., 327. To the same effect see also *Jeffries v. Rowe*, 63 Ind., 592.) In *Smith v. Moore*, 90 Ind., 294, the consti-

tutional provision of that state that "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office," was again construed; and the conclusion was reached by the majority of the court that the term "eligible" in the constitution meant legally qualified and that one holding a judicial office was eligible for election to an office nonjudicial, the term of which would begin after his judicial term expired. The force of this opinion, however, is entirely destroyed by the able and exhaustive dissenting opinion of Elliott, J. In *State v. Bemenderfer*, 96 Ind., 374, *Smith v. Moore, supra,* is virtually overruled. The cases cited above from the 15th and 63d Indiana Reports are cited with approval and the court by unanimous opinion holds that the meaning of the word "eligible" in the constitution of Indiana means capable of being chosen.

The constitution of Nevada provides (art. 4, sec. 9): "No person holding any lucrative office under the government of the United States, or any other power, shall be eligible to any civil office of profit under this state." In November, 1866, one Clarke was elected attorney general of the state of Nevada and on January 7, 1867, entered upon the duties of that office. At the time of his election in 1866, he was United States district attorney for the state of Nevada. On October 25, 1866, Clarke conditionally resigned the office of United States district attorney, the resignation to take effect on January 1, 1867. In a *quo warranto* proceeding to test the title of Clarke to the office of attorney general the supreme court of Nevada, in *State v. Clarke,* 3 Nev., 566, discussing the meaning of the word "eligible" in the Nevada constitution, said: "The relator contends that the plain and unmistakable meaning of the word is 'capable of being elected or chosen.' The defendant, on the other hand, contends that, as used in this section, it means not 'capable of being chosen,' but 'capable of holding.' * * * We

agree with the defendant that the framers of the constitution intended to prohibit one who was holding a lucrative federal office from holding a state office at the same time. But instead of restricting the meaning of the word 'eligible' * * * we think, to carry out the intention of the constitutional convention, we ought rather to give it a more extended signification than is generally given, and hold that it means both 'incapable of being legally chosen,' and 'incapable of legally holding'." And the court held that Clarke was ineligible to election as attorney general.

A statute of Minnesota prescribed six months' residence in the territory as a qualification for election to office; and in *Territory v. Smith*, 3 Minn., 164, the court held that a party to be eligible to election to office in the territory must have resided therein for six months prior to the date of the election; that it was not sufficient that he resided in the state six months prior to the time he took office. (To the same effect see *State v. Williams*, 99 Mo., 291.)

In *State v. Murray*, 28 Wis., 96, it was held that an alien who had not declared his intention to become a citizen of the United States might be elected to the office of clerk of the county board of supervisors in the state of Wisconsin; and in case he had declared his intention to become a citizen of the United States before the commencement of his term of office he was entitled to enter upon and to hold the office; but in this case the court said that the term "ineligible" meant disqualification to hold an office as well as disqualification to be elected to an office. The opinion in the case, however, did not turn upon any constitutional or statutory provision of the state. In *State v. Trumpf*, 50 Wis., 103, the rule announced in *State v. Murray*, *supra*, was adhered to; but it was conceded that the rule was wrong.

A statute of Illinois provided (1 Starr & Curtis Ann. Stats., ch. 24, art. 3, par. 34): "No person shall be eligible to the office of alderman * * * if he is in arrears in

the payment of any tax or liability due the city." Another statute relating to villages, and providing for the election of trustees therefor, provided that "Wherever the words 'city council' or 'mayor' occur in this act the same shall be held to apply to the trustees and president of such village, so far as the same may be applicable." (Starr & Curtis Ann. Stats., ch. 24, art. 11, par. 192.) Hamilton and Grogan were elected trustees of the village of Ashland in the state of Illinois. Each one of them was in arrears at the time of his election in a small sum for taxes. In a *quo warranto* proceeding to test their right to the office as trustees the appellate court of Illinois in *People v. Hamilton*, 24 Ill. App., 609, held that they were not ineligible to the office of trustees of the village because their taxes were in arrears at the time they were elected; but the decision is not predicated upon the court's definition of the word "eligible" in the Illinois statute, but its decision rested on the point that the statute which rendered one in arrears for taxes ineligible to the office of alderman had no reference to village trustees.

The constitution of Kansas provided (art. 5, sec. 2): "No person who has ever voluntarily borne arms against the government of the United States * * * shall be qualified to hold office in this state, until such disability shall be removed by law." One Privett had voluntarily borne arms against the government of the United States during the late Rebellion. At the general election held in Kansas in November, 1880, he was elected sheriff. After his election and before taking possession of the office his disability to hold office was removed. In a *quo warranto* proceeding to test his title to the office the court held that under the constitution of Kansas just quoted, though he was ineligible to the office at the time he was elected, he was qualified to hold the office when his term began, because at that time his disability had been removed. (See *Privett v. Bickford*, 26 Kan., 52.)

These are not all the cases, by any means, in which the

meaning of the words "eligible" and "ineligibility," found in statutes and constitutions, have been considered. But we think the greater number of the adjudicated cases, as well as the decided weight of authority, sustain the proposition that the word "eligible" means both competent or capable of being elected to office, and competent or capable of holding office. And we are of opinion that the word "eligible" found in section 2, article 14, of our constitution means that any person who is "in default" as a collector and custodian of public money or property is not during the existence of such default competent or capable either of being elected to or holding an office of trust or profit under the constitution or laws of this state. If any person is in default as a collector and custodian of public money or property, he is ineligible to election to any office of trust or profit under the constitution or laws of this state. If any person is not in default as a collector and custodian of public money or property, at the time he is elected to an office of trust or profit under the constitution or laws of this state, but at the time of assuming the duties of such office becomes in default as a collector and custodian of public money or property, such default renders him incompetent to take the office to which he is elected; and if after he has assumed the duties of the office to which he is elected he becomes in default as a collector and custodian of public money or property such default renders him incapable, and disqualifies him from continuing, to hold such an office. Not one of the cases reviewed above is authority for the contention made here that the word "eligible" found in our constitution refers solely to legal qualification to hold office. Nor, after a somewhat protracted examination, have I been able to find any case where the word "eligible" was given such a construction when used in a law or constitution like ours. The framers of our constitution, bearing in mind the importance of the prompt and faithful collection and accounting for of the revenue of the state, designed by

this provision of the constitution to encourage and stimulate collectors and custodians of public funds to perform their duties. It was never the intention of the framers of the constitution that a collector and custodian of the public revenue of the state might negligently, carelessly, or criminally fail to account for the public revenue or property in his hands, take the chances of election to an office of trust or profit, and, if elected, then qualify himself to hold the office by complying with the law. To give the constitution this construction, I submit, is to refuse to follow the great weight of authority upon the subject and in effect to repeal the constitution itself. Section 7, article 6, of the constitution provides: "No person shall be eligible to the office of judge of the supreme court unless he shall be at least thirty years of age, and a citizen of the United States; nor unless he shall have resided in this state at least three years next preceding his election." To construe the word "eligible" found in section 2, article 14, of the constitution as meaning legally qualified to hold an office, then it would necessarily follow that a man would be eligible to be elected judge of this court if twenty-nine years of age, provided at the time he was inducted into the office he had attained the age of thirty years. It would follow that if one had declared his intention to become a citizen of the United States he would be eligible to be elected judge of this court and qualified to hold that office if at the time of his induction into the same he had become a citizen of the United States. It would follow that one would be eligible to election as a judge of this court though he had not resided three years in this state at the time of his election, but it would be sufficient if at the time he was inducted into office that he had been a resident of the state for three years. And yet I think the obvious, plain, and ordinary meaning of said section 7, article 6, of the constitution is that no one is eligible to election of judge of this court unless at that time he be thirty years of age and a citizen of the United

States and unless he shall have resided in this state at least three years next preceding the date of his election. (*State v. Boyd*, 31 Neb., 682.)

This constitution is not framed in technical or abstruse language. It speaks the ordinary, every-day language of the people. It expresses the supreme will of the people, and, in construing it, that will should be ascertained and determined from giving to the words of the instrument their ordinary and usual meaning; and when this is done there is no room for the contention that the framers of section 2, article 14, of the constitution did not mean exactly what they said when they declared that no person who is in default as collector and custodian of public money or property shall be eligible,—that is, capable of being chosen,—to any office of trust or profit under the constitution or laws of this state.

3. Are witness fees in the hands of a clerk of a district court, which have been unclaimed and uncalled for by the owner thereof for more than one year from the time they were paid to such clerk, public funds, within the meaning of said section of the constitution? Section 39, chapter 28, Compiled Statutes, provides that where witness fees shall be paid to a clerk of a district court, and shall not be called for by the parties entitled thereto for a period of six months after their payment to the clerk, he shall make a list under oath of the causes in which said fees have been paid and remain uncalled for, with the amount of such witness fees, and file the same with the board of county commissioners of his county; and that, within twenty days after the report is filed with them, the commissioners shall cause a notice to be published directed "to whom it may concern," reciting the fact of the presence of such witness fees in the hands of the clerk of the district court, and if they shall not be called for by the parties entitled to them within six months from the date the clerk reported them to the commissioners, such fees shall be forfeited and

paid to the common school fund of the county. Section 40 of said chapter provides that all witness fees remaining in the hands of a clerk of the district court for six months after the date of his making his report thereof to the board of county commissioners shall be by said clerk paid over to the county treasurer. I think these sections, 39 and 40, are unconstitutional and void. By this legislative act, the property of the citizen is attempted to be taken for public use for no crime or debt of the citizen, and not as a punishment for any crime; and it is taken without any compensation being rendered the citizen therefor, and in this respect it violates section 21, article 1, of the bill of rights. By this act the legislature has also attempted to deprive the citizen of his property without due process of law and in this respect it violates section 3, article 1, of the bill of rights. Unclaimed witness fees in the hands of a clerk of a district court are property which belongs to the witnesses or to some litigant who has advanced the fees and recovered a judgment for them as costs against some other litigant; and the legislature is not depriving the citizen of his property by due process of law by simply providing that such citizen shall forfeit his property lawfully in the hands of a public official unless it be called for by a certain date. The legislation under consideration does not even provide that the owner of property shall have personal notice of the intention of the state to deprive him of his property. A clerk of a district court holds such witness fees in trust for the owners thereof, and, at the expiration of his term of office, he should pay such fees over to his successor in office. But such fees are not public funds, within the meaning of section 2, article 14, of the constitution. They are in all respects private property, and, while the clerk of a district court or his successor in office is the legal custodian of such fees until called for, he holds them in trust for the owners. On this branch of the case I reach the conclusion that a clerk of a district court who has neglected

and failed to pay to the county treasurer witness fees in his hands which have been there unclaimed for a year or more is not by reason of such neglect in default as a collector and custodian of public funds.

4. What is the meaning of "in default" in said section 2, article 14, of the constitution? Section 5, article 8, of the constitution provides: "All fines, penalties, and license moneys arising under the general laws of the state, shall belong and be paid over to the counties, respectively, where the same may be levied or imposed, and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinance of cities, villages, towns, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue." Section 534 of the Criminal Code of the state provides: "Every magistrate or clerk of court upon receiving any money on account of forfeited recognizances, fines, or costs, accruing or due to the county or state, shall pay the same to the treasurer of the proper county, except as may be otherwise expressly provided, within ten days from the time of receiving the same." In the case at bar, while the respondent was clerk of the district court of Douglas county, there were paid to him certain fines and penalties which by the provision of the statute just quoted became and were public funds and belonged to the common school fund of the state. These public funds the statute just mentioned required the respondent to pay to the county treasurer of Douglas county within ten days after their receipt. It stands admitted in the record that the respondent did not pay certain of these fines and penalties to the county treasurer of Douglas county within ten days after their receipt, nor during his term of office as clerk; that he had not paid the same to the said county treasurer at the time he was elected mayor

of the city of Omaha, but that he had paid to said treasurer said fines and penalties at the time he was inducted into the office of mayor. Was the respondent, at the time he was elected mayor of the city of Omaha, in default within the meaning of said section 2, article 14, of the constitution, if within the meaning of said constitution he was, while clerk of the district court, a collector and custodian of public funds?

To make default is to fail to keep a promise or perform an obligation at the time it is due. Such a failure may result from inability to perform the duty or to keep the promise made, or it may result from negligence or carelessness, or it may be the result of a criminal intent. But, if the failure to perform the duty or to keep the promise made is the result of either of these reasons, the party is still in default; and a collector and custodian of public money or property is "in default" within the meaning of this section of the constitution if he collects such money or property and retains it or fails to pay it over or deliver it to the party to whom the law declares it shall be paid or delivered and within the time fixed by statute for its payment or delivery.

In this connection I shall notice the excuses interposed by the respondent in his answer for his neglect or failure to pay over the fines and penalties in his hands to the county treasurer of Douglas county within ten days after their receipt. The respondent says that it was his purpose and *bona fide* intention at all times during his term to pay all the fines by him collected over to the proper officer within a reasonable time after the same were collected. This excuse is not good. It was not for the respondent, while clerk of the district court, to determine for himself what was a reasonable time in which to pay over to the county treasurer the fines and penalties collected. The statute does not prescribe that a clerk of a district court, to whom are paid fines and penalties, may pay them to the county treasurer of his county within a reasonable time, but within ten days after their receipt.

Another excuse of the respondent is that $364 of the fines and penalties which came into his hands were collected, if at all, by deputy of the respondent; that respondent did not know that the same had been received by the deputy until long after it was received, and after the deputy had left respondent's employment. This is not an allegation that the $364 never came into respondent's hands. It is not an allegation that he did not know that his deputy had received this $364 prior to the time respondent was a candidate for mayor. It is not an allegation which alleges that respondent did not know before his term of office expired that his deputy had received for him $364.

Another excuse is that $200 of the fines and penalties retained by the respondent were paid to his deputy during the time respondent was ill,—in the month of April, 1895,—and that respondent's attention was not called to the fact that said sum of money had been paid into his office during the remainder of his term of office. This excuse is likewise invalid. It was the duty of the respondent while clerk of the district court to keep a book or books in which all fines and penalties paid into his office should be entered, the time of their receipt by him, and the day of their payment to the county treasurer. But in this last excuse offered by the respondent he admits that the payment of the $200 to his deputy during respondent's illness was shown on page 226 in one of the dockets kept in his office. It was the duty of the respondent to see this docket.

A final excuse offered by the respondent for retaining the fines and penalties in his hands is that he held them in his hands in pursuance of a stipulation to that effect entered into between the attorney for Douglas county, attorney for the school board of the city of Omaha, and the attorney for the city treasurer of Omaha, as some dispute had arisen as to what particular board or tribunal or school district or municipality was entitled to these fines and penalties. This excuse will not do. The

statute was the finger-board which pointed to the county treasurer's office and in mandatory terms commanded the clerk of the district court to pay the fines and penalties in his hands to the county treasurer of Douglas county; and if any person or corporation claimed the right to those funds, that claim should be made to the county treasurer. The force and effect of a mandatory statute cannot be suspended by stipulation of parties.

I must not be understood from anything said here as imputing to the respondent any criminal intent. Indeed I think it is apparent from respondent's answer that he has at all times acted in good faith; that he has been guilty of no moral delinquency,—no evil intention; that he has at all times been able and ready and willing to account for and pay over the public funds in his hands. On the other hand duty compels me to say that I think this respondent has been guilty of negligence. Like all other men in all vocations of life, he has been careless. But the constitution does not, nor does it attempt to, make any distinction as to one's ineligibility to an office whether it arises from neglect, carelessness, or criminal intent. What the constitution says and what it means is that one who is in default as a collector and custodian of public money or property shall not be eligible to any office of trust or profit under the constitution or laws of this state; and, while I think the respondent was not guilty of any intentional wrong or fraud or crime, I have not the slightest doubt but that by reason of his carelessness and negligence he was at the time he was a candidate for the office of mayor "in default" within the meaning of section 2, article 14, of the constitution, if he was at that time a collector and custodian of public money or property.

The constitutional convention left it to the legislative department of the government to prescribe such civil or criminal penalties as it might see fit against one in default as a collector and custodian of public funds, but itself made the being in default by such a collector and

custodian as to such fund a political offense, and affixed as a penalty for the same ineligibility to election and disqualification for holding an office of trust or profit while such default existed; and the cause or the intention which gave rise to such political offense is in such an inquiry as this wholly immaterial. If the party is in default as a collector and custodian of public funds then by the constitution he is guilty neither of any criminal nor civil offense, but is guilty of the political offense described in the constitution; and no excuse whatever can be heard in extenuation of that offense. If the public funds or property in such collector and custodian's possession had been stolen from him, or if it had been lost as the result of some circumstance wholly beyond his control, then, to prevent his being in default, he must make it good to the public treasury. This provision of the constitution under consideration is analogous to the statute which prescribes a penalty of $50 against any officer for taking fees in excess of those prescribed by statute for performing a duty of his office. And in *Cobbey v. Burks*, 11 Neb., 157, the court held that the mistake or ignorance of such an officer, where he had not been guilty of any evil intent, afforded him no defense to the action to recover such a penalty. This is doubtless the correct construction of the act. I have not been able to find any case where such an act was differently construed. A different construction of such a law as this would effectually destroy it, and it is upon the grounds of public policy that such acts are construed by the courts as in *Cobbey v. Burks, supra.*

I am aware that in *People v. Hamilton*, 24 Ill. App., 609, already referred to, it was said in effect that one was not in default because of his failure to make a payment required by law when there had been an honest intent on his part to pay, but this language of the court was *obiter*. It had nothing whatever to do with the point on which the decision in that case turned. We are also aware that the supreme court of Louisiana in *State v.*

Reid, 12 So. Rep. [La.], 189, said that "default," when used in connection with "disqualification for office," meant default with dishonor. I concede that this expression is good poetry everywhere, and good law when applied to the facts of the case in which it was used, but it has no applicability whatever to this case. The Louisiana court was not defining, nor attempting to define, the meaning of the term "in default," or any kindred term. In that case the constitution of Louisiana made one who had been a collector of taxes ineligible to office until he had obtained a discharge for the amount of collections made by him. Such a collector having been elected to an office, and *quo warranto* proceeding brought to test his title to the office, it was contended by the relator that the respondent had not collected the tax lists placed in his hands, and for that reason he was indebted to the state, and it was in this connection that the court said, in the constitutional disqualification to hold office is the idea not only of debt but of default with dishonor; not only that the collector owes but that he owes money collected and in his hands; not only that he is a debtor but a defaulter.

5. A final inquiry is, is a clerk of a district court a collector and custodian of public funds or property within the meaning of said section 2, article 14, of the constitution? I do not think he is. It is true that the respondent, while clerk of the district court, was a custodian of the fines and penalties received by him from the time he received them. For their loss he doubtless would have been liable upon his official bond. Had he embezzled them or converted them to his own use perhaps he would have been criminally liable. But the language of the constitution is not a "collector or custodian," but "collector and custodian." Unfortunately, we have not access to the debates of the constitutional convention and I do not know for what particular reason the framers of the constitution made the clause read "collector and custodian." It was said by counsel for the relator in his

oral argument in this case in this court that the constitution should be read as though it was written "collector or custodian." The courts are not at liberty to thus change the context and make the disqualification of eligibility to office apply to any other person than the one the framers of the constitution made it apply. A collector, within the meaning of this constitution, is a public officer charged by law with the duty of exacting and receiving payments of money or property due the state or public. To make one a collector within the meaning of this constitution it must not only be his duty to collect or receive money or property due the state or public, but it must be his legal duty. He must be armed by law with authority to demand and enforce payment. Now, while the respondent was clerk of the district court, was by virtue of his office authorized to receive fines and penalties which might be paid to him as clerk, yet no statute of this state made it his duty to demand such fines and penalties from the party owing them, or to enforce, by any process whatever, the payment of such fines or penalties. He was not invested with authority to seize the property of the citizen who owed a fine or a penalty and sell it for the purpose of realizing such fine or penalty.

The demurrer should be carried back to the relation, sustained, and the proceeding dismissed.

IRVINE, C.

In the interpretation of the written law the meaning and intent of the lawgiver must be gathered from the language used. It must be presumed that the framers of the constitution were fairly familiar with the mother tongue, and that in an instrument of that solemnity they selected their words and forms of expression with some care for the purpose of expressing their intent. We are not at liberty to substitute for the meaning of the language so by them deliberately chosen the meaning which in our minds should have been expressed in order to

carry out the policy we attribute to them. Such liberality of construction in effect substitutes for what has been declared the law that which the courts think should have been so declared. We must therefore weigh the language used, imputing to the framers of the constitution deliberation and intelligence of diction, and give to each word some force if practicable. These remarks are expressive of axiomatic rules of construction, which, however, are apt to be overlooked in the attempt to carry out what is loosely styled the spirit of the written law,—an operation frequently accompanied by such a disregard of the English language that laymen, comparing the statute with its exposition, come to regard the process of construction as equivalent to destruction. If we are to pay any attention to the letter of the law we must conclude that a clerk of the district court is not a "collector and custodian" of public money as to fines and penalties received by him. We have no more right to read the word "and" as if it were "or" than we have to reverse the process and in the following phrase substitute the conjunctive for the disjunctive between "money" and "property," or to read the word "public" as if it were written "private," or to interpolate a negative, or in any other manner do violence to the constitution and effect a judicial amendment. It is the duty of the clerk to receive fines and penalties and within ten days pay them over to the treasurer. I am not prepared to say that because he is not charged with the duty and power of exacting and enforcing payment he may not properly be styled a "collector," but if the meaning of that word be so extensive as to include an officer merely empowered to receive and pay over, then to give any effect to the word "custodian" we must hold that it signifies one who is charged with a more permanent and responsible keeping and care of money than devolves on any agent for collection. And yet the latter is plainly the measure of the clerk's power and responsibility. The fact that ten days is allowed the clerk to pay the money to its

custodian, the treasurer, is of no significance. This is only a period fixed by law arbitrarily, for the sake of certainty, as one reasonably to be allowed for making the transfer, and it does not change the character of his possession. The statute attempting to transfer to the public the right of the owners of the other funds which the respondent is charged with retaining is very plainly violative of the constitution, for the reasons given by Judge NORVAL and Commissioner RAGAN. It follows that, in my opinion, the demurrer should be overruled, because the relation states no cause of action; and, as it is not in the nature of the case amendable, the cause should be dismissed. Entertaining this opinion, I feel that some of the other questions discussed are not necessarily involved in the decision, and prefer to express no opinion thereon.

GEORGE W. SHRECK, SHERIFF, V. EDWARD A. GILBERT.

FILED DECEMBER 9, 1897. No. 7579.

1. **Proceedings in Error:** WAIVER. In a proceeding in error it is proper for the defendant, by way of answer, to set up such facts subsequent to the judgment sought to be reviewed as are claimed to have the effect to waive the error complained of.

2. **Replevin:** ISSUES. In replevin the question for adjudication is that of the rights of the parties with respect to the possession of the property when the action was begun.

3. **Exemption:** ATTORNEY'S LIBRARY. The library of an attorney at law, a resident of the state, is exempt under section 530 of the Code of Civil Procedure, but by virtue of section 531 of said Code such exemption cannot be claimed against an execution upon a judgment recovered against him for moneys received professionally for the judgment creditor.

4. ——: ——: JUDGMENT: FINDINGS. The fact that the judgment was recovered for moneys received by an attorney for his client makes said section 531 applicable without any finding to that effect in the judgment.

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

J. S. Bishop and *Halleck F. Rose*, for plaintiff in error.

Gilbert Bros., contra.

NORVAL, J.

On the 20th day of February, 1893, Ab. Kirchbaum & Co. recovered judgment in the district court of Lancaster county against W. T. Scott and E. A. Gilbert, lawyers doing business under the name and style of Scott & Gilbert, in the sum of $111.39, and $92.90 costs. Subsequently, on July 3, 1893, an execution was issued upon said judgment, which was directed to, and placed for service in the hands of, G. W. Shreck, as sheriff of York county. The writ was levied by the officer upon the law library and office furniture of said E. A. Gilbert, who brought this action in replevin against the sheriff, and the possession of the property seized under the execution was delivered to Mr. Gilbert. The trial of the replevin suit resulted in a judgment in his favor. Defendant has prosecuted a petition in error.

Leave from this court having been first obtained, an answer in error has been filed by Gilbert, which alleges substantially that since this proceeding in error was commenced, to-wit, on the 3d day of March, 1896, this court, by a judgment duly entered, reversed the said judgment in the case of Ab. Kirchbaum v. Scott & Gilbert, and upon which the execution issued, and by virtue of which writ the sheriff of York county seeks to justify the seizure of the property replevied, and that a mandate has been issued by the clerk of this court remanding said cause to the district court of Lancaster county, out of which court said execution issued. The doctrine has been frequently decided by the courts that where a party, after appealing or prosecuting an error proceeding

from a judgment in his favor, voluntarily accepts the benefits of such judgment he waives the right to have the cause reviewed. (*Harte v. Castetter*, 38 Neb., 571, and cases in the opinion therein.) The rule is that any facts which have occurred subsequent to the judgment assailed, which are claimed to constitute a waiver of the error relied upon for reversal, may be brought to the attention of the appellate court. In what manner should it be done? We conceive the proper practice to set up, by way of answer, the facts transpiring after the entry of the judgment or final order, which are claimed to constitute a release of error, or an estoppel. The rule is thus stated in 2 Kinkead, Code Pleading, sec. 277: "While it is true that there are no pleadings filed in a proceeding in error, * * * and that the case is heard upon the record, yet a defendant in error may be permitted to file an answer to a petition in error for the purpose of setting up any facts constituting a defense to the proceeding which have occurred subsequent to the rendition of the judgment or order complained of by the plaintiff in error. It is proper practice to allow a defendant in error to allege facts showing that the plaintiff in error has waived the error of which he complains. A settlement of the case may be shown by an answer in error." To the same effect are Elliott, Appellate Procedure, secs. 407 and 408; *Collins v. Davis*, 32 O. St., 76; *Mathews v. Davis*, 39 O. St., 54.

The defendant in error, in the proper mode, has brought to our attention the matter which he claims bars the prosecution of the error proceeding. The question which next confronts us is whether the facts pleaded in the answer to the petition in error renders unavailing the attack made upon the judgment of the court below. The reversal of a judgment wholly vacates and annuls it, and, as a general rule, the party obtaining the judgment will acquire no right or benefit from it. (*Markwell v. Pereles*, 69 N. W. Rep. [Wis.], 984; Freeman, Execution, sec. 306; *Winterson v. Hitchings*, 30 N. Y.

Supp., 260.) The record discloses that no bond was given to supersede the judgment recovered by Ab. Kirchbaum & Co. v. Scott & Gilbert, that an execution was issued upon this judgment and the same was levied upon the property of Mr. Gilbert, which he subsequently replevied in this action. The judgment and the execution sued out thereon were valid and in full force when the property was taken from the officer under the replevin writ, and justified his action in the premises. The gist of a replevin action is the unlawful detention of the property at the inception of the suit, and the rights of the parties with respect to possession of the property at the time. (*Mercer v. James*, 6 Neb., 406; *Blue Valley Bank v. Bane*, 20 Neb., 294; *Fischer v. Burchall*, 27 Neb., 245; *Kavanaugh v. Brodball*, 40 Neb., 875; *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb., 793; *Brown v. Hogan*, 49 Neb., 746.) The sheriff by virtue of the levy of the execution having the undoubted right to the possession of the property in controversy when the same was taken from him under the replevin writ,—unless the property was exempt, which will be adverted to hereafter,—it follows from the principle deducible from the foregoing authorities that the reversal of the judgment upon which the execution issued did not change the rights of the parties as they existed when the replevin action was commenced. If the sheriff did not then unlawfully detain the property, he was entitled to a return thereof on the trial, or judgmen for his right of possession. The fact that the judgment in the action of Ab. Kirchbaum & Co. v. Scott & Gilbert has been reversed on a retrial of the replevin suit could be properly shown for the purpose of reducing the damages and the value of the officer's possession. The damages and value of possession would be merely nominal. To adopt the contention of the plaintiff below would subject the officer to costs, as well as an action for damages for seizing the property upon execution, while he was not a wrong-doer. The conclusion we have reached upon the question coincides with the doctrine

announced in Wells, Replevin, sec. 791, where it is stated as follows: "According to the general rule, the suit is tried on the state of facts as they existed at the commencement of the suit. This rule must prevail, unless there be some peculiar reasons existing to the contrary. Where the defendant justified as an officer, under an attachment, evidence to show that it was dissolved after the property was replevied was immaterial, as the rights of the parties depend upon the facts existing at the time the suit was begun. * * * But this rule will not prevent the consideration of damages to the time of the judgment, as interest is computed on a note; neither will the court refuse to consider the rights of the defendant to a return at the time return is asked." (Cobbey, Replevin, secs. 12, 25, 27.) The matters pleaded in the answer to the petition in error are insufficient to justify a dismissal of the proceeding. But the facts so set up may be proven by plaintiff on a retrial of the cause in mitigation of damage, and also as affecting the value of the officer's possession under the execution.

We now pass to a consideration of the merits of the cause. It is argued that the judgment is unsupported by the evidence and is contrary to law. Defendant below, as sheriff, held the property in controversy under an execution against Scott & Gilbert. Mr. Gilbert is an attorney at law residing in this state, and by reason thereof claims that the property was exempt under the provisions of subdivision 8 of section 530 of the Code of Civil Procedure, which exempts from attachment, execution, or sale on any final process "the library and implements of any professional man." The sheriff insists that the judgment upon which the execution issued was recovered for moneys received by the judgment debtors Scott & Gilbert, as attorneys at law for Ab. Kirchbaum & Co., and, therefore, the property is not exempt from the payment of such judgment. Section 531 of the Code of Civil Procedure declares that "nothing in this chapter shall be so construed as to exempt any property in this

state from execution or attachment * * * for money due and owing by any attorney at law for money or other valuable consideration received by said attorney for any person or persons." It is too plain to require argument or discussion that said section 530 of the Code cannot be invoked to exempt the library of an attorney at law from sale under execution to satisfy a judgment obtained for moneys received by him professionally for the judgment creditor. The statute is a just and wise one, which it is the duty of the courts to enforce.

In justice to plaintiff below, it should be stated that the points urged by him are, first, that section 531 cannot be invoked in this case, since neither the judgment in favor of Ab. Kirchbaum & Co., nor the execution issued thereon, discloses that said judgment was founded on a claim for money received by the judgment creditors as attorneys; second, that as a matter of fact the judgment was not for moneys collected professionally. The purpose of the said section 531 was to subject any property of an attorney at law to execution upon any judgment rendered against him for moneys received for the use of his client in the line of his employment. There is nothing in said section which requires that the judgment or execution shall disclose that the recovery was upon a debt against which the statute allows no exemptions to be interposed. It would have been proper practice for the judgment to have found the privileged character of the debt, and had such a finding been made upon an issue tendered, it, doubtless, would have been conclusive upon the question. But we find nothing in the section which makes such a finding essential, and we conclude that the section is available, whenever the exemption is claimed, if it is disclosed that the judgment was recovered upon a debt for moneys collected by an attorney for the use of another person. (*Rogers v. Brackett*, 25 N. W. Rep. [Minn.], 601; *Taylor v. Rice*, 44 N. W. Rep. [N. Dak.], 1017.) If it was unnecessary that the judgment should have found the privileged character of the debt, it fol-

lows no such recital in the execution was required to make such section 531 applicable. We have examined the authorities cited by plaintiff below, and find them not in point here.

The pleading and judgment in the case of Ab. Kirchbaum & Co. v. Scott & Gilbert were introduced in evidence in the trial of the present action. The petition in the case mentioned, after stating that Scott & Gilbert are attorneys at law and practicing at the city of York, avers that "the defendants are indebted to the plaintiff in the sum of one hundred dollars for so much money had and received by the defendants, as attorneys and counselors at law, of and from Hopkins & Cowan, of the city of York, Nebraska, to and for the use of the plaintiffs on or about the 1st day of February, 1888, and which said sum was then due and payable from defendants to the plaintiffs," and that defendants have unlawfully retained the same, and have paid no part thereof. The amended answer in said cause expressly admits all of said averments excepting the unlawful detention of the money, and, in the nature of an avoidance, pleads the payment of the money in obedience to certain garnishment proceedings brought against them. There having been no testimony introduced in the replevin action to contradict the foregoing documentary evidence, the privileged character of the debt, for the collection of which the execution issued, must be regarded as established. The judgment in this action is reversed, and the cause remanded.

REVERSED AND REMANDED.

RUFUS L. MCDONALD ET AL. V. ROSINA MARQUARDT ET AL.

FILED DECEMBER 9, 1897. No. 7570

1. **Attachment:** SUFFICIENCY OF AFFIDAVIT. An attachment affidavit setting forth the nature of the plaintiff's claim, that it is just, the amount which the affiant believes plaintiff ought to recover, and the existence of one or more statutory grounds for the writ in the language of the Code of Civil Procedure is sufficient.
2. ———: GROUND FOR DISSOLUTION. It is no ground for dissolving an attachment issued against two or more defendants that the property levied on is the individual property of one of them alone.
3. ———: EVIDENCE. Evidence examined and *held* sufficient to authorize an attachment.
4. ———: ISSUES ON MOTION TO DISSOLVE. The merits of a cause will not be adjudicated on a motion to dissolve an attachment.

ERROR from the district court of Pawnee county. Tried below before BABCOCK, J. *Reversed.*

A. D. McCandless and *Lindsay & Raper*, for plaintiffs in error.

Story & Story and *F. Martin*, *contra.*

NORVAL, J.

This was an action in attachment by Rufus L. McDonald and others against Rosina Marquardt, David F. Marquardt, and Charles Place on an account for goods sold and delivered. In the affidavit, as grounds for the writ, plaintiffs' agent deposed:

"1. That said defendants and each of them is about to remove his property, or a part thereof, out of the jurisdiction of this court with intent to defraud his creditors; and

"2. Is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; and

"3. Has property and rights in action which he conceals; and

"4. Has assigned, removed, disposed of, and is about to dispose of his property, or a part thereof, with intent to defraud his creditors; and

"5. Fraudulently contracted the debt."

The defendant Place alone moved for a dissolution of the attachment: (1) Because the facts stated in the affidavit are not sufficient to justify the issuing of the writ; (2) because said affidavit is untrue; (3) the property seized by the officer under the writ belongs to said defendant individually. The court discharged the attachment, and from the order of dissolution plaintiff prosecutes error.

The attachment affidavit alleges that the action is to recover a debt of $1,213.83, due for goods sold and delivered by plaintiffs; that the claim is just; that the affiant believes plaintiffs ought to recover said sum, and the existence of the five grounds of attachment set out above in the language of the statute. This complied with the requirements of sections 198 and 199 of the Code of Civil Procedure, and the first ground of the motion to discharge the attachment is overruled. (*Ellison v. Tallon*, 2 Neb., 14; 3 Neb., 63; *Hilton v. Ross*, 9 Neb., 496; *Steele v. Dodd*, 14 Neb., 496; *Burnham v. Ramge*, 47 Neb., 175.) That the defendant Place was the individual owner of the property upon which the attachment was levied was no ground for dissolving the writ. (Drake, Attachment [6th ed.], 418; *Rosenburg v. Burnstein*, 61 N. W. Rep. [Minn.], 684.) The attachment was doubtless vacated upon the second ground stated in the motion to discharge, namely, that the affidavit made the basis for the issuance of the writ was untrue. There is but little controversy in regard to the main facts of the case. Plaintiffs were wholesale merchants of the city of St. Joseph, Mo., and the defendant David F. Marquardt was a retail merchant at Burchard, this state, from January

1, 1894, to about March 20 of the same year, the business having been conducted by him in the name of his mother, Rosina Marquardt. During which period the bulk of the goods covered by the account sued upon was sold and delivered. On March 20, 1894, the defendant Place traded to Marquardt 160 acres of land, located in Cherry county, which had but little value, for a one-third interest in the stock of goods, which was worth over $5,000. At the time of said transfer Marquardt was indebted in considerable amounts to wholesale houses for goods purchased, of which fact Place was cognizable. After the trade, until April 13, 1894, the two did business under the firm name of Marquardt & Place, dividing the proceeds of sale between them each evening and paying no part of the indebtedness. During which period a small quantity of goods was ordered by them from plaintiffs, which, together with some of the merchandise previously ordered by Marquardt, was received and retained by the firm, but payment for the same never has been made to plaintiffs. On April 13, 1894, Marquardt traded his two-thirds interest in the stock of goods to one Brown, and that night Place and Brown hurriedly divided the goods between themselves. The latter immediately prior to such division stated to the former as the reason for so much haste "that the wholesale men would be there on the next train." No invoice was taken of the stock, but the division was made by removing the goods from the shelves and placing them in three piles, of which Place took one and Brown the remaining two. The latter removed his share to his own building, while the same night Place hauled his portion away from the storeroom in which the business had been conducted and secreted the goods in different places. The next day the suit was instituted. While the testimony may not disclose that the transfer from Marquardt to Place was made for a fraudulent purpose, no other conclusion can be drawn from the facts established by the proofs than that Place secreted a portion of the stock of goods for the purpose

and with the intent of placing the same beyond the reach of the plaintiffs, and to hinder and delay them in the collection of their claim herein involved. At least one of the grounds for the attachment was established by the proofs beyond dispute.

It is said that the debt for which the attachment was issued was the individual debt of Marquardt, and for the payment of which Place is not liable. This, if true, is no ground for vacating the writ. The merits of a cause cannot be adjudicated upon the hearing of a motion to dissolve. (*Olmstead v. Rivers*, 9 Neb., 234.) The order complained of is reversed, and the attachment is reinstated.

REVERSED.

MAX MEYER & BROTHER V. WILLIAM D. HIBLER.

FILED DECEMBER 9, 1897. No. 7560.

1. **Bill of Exceptions:** JUSTICE OF THE PEACE. Prior to the act of 1895 (Session Laws, ch. 72) a justice of the peace had no authority to allow a bill of exceptions embodying the evidence on a motion objecting to the jurisdiction of the court over the person of the defendant.

2. **Justice of the Peace:** ATTACHMENT: SUMMONS: CONSTRUCTIVE SERVICE. In an action for the recovery of money in a justice court, where the defendant has absconded with the intent to defraud creditors, if service of summons cannot be had within the county, and property of the defendant has been seized in attachment, constructive service of process may be had and jurisdiction acquired under the provision of section 932 of the Code of Civil Procedure.

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

M. B. Putney, for plaintiff in error.

J. F. Boyd, contra.

NORVAL, J.

This suit was brought by William D. Hibler against Max Meyer & Bro., a partnership, before a justice of the peace to recover the sum of $122 alleged to be due for commissions on goods sold by plaintiff for defendant. An affidavit for attachment, in the usual form, was filed alleging, as grounds for the writ, that the defendant is about to remove its property, or a part thereof, out of the county with intent to defraud its creditors, and has absconded with the same fraudulent intent. Another affidavit was likewise filed by the plaintiff alleging that the firm of Ray & Ray has property of, and is indebted to, the defendant. At the same time a summons, order of attachment, and garnishee summons were issued, all made returnable on February 7, 1893, and delivered to a constable for service, who returned the same with the indorsement that the said Max Meyer & Bro. "not found in the county;" further, that the order of attachment and summons in garnishment were personally served upon Ray & Ray. On the return day garnishee appeared and answered under oath that the firm of Ray & Ray had in its hands $108 belonging to defendant. Thereupon the justice continued the cause until April 7, 1893, at 10 o'clock A. M., for the purpose of obtaining service by publication, and on that day due proof of notice by publication under the provisions of the statute was filed with the justice. At the hour fixed for trial the defendant appeared specially and filed a motion challenging the jurisdiction of the court over the person and property of defendant on the following grounds: (1) Defendant has not been served with a copy of the summons, and has not waived service thereof; (2) defendant has not entered a voluntary appearance in the cause; (3) defendant is a resident of the state, residing and doing business in the city of Omaha, in Douglas county. This motion was overruled by the justice, an exception was noted to the ruling, and judgment was entered for Hibler, and the

garnishee was ordered to pay the $108 into court. Max Meyer & Bro. prosecuted error to the district court, wherein the proceedings before the justice were affirmed, and the cause is brought here to obtain a reversal of the judgment of the district court.

It was urged, in argument, that the justice of the peace did not acquire jurisdiction over the firm of Max Meyer & Bro., since it was a resident of Douglas county, and this suit should have been commenced in that county. Whether this action was brought in the proper county or not we are unable to determine, for the reason the record does not disclose the residence of the defendant partnership or that of the members thereof. The transcript of the justice shows that the objections to the jurisdiction were heard and determined upon affidavits, but those affidavits are not available here, as they are not a part of the record, and could not, under the law in force at the time of the trial, have been preserved by a bill of exceptions. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520; *Valsek v. Wilson*, 44 Neb., 10; *Real v. Honey*, 39 Neb., 516.) This court cannot take judicial notice of the residence of Max Meyer & Bro.

The only other question presented for our consideration is whether the justice acquired jurisdiction by the published notice. Section 77 of the Code of Civil Procedure provides that "service may be made by publication in either of the following cases: * * * Third—In actions brought against a nonresident of this state, or a foreign corporation, having in this state property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way. * * * Fifth—In all actions where the defendant being a resident of the state has departed therefrom or from the county of his residence, with intent to delay or defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the like intent." Section 932 of said Code, relating to constructive service on defendant by publication in actions

brought before a justice of the peace, declares that "if the order of attachment is made to accompany the summons, a copy thereof, and the summons, shall be served upon the defendant in the usual manner for the service of a summons, if the same can be done within the county; and when any property of the defendant has been taken under the order of attachment, and it shall appear that the summons issued on the action has not been and cannot be served on the defendant in the county, in the manner prescribed by law, the justice of the peace shall continue the cause for a period not less than forty days, nor more than sixty days, whereupon the plaintiff shall proceed for three consecutive weeks to publish, in some newspaper printed in the county, or if none be printed therein, then in some newspaper of general circulation in the said county, a notice, stating the names of the parties, the time when, by what justice of the peace, and for what sum said order was issued, and shall make proof of such publication to the justice; and thereupon said action shall be proceeded with, the same as if summons had been duly served." It will be observed that said section 77 of the Code has authorized service of process by publication in certain enumerated instances, among others, when the defendant has left the county of his residence with the intent to delay or defraud his creditors. There is as much right to make substituted service of summons in such a case as there is when the action falls within the third subdivision of the section, which empowers service by publication in certain causes where the defendant is a nonresident of the state or is a foreign corporation. The affidavit upon which this writ of attachment was issued avers that the defendant has absconded from the county of its residence with the intent of defrauding creditors. Property of the defendant was seized by virtue of the attachment and garnishee summons, and it is disclosed that not one of the processes issued in the action has been or can be served upon the defendant in the county. In the light of the facts disclosed in the

record, constructive service on the defendant below by publication was proper and jurisdiction was acquired under the provisions of the sections of the Code copied above. The identical question was decided in the same way in *Smith v. Johnson*, 43 Neb., 754. (See *Halliday Hay Co. v. Cline*, 9 O. C. C., 280.) The judgment is

AFFIRMED.

ADDISON W. HALLECK V. AUGUSTUS L. STREETER.

FILED DECEMBER 9, 1897. No. 7603.

1. **Action Between Partners.** A partner may sue his co-partner at law where the cause of action is not connected with the partnership accounts, and their consideration is not involved.

2. ———: INSTRUCTIONS. *Held*, No reversible error in the giving of the instructions set out in the opinion.

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

W. T. Thompson, for plaintiff in error.

E. L. King, contra.

NORVAL, J.

Augustus L. Streeter and Addison W. Halleck jointly executed and delivered their three promissory notes,—one to the Central City Bank for $131, one to the Merrick County Bank in the sum of $41.75, and the third for $22, payable to L. V. Haskell. Streeter paid the notes to the respective owners thereof, and instituted this action to recover from his co-maker the one-half of the amount so paid to lift said obligations. The defendant admitted the execution and delivery of the notes, pleaded certain matters as constituting set-offs, and as to the larger note alleged, substantially, that plaintiff and de-

fendant, at the time the same was executed, were partners engaged in the harvesting, buying, and selling of hay in this state; that said note was given for matters pertaining to the said business, and that no settlement has been had between the members thereof of the partnership affairs or accounts. The reply, so far as important to mention here, averred that a partnership existed between plaintiff and defendant and a third person; that said partnership was never settled, and no accounting ever has been had between the members thereof; that the note for $131 was not a partnership obligation, but was given solely for money borrowed to be contributed one-half by each party to launch the partnership, and it was agreed that each should pay one-half of the note. A jury trial resulted in a verdict for plaintiff in the sum of $100, and from the judgment rendered thereon defendant has brought the cause to this court, urging as grounds for reversal: (1) That plaintiff below, under the evidence, cannot recover contribution in this action on the note of $131; (2) the court erred in giving instructions 1 and 2 tendered by plaintiff.

The rule is firmly established that ordinarily one partner cannot maintain an action at law against his copartner on matters relating to the partnership business until there has been a settlement of the accounts of the firm. (*Younglove v. Leibhardt*, 13 Neb., 557; *Lord v. Peaks*, 41 Neb., 891.) If, therefore, the note of $131 was executed by the partners on account of the partnership, plaintiff cannot recover from defendant his contributive share of said note, since it is undisputed that there has been no settlement of the firm business. The record discloses a conflict in the testimony with respect to this note of $131. That introduced by the defendant tended to show that the obligation was contracted for the purpose of obtaining money with which to carry on the partnership venture. In other words, that it was in fact, and was at the time so regarded by both parties, a firm transaction and debt. There is in the bill of exceptions

testimony to the effect that plaintiff and defendant and one Fitch were partners in the hay business; that Halleck and Streeter were to furnish the capital; that they borrowed $131 from the payee of the note with the express agreement that each was to contribute one-half of the sum so borrowed towards carrying on the partnership enterprise, and that each was to pay a like share of the note when it matured. While the money was employed to buy property which went into the partnership, it was money of the two individual members of the firm when borrowed, and the note was not a partnership liability, but the joint debt of plaintiff and defendant. The jury by their verdict, under suitable instructions, adopted plaintiff's contention of the transaction, which finding has support in the testimony adduced on the trial. This being true, plaintiff could maintain a suit at law for contribution, since the cause of action was not connected with the partnership accounts, and their consideration is not involved herein. (17 Am. & Eng. Ency. Law, 1257-1262, and cases there cited; *Soul v. Frost*, 76 Me., 119; *Mullany v. Keenan*, 10 Ia., 224; *Bates v. Lane*, 62 Mich., 132; *Coffin v. McIntosh*, 34 Pac. Rep. [Utah], 247; *Carpenter v. Greenop*, 42 N. W. Rep. [Mich.], 276.)

Complaint is made of the following instruction, which was given at the request of plaintiff below:

"2. The jury are instructed that contracts between partners in respect to matters which, though relating to the partnership business, are separate and distinct from all other matters in question between the partners, and can be determined without going into partnership accounts, may be the subject of a suit at law between the partners, and, if you believe from the evidence that the $131 note sued upon, though relating to partnership matters, is separate and distinct from the partnership accounts and can be settled without going into the accounts of the partnership, you will find for plaintiff on said note."

It is admitted by defendant's counsel that the foregoing is correct as an abstract legal proposition, but the contention is that it was not applicable to the issue made by the pleadings and evidence. We think otherwise. It was predicated upon evidence in the case, and when read in connection with the other instructions given fairly submitted for the consideration of the jury one of the important issues involved.

Error is assigned upon the giving of this instruction tendered by plaintiff:

"1. If you find from the evidence that the payment of $20 to Mr. Haskell was made from funds derived from the partnership between the parties hereto, then it cannot be taken into account in this suit, and you will find for plaintiff for one-half of the note and the interest paid thereon, but if you find from the evidence that the defendant made said payment out of his separate money, not derived from the partnership existing, then you will find for the defendant on such items."

The foregoing related to the $20 joint note of plaintiff and defendant given to Mr. Haskell. Defendant in his answer pleaded payment thereof to Mr. Haskell as an off-set. It was established upon the trial that he paid $20 on this note. There was a conflict in the evidence whether it was paid out of defendant's own money, or was paid at plaintiff's request out of their joint funds, and the instruction did not invade the province of the jury, but permitted them to pass upon the disputed question of fact involved and directed that the verdict should be for plaintiff in case they reached a certain conclusion from the evidence, and in favor of the defendant if they found the facts to be different. The cause was fairly submitted to the jury, and there being no prejudicial error in the record, the judgment is

AFFIRMED.

C. W. CRUSE V. STATE OF NEBRASKA, EX REL. F. R. HARPHAM.

FILED DECEMBER 9, 1897. No. 7534.

1. **Mandamus:** TITLE TO OFFICE. While *mandamus* is not the appropriate remedy to determine the title to a public office, yet sufficient investigation may be made in such a proceeding to ascertain whether the relator has a *prima facie* title to the office in question.

2. ———: ———. Where a relator shows a *prima facie* title to a public office, he is entitled to the aid of *mandamus* to compel the delivery to him of the books, papers, and moneys belonging to such office by a former incumbent, who has no color of title to the office.

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

C. H. Tanner, for plaintiff in error.

W. P. McCreary, contra.

NORVAL, J.

This cause originated in the district court of Adams county. It was an application by the state on the relation of F. R. Harpham for a peremptory *mandamus* to compel the respondent to turn over to him all the books, papers, and moneys in possession of respondent pertaining to the office of treasurer of school district No. 69 of Adams county. Upon the hearing, a peremptory writ was granted as prayed.

It appears that the respondent, on and prior to November 7, 1893, was the acting treasurer of said school district, and on said date, at a meeting of the school board of said district, his official bond was found and declared insufficient, and in pursuance of the provisions of section 8, subdivision 4, chapter 79, Compiled Statutes, respondent was required to give additional security or a new bond within ten days. He having failed and neglected to comply with said request, the director and

moderator of said district, on November 18, 1893, under the authority of said section 8, declared vacant the office of treasurer of said school district, and called a district meeting to be held on December 1, 1893, to choose a successor, at which time the voters of said district elected relator as treasurer, who qualified and filed his bond as required by law, and ever since has been discharging the duties of his office. Respondent, although requested so to do, has refused to deliver to relator the books, papers, and moneys belonging to the office.

The sole question is whether *mandamus* is the appropriate remedy. Respondent insists that it is not until the relator has first established his right to the office by a proper action. Unquestionably the title to a public office cannot be adjudicated on an application for *mandamus*. However, in such a proceeding, sufficient investigation may be made to ascertain whether relator has a *prima facie* title to the office. (*State v. Plambeck*, 36 Neb., 401; *McMillin v. Richards*, 45 Neb., 786.) The purpose of this proceeding was not to have judicially determined the title to the office of treasurer of said school district, nor was the title to the office adjudicated. The evidence adduced discloses that relator has a *prima facie* right to the office by having been elected at a district meeting duly called for that purpose under and in pursuance of section 8, subdivision 4, chapter 79, Compiled Statutes, and qualified as such officer according to law. Respondent recognized the validity of said election by participating therein, he having been a candidate against relator for the office of treasurer. Obviously he hath not color of title to said office, and *mandamus* is the proper remedy to compel him to surrender possession of the books, papers, insignia, and moneys belonging to the office to the person who holds the *prima facie* title to the office. (*State v. Archibald*, 66 N. W. Rep. [N. Dak.], 234; *State v. May*, 17 S. W. Rep. [Mo.], 660; *State v. Johnson*, 11 So. Rep. [Fla.], 845; *Huffman v. Mills*, 18 Pac. Rep. [Kan.], 516; *Cameron v. Parker*, 38 Pac. Rep. [Okl.], 14;

Ewing v. Turner, 35 Pac. Rep. [Okl.], 951.) The judgment is

AFFIRMED.

A. U. WYMAN, RECEIVER, APPELLEE, V. L. B. WILLIAMS ET AL., APPELLANTS.

FILED DECEMBER 9, 1897. No. 7634.

1. **Corporations:** INSOLVENCY: AUTHORITY OF RECEIVER. The authority of the receiver of an insolvent corporation to collect assessments made by its board of directors before his appointment as such receiver is sufficiently established by showing that such receiver, under his order of appointment, was required to collect all sums due such insolvent corporation from whomsoever such indebtedness might be owing.

2. ———: ASSESSMENTS: LIABILITY OF STOCKHOLDERS. The members of a board of directors of an insolvent corporation who took part in a meeting of said board at which, by a unanimous vote, an assessment upon the unpaid subscriptions of such directors was declared necessary to discharge the debts of the corporation and accordingly there were made such assessments, are in no situation to question their liability for the amount of such assessments because of the fact that no judgment had been rendered against the corporation, and its want of assets established by the return, *nulla bona*, of an execution against it.

3. ———: ———: PAYMENT: PLEADING: REVIEW. Where a note was made for the amount of an unpaid subscription to the capital stock of a corporation, the payment of such note, to be available, must be pleaded and proved by the party relying on such payment as a discharge of his liability, and a finding of the trial court adverse to such alleged discharge will not be disturbed on appeal when all the evidence on that issue is not preserved by bill of exceptions.

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

Hall & McCulloch, Warren Switzler, and *J. W. West*, for appellants.

E. Wakeley and *A. C. Wakeley, contra.*

RYAN, C.

This was an action brought in the district court of Douglas county by Albert U. Wyman, as receiver of the Nebraska Fire Insurance Company, an insolvent corporation, for the collection from several of its individual stockholders of an amount equal to the unpaid subscription of each stockholder named as a defendant. The final decree, in so far as it establishes the liability of the appellants, was in this language: "And it is further considered, adjudged, and decreed that the plaintiff, as receiver of the said Nebraska Fire Insurance Company, have and recover of and from the said defendant Lorenzo B. Williams the sum of $6,243.75, with interest from the 13th day of April, A. D. 1891; and of and from the defendant George F. Wright the sum of $7,617.37, with interest from the 13th day of April, A. D. 1891; and of and from the defendant Samuel R. Johnson the sum of $10,156.50, with interest thereon from the 13th day of April, A. D. 1891; and of and from the defendant Henry W. Yates the sum of $208.13, with interest thereon from the 13th day of April, A. D. 1891; * * * and that the plaintiff recover of and from the said defendants his costs of this action, taxed at $——," etc. From this judgment Williams, Wright, Johnson, and Yates have appealed. A motion was submitted to affirm the judgment against Williams because of his failure to file a brief as required by the rules of this court. This motion must be sustained, and accordingly the judgment against Williams is affirmed.

It is not necessary to describe at length the various pleadings by which the issues were presented in the district court. For every practical purpose, it is sufficient to say that all the questions urged by the appellants on this appeal were distinctly presented to, and passed upon, by the trial court. These questions summarized, are as follows: (1.) With reference to the right of the receiver to maintain this action two objections were

urged, of which the first was, that the receiver simply represented and stood in place of the corporation for which he assumed to act, and the second objection to the prosecution of this action by the receiver, was, that he was not thereto authorized. (2.) The next question is as to the alleged want of a showing of a necessity for the collection of unpaid subscriptions, even if a creditor was bringing suit. (3.) It is insisted that the amount of debts had not been ascertained nor the assets exhausted before this suit was instituted. (4.) The fourth question presented by appellants involves the right of recovery on any theory, because, as it is insisted, their entire subscriptions for stock had been paid by appellants.

Albert U. Wyman was appointed receiver in an action originally instituted by one of the stockholders against the Nebraska Insurance Company for the purpose, among others, of procuring the appointment of a receiver to wind up the affairs of said corporation, which, as said stockholder alleged, was insolvent. The petition of this stockholder was filed in the district court of Douglas county on May 14, 1891. Nine days afterwards the auditor of public accounts of the state of Nebraska filed his petition of intervention, in which he asked the appointment of a receiver to be clothed with extensive powers such as would enable him to fully wind up the affairs of the said Nebraska Insurance Company. On May 26, 1891, another petition of intervention was filed, this time by the state of Nebraska on the relation of its attorney general. In this petition of intervention there was a prayer for the dissolution of the Nebraska Insurance Company. On April 11, 1892, the final order under and by virtue of which Albert U. Wyman assumes to possess the authority to maintain this suit was made and thereby his powers were defined as follows: "The said receiver shall have power, and it shall be his duty, to commence, institute, and carry on in his own name as such receiver, in this state or elsewhere, all such

actions and proceedings of either a legal or equitable nature as may be necessary to recover possession or obtain control of any and all such property and effects as aforesaid and to recover the value thereof or damages for the conversion of the same or injury thereto or to collect and enforce any and all claims, demands, and choses in action whatever due to said company; and he shall have power, and it shall be his duty, to institute, commence, and carry on in his own name as such receiver any action, suit, or proceeding, in this state or elsewhere, which any general or judgment creditor might commence, prosecute, or carry on, or could, under any circumstances, have commenced, prosecuted, or carried on, or which may be necessary or proper for the purpose of recovering any property, real or personal, or any money or funds or effects whatsoever, held in trust for the creditors or stockholders of the said insurance company, or which ought, legally or equitably, to be applied to, or towards, the payment of any judgment, claim, or demand against said company, or to be distributed among the creditors or stockholders thereof, or any other action, suit, or proceeding which may be necessary and proper for the winding up of all the affairs of the said insurance company or the due distribution of its effects," etc. The language of this order was broad enough to authorize the receiver to maintain an action for the recovery of whatever sum or sums was owing the insurance company. An order to this effect was declared within the powers of the district court in *Farmers Loan & Trust Co. v. Funk*, 49 Neb., 353, where the fund to be collected was the superadded liability of the holder of stock in a banking corporation, and, on principle, there exists no reason for restricting the powers of a district court to that class of cases. The reason of the rule extends to actions against stockholders in ordinary corporations for pecuniary profit for the enforcement of unpaid subscriptions to the capital stock, and we are therefore of the opinion that the order of

the court was within the proper exercise of its jurisdiction and conferred upon the receiver, as such, the right to institute and maintain this action against the appellants.

To an intelligent consideration of the three remaining objections urged by appellants it is necessary to refer to the proceedings of the board of directors of the Nebraska Insurance Company of date April 13, 1891, which, in the decree, was fixed as the initial date for reckoning interest. There were six directors on April 13, 1891, of whom four were Samuel R. Johnson, George F. Wright, Lorenzo B. Williams, and M. J. Burns. Of the other two, one was a son of Samuel R. Johnson, and the other was a son of George F. Wright. Each of these two directors had one share of stock and, very soon after April 13, 1891, both ceased to be stockholders and directors. The evidence indicates quite clearly that while but one of these young men was present at the first meeting, on the day indicated, both were present at the subsequent meetings of the board hereinafter referred to. At the first meeting, as shown by the record signed by the president and secretary of the company, its manager, Mr. Burns, reported that the sum of $15,552.65, which had been borrowed by him to pay losses, had become due and that the creditors were demanding immediate payment of the sum, and unless the same was paid at once suit would be brought against the company, to the great injury of its credit. It was thereupon resolved by the board of directors that the sum above named should be borrowed, and accordingly the president and secretary of the company were authorized to execute the company's notes, bearing ten per cent interest, to such parties as would loan the required amount, or any part thereof. The directors then severally offered to loan the following amounts, respectively: Williams, $3,823.80; S. R. Johnson, $6,222.93; George F. Wright, $4,686.40, and Burns, $819.52. Notes were executed for said sums as above indicated should be done. After

the execution of these notes had been approved and confirmed by the board it was resolved, in view of the large amount required to pay fire losses adjusted and in process of adjustment, that Manager Burns should discharge one-half the employes of the company. In the forenoon of the same day another meeting of the board of directors was had at which Manager Burns reported that the assets of the company, composed of judgments, chattel notes, bills receivable, real estate mortgages, etc., and office furnitures and fixtures, amounts due from agents and others, amounted to $96,153.24. In this report the indebtedness of the company was summarized at $41,703.60, and the manager, in this connection, reported that for the payment of the indebtedness above named an assessment on the unpaid capital of the company of 83¼ per cent would be required, which would yield $41,625. On the same day, and apparently at another meeting of the board of directors, Manager Burns presented for its consideration the following written demand:

"MARCH 13, 1891.

"*To the Board of Directors of the Nebraska Fire Insurance Company*—GENTLEMEN: You and the Nebraska Fire Insurance Company are hereby notified that, and we do hereby demand, immediate payment of the moneys loaned by us to the company, as evidenced by its promissory notes we now hold against the same.

"SAMUEL R. JOHNSON.
"L. B. WILLIAMS.
"GEORGE F. WRIGHT.
"M. J. BURNS."

While this communication was under consideration, Director Wright offered the following resolution, which was unanimously adopted: "Resolved, that the report of Secretary and Manager Burns, showing the present indebtedness of the Nebraska Fire Insurance Company for moneys borrowed from time to time to pay adjusted losses by fire and the proper expenses of said company

aggregating at this date the sum of forty-one thousand six hundred and twelve dollars, is found upon due examination thereof to be correct and just, and that the same amount has been borrowed from (and loaned to said company) by L. B. Williams in the sum of $10,757.42, by Samuel R. Johnson in the sum of $16,442.57, by George F. Wright in the sum of $12,265.05, by M. J. Burns in the sum of $2,147.02, and that the loan thereof by said parties to this company is hereby approved and ratified, and that the same is now due and owing said parties from said company, with ten per cent interest thereon from this date, and said report, as made and submitted, and the indebtedness of the company to said parties as thereby shown, is allowed, adopted, approved, and confirmed, and the president and secretary of the company are hereby authorized and instructed to execute to said above named parties promissory notes of the company, due on demand, evidencing said indebtedness of said company to them with interest as aforesaid." The record of the proceedings of the board of directors thereupon recites the execution of these notes on behalf of the company by the president (Samuel R. Johnson) and secretary (M. J. Burns), and the approval and ratification of said act of execution by the entire board. Secretary Burns submitted his report showing in detail the ownership of the stock of the company as follows: Samuel R. Johnson, 244 shares; George F. Wright, 183 shares; L. B. Williams, 150 shares; G. W. Kingsnorth, 130 shares; M. J. Burns, 32 shares; J. W. Morse, 30 shares; J. T. Hart, 168 shares; Susan E. Hart, 1 share; Mat Goodwin, 1 share; C. Duras, 1 share; J. T. Hart or the Bank of Commerce or its successor, the National Bank of Commerce, 212 shares; total, 1,000 shares. By a resolution introduced by Director Wright, and unanimously adopted by the board of directors, an assessment was made and ordered of 41.625 per cent on the capital stock held by each individual, or 83.25 per cent on the 50 per cent of such stock which remained unpaid. As-

against the appellants Williams, Wright, and Johnson, the district court held that the figures thus fixed were controlling, and accordingly rendered a judgment against each of these parties for an amount equal to 83.25 per cent of the unpaid subscription for stock held by such party. It is true that, by subsequent proceedings at the same meeting of the board of directors, these assessments were declared paid and satisfied, but it is to be borne in mind that these proceedings were had by the very directors whose said resolutions declared themselves discharged from an indebtedness owing to the company of which they were the officers. Under the holdings of this court in *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548; *Ingwersen v. Edgecombe*, 42 Neb., 740; *Tillson v. Downing*, 45 Neb., 549, it was incumbent upon the directors to show affirmatively that they made no use of their official position to secure to themselves an undue advantage over other creditors of the company. They were owing the company an amount equal to fifty per cent of the par value of the stock held by them. This was a fund to which the creditors of the company had a right to resort. (*Farmers Loan & Trust Co. v. Funk, supra.*) The mere fact that the directors, as individuals, owed this company gave them no right to appropriate the assessment on their stock to the payment of debts owing by themselves to the company, to the exclusion of its other creditors. With reference to the resolution whereby the indebtedness of the company was declared discharged by the appropriation to that purpose of the assessments upon the directors, the district court made a special finding which, in view of the evidence, we cannot say was without support. This finding was as follows:

"9. That the said resolution and all the said proceedings purporting to permit or authorize the application of the said assessment upon or towards the said indebtedness of the company to the said defendants respectively were unauthorized, fraudulent, and void, as to

the creditors and stockholders of the said corporation and did not in anywise release the said defendants from or impair their liability or obligation to pay the said assessments respectively, and the same remain valid as to such creditors and stockholders and in full force against the said defendants respectively."

As these directors in due form authoritatively as a board had ascertained and declared the existence of an indebtedness and of an exigency demanding an assessment on the unpaid stock held by themselves, these assessments became, at least as against these directors, an indebtedness duly ascertained which, therefore, was collectible in this action without further preliminaries.

The appeal of Henry W. Yates may be disposed of on principles resembling those above applied. For the fifty per cent of his unpaid subscription of stock the company held his promissory note. His testimony shows that he came into possession of this note by virtue of some arrangement with Mr. Hart, the purchaser of his stock, whereby it was claimed such purchaser's liability was substituted for that of Yates. The district court found adversely to the contention of Mr. Yates and we cannot assume that this finding was unsupported by the evidence, for we have not been able to find in the bill of exceptions the written instrument upon which, apparently, was founded the claim that Hart had been substituted for Yates and the liability of the latter discharged. This contract was identified and offered as Exhibit 134. There was also offered in evidence a note in no way described, except that it was designated as Exhibit 133. There was, moreover, the following offer in connection with the testimony of Mr. Yates: "I will offer in evidence * * * page 6 and page 31 of one of the ledgers of the Nebraska Insurance Company, which has been identified as Exhibit 30, the said pages being marked by the reporter as Exhibits 135 and 136." In that portion of the bill of exceptions which contains the exhibits we find the following memorandum: "Ex-

hibits 123 to 136, inclusive, are offers relating to, and which were offered in evidence on the part of, the defendants Alexander, Meyer, and Yates." The exhibits thus referred to are not in or with the bill of exceptions; hence we cannot say that the district court misapprehended their provisions because it refused to credit the note of Yates as fully paid. There is found no error in the record and the judgment of the district court is

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Assessments. See CORPORATIONS, 3. MUNICIPAL CORPORATIONS, 8-12. TAXATION.

Assignments of Error. See NEW TRIAL, 7, 8. REVIEW, 16-29.

Attachment. See GARNISHMENT. INTERVENTION. JUSTICE OF THE PEACE, 2, 5. REPLEVIN, 4. TROVER AND CONVERSION, 2-5.

1. An attaching plaintiff is estopped to assert that defendant has not sufficient interest to defend against the attachment. *Kountze v. Scott* 460
2. Defendant may move to discharge the attachment though he disposed of his entire interest in the property before it was seized under the writ. *Id.*
3. Evidence *held* sufficient to support an order discharging an attachment. *Id* 461
4. Section 236 of the Code does not confer on plaintiff the right to resist by oral evidence a motion to discharge the attachment. *Id.*
5. Whether oral evidence shall be used on the hearing of a motion to discharge an attachment is a matter resting in the discretion of the court. *Id.*
   Hamer v. McKinley-Lanning Loan & Trust Co 705
6. Plaintiff has control of the writ and may require the release of a levy. *Cole v. Edwards* 711
7. Ambiguous language in an affidavit drawn by counsel for a party will be most strongly construed against the latter. *Nebraska Moline Plow Co. v. Fuehring* 541
8. In view of the fact that the names of certain attorneys at law do not appear in the record as attorneys for either party, and of the further fact that there was direct positive testimony by one of the attorneys that neither of them was an attorney for the plaintiff until long after the commencement of the action in which an attachment issued, no presump-

Attachment—*concluded.*

tion founded upon unsatisfactory circumstantial evidence will be entertained to avoid the effect of such testimony in order that there may be justified the dissolution of the attachment issued at the commencement of the suit by virtue of which such alleged attorneys were garnished as debtors of the attachment defendant. *Id.*

9. Where an attachment was issued on the ground, among others, that the defendant had disposed of his property in whole or in part with intent to defraud his creditors, and, in resistance of a motion to discharge the attachment there was undisputed proof of admissions by the attachment defendant that he had made such a transfer of the nature charged that no execution against him could be collected, *held*, that there exists no reason for assuming that the transfer must have been made subsequent to the commencement of the attachment suit in view of the fact that the attachment defendant himself placed no such limitation on his own admissions of the fraudulent transfer in question. *Id.*

10. An attachment affidavit stating the nature of plaintiff's claim, that it is just, the amount affiant believes plaintiff ought to recover, and setting forth in the language of the Code the existence of one or more statutory grounds for the writ, is sufficient. *McDonald v. Marquardt*..... 820

11. The merits of a cause will not be adjudicated on motion to dissolve an attachment. *Id.*

12. It is no ground for dissolving an attachment against two or more defendants that the property seized is the individual property of one of them. *Id.*

13. Evidence *held* sufficient to authorize an attachment. *Id.*

Attorney. See NEW TRIAL, 6.

Attorney and Client. See ATTACHMENT, 8. EXEMPTION.

1. In an action against attorneys for negligence resulting in the loss of plaintiff's lien, a direction to the jury to find for defendants was *held* proper under the pleadings and evidence. *Westerman v. Sheppard*..... 124

2. Where the right of an attorney to recover fees depends on whether one who had authorized a foreclosure suit did so with mortgagee's authority, the burden is on the attorney to establish such authority on part of the alleged agent, and evidence tending to negative its existence is admissible under proper pleadings. *Saxton v. Harrington*..... 300

3. In a suit against a mortgagee for attorneys' fees for foreclosure, where defendant alleged non-employment and plaintiff pleaded ratification, representations that the attorney was employed by one desiring to cut out a subsequent mortgage and that the latter would pay the fees, *held* admissible evidence in explanation of mortgagee's failure to disaffirm the foreclosure proceeding. *Id.*

Attorneys' Fees. See BASTARDY, 2.

Attornment.

The attornment of a tenant to a stranger is void and does not affect the landlord's possession. *Perkins v. Potts* 114

Bail and Recognizance.

On appeal from a police magistrate a recognizance failing to designate the court wherein the prisoner is to appear is invalid and confers no jurisdiction on the appellate court to try the case. *Kazda v. State* 499

Bailment.

An involuntary bailee of goods may conserve the same, and recover from the owner what the service is reasonably worth. *Moline, Milburn & Stoddard Co. v. Neville* 574

Banks and Banking. See FRAUDULENT CONVEYANCES, 6. TRUSTS, 2.

1. A banker receiving on deposit from a school district treasurer funds known to be held by the latter in his official capacity becomes a trustee for the district, and it, upon insolvency of the banker, may recover such funds as a preferred claim against his estate. *State v. Midland State Bank* 1
2. Evidence *held* insufficient to show that a bank was liable as trustee for the proceeds of a sale of cattle, the funds having been deposited with the bank by the commission agents who made the sale. *Pederson v. South Omaha Nat. Bank* 95

Bastardy.

1. The word "maintenance" as used in sec. 6, ch. 37, Comp. Stats., relating to bastardy proceedings, does not include the value of services of prosecutrix's attorneys. *Harshman v. Ingwerson* 116
2. On the hearing of a bastardy proceeding it is error to admit evidence of the value of the services rendered by the attorneys for prosecutrix. *Id.*

Bidders. See EXECUTIONS, 17, 18. STATE.

Bill of Exceptions. See CORPORATIONS, 4. REVIEW, 30-39.

Authentication.

1. A bill of exceptions, to constitute part of the record of the appellate court, must be authenticated by the certificate of the clerk below. *Costello v. Kottas* 15
2. The bill of exceptions will be disregarded unless authenticated by certificate of the clerk of the district court. *Chicago, R. I. & P. R. Co. v. Ringo* 163
3. An unauthenticated bill of exceptions will not be considered. *Hale v. Sheehan* 184
4. To make a bill of exceptions available on review it is necessary for the clerk to certify either that it is the original bill filed in the district court or a transcript thereof. *Groneweg v. Mathewson* 591
   Moline Plow Co. v. Mathewson 591

Bill of Exceptions—*concluded.*

5. A bill of exceptions not authenticated by the clerk of the district court will be disregarded in the supreme court. *Winquest v. Schaefer* 626
6. To authenticate a document attached to a record as the original bill of exceptions or a copy thereof, a certificate of the clerk of the trial court to that effect is indispensable. *Bryant v. Cunningham* 717

Proceedings Before Referee.

7. In a trial before a referee, the latter only has power to certify as to exceptions. *Disbrow v. McNish* 309
8. A bill of exceptions settled and signed by the clerk of the district court alone is nugatory, where it only contains proceedings before a referee. *Id.*

Stenographer.

9. A party or his attorney is justified in relying upon the stenographic reporter for a copy of the testimony. *Holland v. Chicago, B. & Q. R. Co* 101

Instructions.

10. Instructions need not be embodied in the bill of exceptions. *Bennett v. McDonald* 278

Omissions.

11. A bill of exceptions showing that material evidence has been omitted therefrom will not be considered in determining whether the verdict is sustained by the evidence. *Dunn v. Eberly* 468

County Judge.

12. In 1894 a county judge had no jurisdiction to settle a bill of exceptions preserving the evidence adduced on the hearing of an objection to the regularity of an appointment of a person to act specially as county judge. *Lowe v. Bishop* 552

Justice of the Peace.

13. Prior to the act of 1895 (Session Laws, ch. 72) a justice of the peace had no authority to allow a bill of exceptions embodying the evidence on a motion objecting to the jurisdiction of the court over the person of defendant. *Meyer v. Hibler* 323

Bills and Notes. See ALTERATION OF INSTRUMENTS. NEGOTIABLE INSTRUMENTS.

Bonds. See BAIL AND RECOGNIZANCE. REPLEVIN, 2-5. REVIEW, 10, 11. SHERIFFS AND CONSTABLES, 1.

Books. See EVIDENCE, 2.

Bribery. See SUBSCRIPTIONS.

Briefs. See REVIEW, 12-15.

Brokers. See FACTORS AND BROKERS.

Buildings. See MECHANICS' LIENS.

Burden of Proof. See ALTERATION OF INSTRUMENTS, 1. FRAUDULENT CONVEYANCES, 9, 10. PUBLIC LANDS, 3. RAILROAD COMPANIES, 2.

Burglary.

1. A breaking necessary to constitute the crime of burglary may be by any act of physical force, however slight, by which the obstruction is removed. *Ferguson v. State*..... 432
2. The lifting of a hook with which a door is fastened, or the opening of a door to enter a building, is a "breaking" within the definition of burglary, though the entry might have been effected through an open door. *Id.*
3. Evidence that the burglary was committed on the precise day laid in the information is not essential to a conviction, proof that the crime was committed within the period limited by statute for the prosecution being sufficient. *Id.*

Carriers.

1. In an action against a railroad company, evidence *held* to warrant a finding that the contract of shipment sued on was executed by authority of defendant. *Burlington & M. R. R. Co. v. Kittridge*..... 16
2. Evidence *held* sufficient to sustain a verdict for plaintiff in an action by a shipper for injury to a shipment of live stock. *Union P. R. Co. v. Langan*..... 105
3. A contract of carriage not specifying a time for performance implies performance within a reasonable time. *Denman v. Chicago, B. & Q. R. Co*..... 140
4. An action against a carrier for unreasonable delay may be maintained on a shipping-contract not specifying a time for performance. *Id.*
5. In a suit against a carrier for unreasonable delay, a petition alleging the reasonable and usual time for transporting the goods and that they were not transported within that time, but were unreasonably delayed, states in that respect a cause of action, justifiable delay beyond the usual time being matter of defense. *Id.*
6. An action for breach of contract of carriage is not for a liability created by statute within the meaning of sec. 11 of the Code, because of the duties imposed on railroad companies by ch. 16, sec. 111, Comp. Stats. *Id.*

Cattle Stealing. See LARCENY.

Chattel Mortgages. See REPLEVIN, 10.

1. Section 6, chapter 12, Compiled Statutes, prescribing the mode of conducting a chattel mortgage sale, was designed for the protection of the mortgagor, and he may waive his right thereunder to have the mortgaged property in view at the time of sale. *Lexington Bank v. Wirges*..... 649
2. By proper stipulation in a mortgage, mortgagor may dispense with a public auction of the property. *Id.*

Chattel Mortgages—*concluded.*

3. Mortgagor's stipulation for a public or private sale, and for dispensing with a sale according to law, *held* to be a waiver of his right to have the property in view when sold. *Id.*

Claims. See MECHANICS' LIENS, 10.

Clerk of Court. See COURTS, 4, 6. JUDGMENTS, 10. REVIEW, 81, 82.

A clerk of the district court, as to moneys received by him in payment of fines and penalties, is a "collector and custodian" of public money, within the meaning of section 2, article 14, of the constitution, providing: "Any person who is in default as collector and custodian of public money or property shall not be eligible to any office of trust or profit under the constitution or laws of this state." *State v. Moores,* 770

Condemnation Proceedings. See EMINENT DOMAIN.

Confirmation. See EXECUTIONS, 11, 12.

Confusion of Goods. See ACCESSION AND CONFUSION.

Consideration. See CONTRACTS, 15.

Conspiracy. See JUSTICE OF THE PEACE, 3.

Constables. See SHERIFFS AND CONSTABLES.

Constitutional Law. See STATUTES.

1. The provision of section 11, article 3, of the constitution that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," was intended to prevent surreptitious legislation. *State v. Stuht*..... 210
2. In the absence of any constitutional prohibition or affirmative provision fixing the term of a public officer, his term may be shortened by legislative enactment. *State v. Stewart,* 243
3. Construction of section 19, article 6, of the constitution requiring uniformity as to jurisdiction, powers, proceedings, and practice of courts. *State v. Magney*..... 508
4. The constitution classifies or grades all courts which exist or may exist in the state and the legislature has no authority to alter such classification. *Id*..... 509
5. Unclaimed witness fees and costs remaining in the hands of the clerk of the district court are not public moneys, and the legislation of the state, in so far as it attempts to divest the persons for whose benefit such fees and costs were paid of title thereto, is unconstitutional and void. *State v. Moores,* 770

Constructive Service. See JUSTICE OF THE PEACE, 5.

Continuance.

Denial of a continuance sought on account of the absence of a witness *held* not ground for reversal, where the party resisting the application admitted that the witness, if present, would testify as stated in the affidavit for the continuance, and the statements of the affidavit were read in evidence by the party making it. *Catron v. State*..... 389

Contracts. See CARRIERS, 3-6. INSURANCE. PLEADING, 7. PRINCIPAL AND AGENT, 9. SALES. STATE. STATUTE OF FRAUDS. VENDOR AND VENDEE, 4-6.

1. In a contract of employment, a provision for the retention by employer of one month's wages was *held* to be a penalty to secure the faithful performance of the stipulations on part of the employe. *Adams-Smith Co. v. Hayward*..... 79
2. In an action for labor performed in the improvement of a highway upon request of one claiming to represent a principal having no legal existence, the damages assessed in plaintiff's favor were *held* not excessive. *Learn v. Upstill*.... 271
3. One suing and relying solely upon a special contract cannot recover on a *quantum meruit*. *Dorrington v. Powell*..... 440
4. Instructions as to a contract between a teacher and her employer *held* erroneous. *Nebraska Wesleyan University v. Parker* 453
5. A defendant cannot object that the description by which the contract sued upon was entered into by plaintiff is not a sufficiently full description of such plaintiff and of the capacity in which he brings his action. *Eiseley v. Taggart*..... 658

Breach. Damages.

6. One who refuses to perform his part of a contract cannot recover for a breach by the other party. *Hale v. Sheehan*.... 184
7. Where one party to an express contract is wrongfully prevented by the other from completing it, the former may sue for breach of contract, or ignore the contract and declare upon a *quantum meruit* or a *quantum valebat*. *Thompson v. Gaffey* 317
8. Where one party to a contract wrongfully prevented the other party from completing it, the latter's measure of damages, in an action for the breach, is the value of the part performed, as measured by the contract price, plus the profits, if any, which would have accrued to plaintiff upon completion of the contract. *Id.*

Construction.

9. A practical construction placed upon an ambiguous contract by the parties will generally be adopted by the courts. *Hale v. Sheehan*..... 184

Mechanics' Liens.

10. A contractor cannot have a mechanic's lien for damages resulting from the breach of a building contract. *Pardue v. Missouri P. R. Co*..... 201
11. A contractor agreeing to accept realty in payment for labor and materials is not entitled to a mechanic's lien. *Frost v. Falgetter* 692
12. The relationship between a building contractor and the owner of the realty rests in contract, express or implied; but there is no privity of contract between a subcontractor and the owner. *Id.*

Contracts—*concluded.*

Public Policy.

13. Courts will refuse to enforce contracts in contravention of statutes or good morals. *Wilson v. Parrish* 6
14. A contract providing for the sale of intoxicating liquors without a license is void. *Hall v. Hart* 4
Wilson v. Parrish 6
15. The relinquishment of a valid entry of land under the timber culture act of congress constitutes a valuable consideration and is not void as against public policy. *Jones v. Dunbar,* 151
16. A sheriff cannot make a valid agreement with a litigant for a greater compensation for official services than that prescribed by statute. *Phœnix Ins. Co. of Hartford v. McEvony* .. 567

Ratification.

17. Where rescission of a contract is sought on the ground of deceit, the party injured must allege and prove that he relied upon the false representations of the other party. *Griswold v. Hazels* 64
18. A principal cannot ratify an unauthorized contract before he has knowledge of its existence. *Nebraska Wesleyan University v. Parker* 453

Contribution.

A partner who paid a note jointly executed by him and another partner may sue the latter at law for contribution where the cause of action is not connected with the partnership accounts. *Halleck v. Streeter* 827

Conversion. See TROVER AND CONVERSION.

Conveyances. See CHATTEL MORTGAGES. DEEDS. FRAUDULENT CONVEYANCES. MORTGAGES. SALES. VENDOR AND VENDEE.

Corporations.

1. In an action on a subscription to procure the location of the state fair at a certain place, it was *held* that a general denial did not put in issue the corporate existence of the state board of agriculture,—the body determining the location. *Kelly v. Nebraska Exposition Ass'n* 355
2. The authority of the receiver of an insolvent corporation to collect assessments made by its board of directors before his appointment as such receiver is sufficiently established by showing that such receiver, under his order of appointment, was required to collect all sums due such insolvent corporation from whomsoever such indebtedness might be owing. *Wyman v. Williams* 833
3. The members of a board of directors of an insolvent corporation who took part in a meeting of said board at which, by a unanimous vote, an assessment upon the unpaid subscriptions of such directors was declared necessary to discharge the debts of the corporation and accordingly there were made such assessments, are in no situation to question

Corporations—*concluded.*

their liability for the amount of such assessments because of the fact that no judgment had been rendered against the corporation, and its want of assets established by the return, *nulla bona,* of an execution against it. *Id.*

4. Where a note was made for the amount of an unpaid subscription to the capital stock of a corporation, the payment of such note, to be available, must be pleaded and proved by the party relying on such payment as a discharge of his liability, and a finding of the trial court adverse to such alleged discharge will not be disturbed on appeal when all the evidence on that issue is not preserved by bill of exceptions. *Id.*

Costs. See CONSTITUTIONAL LAW, 5. EXECUTIONS, 9. GARNISHMENT, 2. SHERIFFS AND CONSTABLES, 5-9.

1. Where a case within the jurisdiction of a justice of the peace has been brought in another court, plaintiff cannot recover costs, but each party is liable for his own costs. *Morsch v. Besack* 503
2. Assessment of amount of attorney's fee and allowance thereof are not reviewable upon a record failing to show such allowance. *Hanover Fire Ins. Co. v. Stoddard* 746
3. Jury fees taxed under sections 28 and 29, chapter 28, Compiled Statutes, are public moneys. *State v. Moores* 770
4. Where a change of venue is granted by a justice of the peace on application of defendant, the latter can only be taxed with costs for issuing and serving subpœnas, witness fees, and costs of the justice for transferring the cause. *Head v. Levy* 456

Counties.

1. County authorities, except for the special reasons mentioned in section 5, article 9, of the constitution, cannot assess taxes for county purposes in excess of 15 mills on the dollar. *Chicago, B. & Q. R. Co. v. Klein* 258
2. Under township organization a county may assess property for county purposes and a township may assess it for township purposes, though the aggregate of the taxes thus assessed exceeds 15 mills on the dollar. *Id* 259
3. A county board in passing on claims acts judicially, and its judgment is final unless reversed on appeal. *Gage County v. Hill* 444

Counts. See INDICTMENT AND INFORMATION, 4. PLEADING, 14.

County Courts. See COURTS, 13. REVIEW, 11.

County Judge. See BILL OF EXCEPTIONS, 12.

County Treasurer. See TAXATION.

Courts. See CLERK OF COURT. DIVORCE. MANDAMUS, 4. MUNICIPAL CORPORATIONS, 11.

1. From motives of self-respect courts will refuse to enforce

Courts—*concluded.*

contracts in contravention of statutes or good morals. *Wilson v. Parrish* 6

2. The appellate jurisdiction of the supreme court in proceedings in error is limited to final orders and judgments of the district courts. *Marrow v. Gilbert* 195

3. The legislature is without power to prevent the courts from granting any relief the circumstances of a case may render necessary. *Hutchinson v. City of Omaha* 350

4. An action in equity will not lie to subject to the payment of the claims of a creditor money held by the clerk of a court in his official capacity. *Anheuser-Busch Brewing Ass'n v. Hier* 424

5. On federal questions state courts should follow the decisions of the supreme court of the United States. *Pfund v. Valley Loan & Trust Co* 476

6. A district court has authority to direct its clerk in the performance of his official duties. *State v. Frank* 553

Municipal Courts.

7. Chapter 25, Session Laws of 1897, establishing a municipal court in cities of the metropolitan class is unconstitutional and void. *State v. Magney* 509

Uniformity. Jurisdiction.

8. The territorial jurisdiction of the district and county courts, respectively, must be uniform. *Id* 508

9. Under section 19, article 6, of the constitution relating to courts, the territorial jurisdiction of all courts of the same grade or class must be uniform. *Id.*

10. Section 8, chapter 25, Session Laws of 1897, relating to jurisdiction of municipal courts, violates the constitutional requirement as to uniformity of jurisdiction and powers of courts. *Id.*

11. The constitution does not require that the territory within the limits of which the jurisdiction of justices of the peace is restricted shall be of uniform size, but that every such territory shall consist of like political division. *Id.*

12. Where counties are chosen as a basis of territorial jurisdiction of justices of the peace, no other political division can be adopted in part, and when any political division other than the counties is made the criterion, to be uniform it must be of all such divisions throughout the state. *Id.*

13. The constitution prohibits the legislature from vesting in the county courts or justices of the peace of one county a jurisdiction or power that is not vested in the county courts and justices of the peace of every other county of the state. *Id.* 509

14. The constitution classifies or grades all courts which exist or may exist in the state and the legislature has no authority to alter such classification. *Id.*

Covenants.

To sustain an action on a covenant of warranty, or for quiet enjoyment in favor of a covenantee, it must appear that there has been an eviction or surrender by reason of a paramount title. *Troxell v. Johnson* 46

Creditors' Bill. See FRAUDULENT CONVEYANCES, 9, 10.

1. An action in equity will not lie to subject to the payment of the claim of a creditor money held by the clerk of a court in his official capacity. *Anheuser-Busch Brewing Ass'n v. Hier*, 424
2. A creditors' bill to subject to the payment of a judgment against a husband realty conveyed to his wife by a stranger, does not state a cause of action, where plaintiff fails to allege that the debt of the husband existed at the date of the conveyance, or that the latter caused the property to be conveyed to his wife in expectation of becoming indebted. *Lavigne v. Tobin* 686

Criminal Conversation.

1. In an action for damages for criminal intercourse with plaintiff's wife, the petition may lay the time of the alleged wrongful act with a *continuando*, and the evidence may be directed to any time within that covered by the petition, and within the period of the statute of limitations. *Smith v. Meyers* 70
2. Petition *held* to state a cause of action for criminal conversation. *Id.*
3. In an action for criminal conversation, it was *held* not an abuse of discretion to overrule defendant's motion to require plaintiff to state in his petition with more particularity the times and places of the committing of alleged acts of adultery. *Id.*
4. Cohabitation by the husband with the wife after knowledge of her infidelity will not defeat an action against her seducer for damages. *Id.*
5. In a suit for criminal conversation the wife of plaintiff is a competent witness in his behalf. *Id.*
6. In an action for criminal conversation plaintiff may recover, aside from the loss of services of his wife, for mental anguish, mortification, injured feelings, and disgrace in consequence of the acts of the defendant. *Id.* 71

Criminal Law. See CONTINUANCE. INDICTMENT AND INFORMATION. INSTRUCTIONS, 5-11. JURY, 8. TRIAL, 10.

1. A sentence of imprisonment for seven years imposed upon one found guilty of having stolen property valued at $50, *held* not excessive. *Catron v. State* 394
2. Where property is stolen in one county and taken by the thief into another county, he may be prosecuted and convicted in either county. *Hurlburt v. State* 428
3. A general verdict of guilty against a defendant on an indictment consisting of two counts charging a single offense, is

Criminal Law—*concluded.*

sufficient without specifying the count on which the jury found him guilty. *Id.*

4. On appeal from a police magistrate a recognizance failing to designate the court wherein the prisoner is to appear confers on the appellate court no jurisdiction to try the case. *Kazda v. State* 499

Crops. See VENDOR AND VENDEE, 1.

Cross-Examination. See WITNESSES, 2-5.

Custom and Usage.

1. Custom and usage cannot be shown for the purpose of changing the intrinsic character of a contract. *McKee v. Wild*.... 9
2. Where a custom is relied upon to prove a meaning other than the ordinary significance of words used in a contract, it should be pleaded. *Id.*
3. Custom or usage in trade or business may be shown for the purpose of interpreting a contract or controlling its execution. *Id.*
4. Proof of knowledge is required to give effect to a custom not widely and generally known. *Frey v. Curtis*..... 409

Damages. See CONTRACTS, 2. ELECTION OF REMEDIES, 1. EMINENT DOMAIN. JUSTICE OF THE PEACE, 2. MUNICIPAL CORPORATIONS, 2-5. RAILROAD COMPANIES, 2. REPLEVIN, 14. SALES, 7, 8. SHERIFFS AND CONSTABLES. VENDOR AND VENDEE, 4-6.

1. Verdict for plaintiff for $3,000, in an action for criminal conversation, *held* not excessive. *Smith v. Meyers*..... 71
2. Evidence *held* sufficient to sustain a verdict for plaintiff in an action by a shipper for an injury to a shipment of live stock. *Union P. R. Co. v. Langan*..... 105
3. Damages assessed by the jury in an action by a purchaser for breach of contract for the sale of corn, *held* inadequate under the evidence. *Forbes v. McClatchey*..... 182
4. A contractor cannot have a mechanic's lien for damages resulting from the breach of a building contract. *Pardue v. Missouri P. R. Co*..... 201
5. The fact that a finding for plaintiff was $5 in excess of the amount claimed by him does not justify the conclusion that the verdict was the result of passion or prejudice. *Wainwright v. Satterfield* 403
6. In a suit against a seller for breach of contract to deliver notes, plaintiff is restricted in his recovery to the value of the notes at the time when and the place where they should have been delivered. *Winside State Bank v. Lound*..... 469
7. In a suit for damages for seller's breach of contract to sell notes of a third person, declarations of a stranger as to what he would be willing to give for the notes, *held* inadmissible to prove value. *Id.*

Death by Wrongful Act. See MUNICIPAL CORPORATIONS, 5.

Deceit. See CONTRACTS, 17. FRAUD.

Declarations. See PRINCIPAL AND AGENT, 5.

Decrees. See JUDGMENTS.

Deeds. See ESTOPPEL, 4, 5. HOMESTEAD. JURY, 6.

All persons claiming an interest in or lien upon real estate are bound to take notice of the recitals in a duly recorded deed in the chain of title of their grantor. *Hubbard v. Knight*..... 401

Default. See RES JUDICATA, 3.

Deficiency. See MORTGAGES, 4, 5. RES JUDICATA, 2.

Delivery. See SALES, 12.

Demurrer. See PLEADING, 11-13.

Deposit. See BANKS AND BANKING, 2.

Depositions.

1. A deposition is incompetent unless the certificate of the officer affirmatively shows that the deposition was written in his presence. *New Kentucky Coal Co. v. Union P. R. Co*.... 127
2. The overruling of a motion to suppress an insufficiently certified deposition is reversible error, where it is read to the jury on a material issue and tends to support the contention of the party offering it. *Id.*
3. The caption of a deposition may be read in connection with the certificate to show whether it was taken at the time and place and before the officer mentioned in the notice. *McClintock v. State Bank of Table Rock*..... 130

Deputy Sheriffs. See EXECUTIONS, 13, 14.

Descent.

Where an ancestor dies intestate, his lands descend instantly to his heirs, and it does not require settlement of his estate, or a probate order declaring heirship, to vest the title. *Johnson v. Colby* 328

Description. See CONTRACTS, 5. EXECUTIONS, 26. MECHANICS' LIENS, 2, 10.

Directing Verdict. See TRIAL, 12.

Discretion of Court. See EVIDENCE, 13. REVIEW, 41, 42.

Dismissal. See REPLEVIN, 7-9, 14. REVIEW, 82.

Distribution. See EXECUTIONS, 16-18.

Divorce.

Evidence *held* insufficient to establish that the county courts of Colorado, under the laws of that state, had jurisdiction to grant divorces. *Clemons v. Heclan*..... 287

Documents. See EVIDENCE, 1.

Dower.

1. Where the right of dower is not disputed, it may be assigned by the county court, under sections 8-11, chapter 23, Compiled Statutes. *Clemons v. Heelan* 287
2. Where a right of dower is disputed, it may be established by a decree of the district court. *Id.*

Ejectment.

1. Where plaintiff shows a right to recover at commencement of suit, and the right terminates pending litigation, he may recover for withholding the property. *Orr v. Broad* 490
2. Where a father who had an estate by the curtesy sold the land as guardian for an infant son having the remainder in fee, executed a deed purporting to convey the entire estate, and subsequently gave the son a deed of quitclaim, it was *held* that the son was estopped from asserting, as against the purchaser at the guardian's sale, a right of possession based on the quitclaim deed, though the guardian's sale was void. *Wells v. Steckelberg* 597
3. Under an answer denying plaintiff's title and right of possession to the premises, the defendant may show title in himself by adverse possession. *Fink v. Dawson* 647

Election of Remedies. See CONTRACTS, 7. PLEADING, 11. REVIEW, 42. SALES, 3. VENDOR AND VENDEE, 4.

1. Where a carrier violates a contract of shipment, the shipper may sue for damages for failure of the carrier to perform public duties, or he may maintain an action for breach of a special contract. *Denman v. Chicago, B. & Q. R. Co* 140
2. A landowner by electing to pursue his remedy for the value of property appropriated by a city for a street recognizes the easement of the public, and afterward is estopped to call in question the title of the city to the land taken. *Hawver v. City of Omaha* 734

Eminent Domain. See ELECTION OF REMEDIES, 2.

The necessary expense of filling residence lots to grade *held* a proper subject of inquiry in condemnation proceedings. *Farwell v. Chicago, R. I. & P. R. Co* 614

Equalization. See TAXATION, 5.

Equity. See CREDITORS' BILL. JUDGMENTS, 7. JURY, 5. NEW TRIAL, 2. REVIEW, 1.

The issues in equity causes are, as a rule, triable to the court without a jury. *Smith v. Perry* 738

Error. See REVIEW.

Estoppel. See CORPORATIONS, 3. HOMESTEAD, 3. INTOXICATING LIQUORS, 2. RES JUDICATA. SALES, 4.

1. A plaintiff seizing on execution, as property of defendant, chattels sold by the former to the latter, *held* estopped from asserting afterward that title did not pass. *Bronson v. McCormick Harvesting Machine Co* 344

Estoppel—*concluded.*

2. An attaching plaintiff is estopped to assert that defendant has not sufficient interest to defend against the attachment. *Kountze v. Scott* 460
3. A payee suing on a note taken by his agent for the purchase price of a harvesting machine, *held* estopped to assert that a warranty made by the agent, as an inducement to procure the note, was unauthorized. *Osborn Co. v. Jordan*... 465
4. One who in a representative capacity assumes to sell and convey to another the entire estate in land, is estopped as against the purchaser from asserting an estate in his own right in the same land, though the first sale and deed were void. *Wells v. Steckelberg* 597
5. Where a father who had an estate by the curtesy sold the land as guardian for an infant son having the remainder in fee, executed a deed purporting to convey the entire estate, and subsequently executed to the son a deed of quitclaim, it was *held* that the son was estopped from asserting, as against the purchaser at the guardian's sale, any interest acquired through the quitclaim deed. *Id.*
6. A landowner by electing to pursue his remedy for the value of property appropriated by a city for a street, is estopped to call in question the title of the city to the land taken. *Hawver v. City of Omaha*..... 734
7. A taxpayer free from laches is not estopped from resisting a tax because he has permitted work to proceed on an improvement, before complaining. *Hutchinson v. City of Omaha*, 346

Evidence. See ATTACHMENT, 8, 9, ATTORNEY AND CLIENT, 2, 3. BANKS AND BANKING, 2. BASTARDY, 2. BILL OF EXCEPTIONS. BURGLARY. CONTINUANCE. CRIMINAL CONVERSATION, 1. DAMAGES, 2, 3. DEPOSITIONS. EJECTMENT, 3. ESTOPPEL, 3. FRAUDULENT CONVEYANCES, 3-10. INSURANCE, 7. LANDLORD AND TENANT, 3. LARCENY, 7, 8. MASTER AND SERVANT, 2. MECHANICS' LIENS, 4. MUNICIPAL CORPORATIONS, 5. NEGLIGENCE, 6. NEW TRIAL, 1. PERJURY. PLEADING, 1. PRINCIPAL AND AGENT, 3-5. RES JUDICATA, 6. REVIEW, 43-59. SUMMONS, 5. TRIAL, 15. WITNESSES, 2-5.

Account-Book, Papers, and Records.

1. A copy of a sheriff's return which has not been attested according to the requirements of sec. 414 of the Code, is incompetent for the purpose of proving a judicial sale in another state. *Westerman v. Sheppard*..... 124
2. Alleged error in admitting an account-book in evidence was disregarded upon review, where the party complaining failed to make the book or its contents a part of the bill of exceptions. *Anderson v. Beeman*..... 387
3. Where breach of warranty was alleged by defendant in a suit for the purchase price of bicycles, admission in evidence of

Evidence—*continued.*

a catalogue and price-list containing a warranty different from that pleaded, *held* prejudicial error. *Burr v. Redhead*.. 617

4. In an action against one who wrongfully caused the property of a stranger to be seized under a writ of attachment, a transcript of the record in the attachment suit was *held* admissible in evidence. *Cole v. Edwards*..... 714

5. In an action on an insurance policy admission in evidence of a photograph of the insured premises *held* not prejudicial error. *Hanover Fire Ins. Co. v. Stoddard*..... 756

Affidavits and Pleadings.

6. The use of affidavits is a very unsatisfactory method of trying an issue of fact, since they are frequently couched in language of counsel, instead of that of witness, and do not always contain all the facts. *Kountze v. Scott*..... 465

7. In an error proceeding in the district court questioning the sufficiency of the service of summons in the county court, an affidavit was *held* incompetent as evidence for the purpose of impeaching the jurisdiction of the county court. *Nelson v. Keith*..... 549

8. An answer verified on belief is not admissible as substantive evidence in favor of defendant. *Bourke v. Falck*..... 768

Compromise.

9. An offer of compromise made by one party to an action, and not accepted by the other, is not generally admissible. *Hanover Fire Ins. Co. v. Stoddard*..... 746

Credibility.

10. Where the testimony of a party to an alleged fraudulent conveyance was of such a character as to make his good faith impossible of belief without reasoning abnormally, a verdict in his favor was set aside in the supreme court. *Smith v. Logan*..... 590

Foreign Laws.

11. Evidence of the law of Colorado *held* insufficient to establish that the county courts of that state had jurisdiction to grant divorces. *Clemons v. Heelan*..... 287

Foundation.

12. It is not error to reject evidence in absence of a proper foundation for its admission. *Union P. R. Co. v. Evans*..... 51

Hearing of Motions.

13. It is within the discretion of the court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony. *Hamer v. McKinley-Lanning Loan & Trust Co*..... 705

14. Whether oral evidence shall be used on the hearing of a motion is a matter resting in the discretion of the court. *Kountze v. Scott*..... 461

Evidence—*concluded.*

Letters.

15. Letters identified only by one having a direct legal interest in the result of the suit *held* inadmissible as against an adverse party who is the representative of a deceased person. *Smith v. Perry* 738
16. Admission in evidence of an envelope upon which some poetry had been written, *held* not prejudicial error. *Hanover Fire Ins. Co. v. Stoddard* 757

Order of Introduction.

17. The order of the introduction of proof is within the discretion of the trial court. *Ream v. State* 727

Parol Evidence.

18. Parol testimony is competent to reform an insurance policy so as to make it recite the actual agreement between the parties. *Slobodisky v. Phenix Ins. Co* 395

Presumption.

19. The holder of the legal title to land, of which there is no actual occupancy, is presumed to be in possession. *Troxell v. Johnson* 46

Reward for Arrest.

20. In a suit by an indorsee of a note, admission in evidence, over plaintiff's objection, of a published reward for payee's arrest, *held* prejudicial error. *Sanford v. Craig* 486

Proof of Publication.

21. Publication of a notice of foreclosure sale may be proved by affidavit of any one knowing the fact. *Johnson v. Colby* 328

Value.

22. In a suit by a plumber to recover the fair and reasonable value of certain plumbing material furnished to defendant, the price charged by other plumbers for such material is irrelevant, when standing alone. *Thompson v. Gaffey* 317
23. The necessary expense of filling residence lots to grade *held* a proper subject of inquiry in condemnation proceedings. *Farwell v. Chicago, R. I. & P. R. Co* 614
24. In a suit for damages for a seller's breach of contract to sell notes of a third person, declarations of a stranger as to what he would be willing to give for the notes, *held* inadmissible to prove value. *Winside State Bank v. Lound* 469

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 16-22. REVIEW, 71. TRIAL, 10, 15.

Executions. See ESTOPPEL, 1, 4, 5. EXEMPTION. MANDAMUS, 2. REPLEVIN, 13. TAXATION, 4.

1. The interest of mortgagor in realty may be sold under execution, and his right and title at the time the judgment lien attached vest in the purchaser at sheriff's sale. *Orr v. Broad,* 490

Appraisement.

2. An objection that the appraisement of mortgaged realty was

Executions—*continued.*

too low comes too late after the sale. *Scottish-American Mortgage Co. v. Bigsby* 104

3. An appraisement is not so defective as to invalidate the sale where it finds the value of each of several tracts and the incumbrances on each separately, but concludes by stating defendants' interest in gross. *Johnson v. Colby* 328

4. A sale should not be set aside on motion of the mortgagor because no certificates of incumbrances were procured, when the incumbrances found and deducted were less than those actually existing. *Id.*

5. A copy of the appraisement and the other papers mentioned in section 491*d* of the Code must, before notice of sale is advertised, be deposited in the office of the clerk who issued the writ. *Reuland v. Waugh* 358
Walker v. Patch 763

6. Objections to the appraisement of property for the purpose of a judicial sale should be filed prior to the sale. *Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co* 410

7. Failure to obtain certificates and deduct incumbrances in appraising land for the purpose of a foreclosure sale is not prejudicial to the defendants—owners of the equity. *Hamer v. McKinley-Lanning Loan & Trust Co* 705

8. On motion to vacate an appraisement, refusal to hear oral testimony *held* not an abuse of discretion on part of the trial court. *Id.*

Appraisers' Fees.

9. Freeholders summoned by a sheriff to appraise realty seized on execution are not entitled to mileage, and their compensation is limited to 50 cents each for each day's service. *Phœnix Ins. Co. of Hartford v. McEvony* 566

Caveat Emptor.

10. A purchaser at a judicial sale must take notice of the terms of the decree. *McKinley-Lanning Loan & Trust Co. v. Hamer* .. 709

Confirmation.

11. Where defendant paid the clerk of the court enough of money to satisfy the judgment, confirmation of a sheriff's sale subsequently made to plaintiff was properly refused, though the clerk failed to enter satisfaction of record. *Moore v. Boyer* 446

12. Where liens are improperly decreed to exist, the remedy is by modification or vacation of the decree or appellate proceedings, and not by resistance to the confirmation of the sale. *Hamer v. McKinley-Lanning Loan & Trust Co* 705

Deputy Sheriff.

13. A deputy sheriff may act for his principal in appraising and selling land under a decree of foreclosure. *Johnson v. Colby*, 328

Executions—*continued.*

14. A deputy sheriff may act for his principal in making a foreclosure sale. *Hamer v. McKinley-Lanning Loan & Trust Co.*... 705

Distribution.

15. A motion for distribution should be made after the fund is paid to the sheriff or paid into court. *Clark & Leonard Investment Co. v. Way*..... 204
16. Where a motion for distribution is overruled on the ground that it is premature, the order should be made without prejudice to a later application. *Id.*
17. A purchaser who, instead of paying the amount of his bid to the sheriff, undertakes to distribute the money in discharging liens, acts at his peril. *Id.*
18. When confirmation of a foreclosure sale is affirmed on appeal, the title of the purchaser relates back to the confirmation, and he cannot deduct from his bid the amount of tax liens which attached pending appeal, or the amount of interest which accrued during that time on a senior mortgage. *Id.*

Levy.

19. A manual interference with chattels is not essential to a valid levy thereon. *Boslow v. Shenberger*..... 164
20. A levy on chattels is sufficient where they are present and subject to the control of the officer holding the writ, and he asserts dominion over the property. *Id.*

Notice, Proof of Publication and Description.

21. Notice of mortgage-foreclosure sale *held* sufficient. *Scottish-American Mortgage Co. v. Bigsby*..... 104
22. Publication of a notice of foreclosure sale may be proved by affidavit of any one knowing the fact, and such knowledge need not be expressly stated in the affidavit. *Johnson v. Colby*, 328
23. The word "printed" in the statute requiring the notice to be in some newspaper printed in the county, is used in the sense of "published," and an affidavit that the newspaper was published in the county is therefore sufficient. *Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.*..... 410
24. Notice of a mortgage-foreclosure sale February 21, which was published in a weekly newspaper in five consecutive issues, beginning January 19, is a sufficient advertisement under the statute requiring publication for at least thirty days before the sale. *Id.*
25. Proof of publication of notice of a mortgage-foreclosure sale may be made immediately after the last weekly publication, though less than thirty days after the first. *Id.*
26. The omission of the word "north" after the number of the township, in describing land offered for sale under decree of foreclosure, does not invalidate the notice of sale, where the description is not thereby rendered ambiguous. *Hamer v. McKinley-Lanning Loan & Trust Co*..... 706

Executions—*concluded.*

Order of Sale.

27. An order of sale is not necessary to the execution of a decree of foreclosure. *Johnson v. Colby* 327
28. A judicial sale under a decree of foreclosure should not be set aside for formal defects in an order of sale, or for failure of the sheriff to follow its commands, where he followed the law and the decree. *Id.*
29. Where a decree and an order of sale differ, the decree governs. *McKinley-Lanning Loan & Trust Co. v. Hamer* 709
30. It will not be presumed that bidders were misled by a variance between the decree and the order of sale. *Id.* 710

Return.

31. The district court has power to permit a sheriff to amend his return on a process to conform to the facts. *Phœnix Ins. Co. of Hartford v. King* 562
32. An execution issued by a county court or justice of the peace must be returned within thirty days after its receipt by the officer to whom it is directed. *Buckley v. Mason* 639
33. After return day, a sheriff or constable has no authority to act under an execution issued by a justice of the peace or a county court. *Id.*

Executors and Administrators. See PARTIES, 4.

1. A subsisting demand against an estate of a deceased person which had matured and was capable of being enforced at law during the lifetime of the decedent, is not a contingent claim. *Stichter v. Cox* 533
2. Provable claims against an estate of a deceased person are barred unless presented to the county court for allowance within the time provided by law. *Id.* 532
3. A contingent claim, within the meaning of section 258 *et seq.* of chapter 23, Compiled Statutes, is a claim not absolute or certain, but depending upon some event after the death of the testator or intestate, which may or may not happen. *Id.*

Exemption.

The library of an attorney is exempt under section 530 of the Code, but by virtue of section 531 such exemption cannot be claimed against an execution on a judgment recovered against him for moneys received for his client, though the judgment does not contain a finding that the moneys were thus received. *Shreck v. Gilbert* 813

Factors and Brokers.

1. A verdict for plaintiff in an action for commissions and salary *held* sustained by sufficient evidence. *Adams-Smith Co. v. Hayward* 79
2. In a suit for the compensation agreed upon for making a sale, plaintiff is not entitled to recover for merely finding a purchaser where the sale failed of consummation. *Dorrington v. Powell* 440

False Representations. See FRAUD.

Fees. See ATTORNEY AND CLIENT, 2, 3. COSTS.

Fellow Servants. See MASTER AND SERVANT, 2.

Final Orders. See REVIEW, 60-70.

Findings. See JUDGMENTS, 5.

Fines and Penalties. See CONSTITUTIONAL LAW, 5.

Fire and Police Commissioners. See STATUTES, 5.

Foreclosure. See EXECUTIONS, 1, 12, 26. VENDOR AND VENDEE.

Foreign Laws. See EVIDENCE, 11.

Forfeiture. See INSURANCE, 3.

Fraud. See ACCESSION AND CONFUSION. PUBLIC LANDS, 2. STATUTE OF FRAUDS. WITNESSES, 4.

1. An action in the nature of deceit cannot be founded on mere promises to be performed in the future, nor, generally, upon mere expressions of opinion by a seller as to the quality of his goods. *Esterly Harvesting Machine Co. v. Berg* 147
2. To found an action in the nature of deceit on false representations, they must be representations of known existing facts. *Id.*

Fraudulent Conveyances. See ATTACHMENT, 9. CREDITORS' BILL, 2.

1. Property transferred by an insolvent, or by a debtor in failing circumstances, under a contract which is void as against public policy, may be subjected to payment of his debts. *Hall v. Hart* 4
2. In a contest between a purchaser and creditors of the seller, the adequacy of the consideration, if valuable, will not be inquired into except for the purpose of throwing light on the intention of the parties. *Jones v. Dunbar* 151
3. Evidence *held* to sustain a finding that chattels had been purchased in good faith without notice by purchaser of an intent on part of the sellers to defraud creditors. *Id.*
4. In a contest between buyers of goods and creditors of seller, evidence *held* insufficient to sustain a verdict that the sale was made in good faith. *Smith v. Logan* 585
5. The validity of a sale to a creditor by an insolvent, to pay a pre-existing debt, is not affected by the seller's fraudulent intent regarding claims of other creditors, where the purchaser did not participate in such intent, though he had knowledge thereof. *Sunday Creek Coal Company v. Burnham,* 364
6. Where a purchase of an entire stock of goods was made from a merchant at a fair price and with no knowledge that such merchant was indebted to other parties than those whose debts were paid through such purchase, the transfer will not be declared void, though the purpose of the purchaser was, in part, to secure payment of a debt due him-

Fraudulent Conveyances—*concluded.*

self and another debt due a bank of which he was at the time the president and managing officer. *Nathan v. Sands*.. 660

7. Evidence *held* insufficient to sustain a finding that a transfer was fraudulent and void as to transferrer's creditors. *Id.*
8. In a suit involving the validity of a conveyance to a relative of the grantor, restriction of the former's cross-examination may be prejudicial error. *Bennett v. McDonald*..... 278
9. The presumption that a conveyance from a husband to his wife is fraudulent as to his creditors, is applicable only to creditors whose debts existed at the time the conveyance was made. *Jansen v. Lewis* 556
10. Where a conveyance from a husband to his wife is attacked as fraudulent by a subsequent creditor of the husband, the burden is on the creditor to show by a preponderance of evidence that the conveyance was made and accepted with a fraudulent purpose. *Id.*

Garnishment. See ATTACHMENT. INTERVENTION. MECHANICS' LIENS, 12.

1. A garnishee is not liable for a failure to appear and answer where the requisite amount of fees has not been tendered him. *Chicago, B. & Q. R. Co. v. Van Cleave*..... 67
2. By section 221 of the Code, a garnishee is not required to appear and answer until he is tendered the same fees as the law allows a witness in the suit. *Id.*
3. A garnishee cannot be charged as the debtor of the defendant unless it appears affirmatively that at the time he was garnished a cause of action existed against him, and in favor of the defendant, for the recovery of a legal debt due, or to become due by the efflux of time. *Id.*

Gifts. See HUSBAND AND WIFE.

Guaranty.

A creditor who voluntarily parts with security for the debt thereby releases the surety or guarantor, to the extent of such security. *Bronson v. McCormick Harvesting Machine Co.*, 342

Guardian and Ward.

In conveying a ward's interest in land a guardian, by a deed purporting to convey the entire estate, may be estopped from afterward asserting his own interest in the land as against the purchaser at the guardian's sale. *Wells v. Steckelberg*.... 597

Harmless Error. See INSTRUCTIONS, 18, 24, 25. REVIEW, 64-70. TRIAL, 4.

Highways. See CONTRACTS, 2.

Homestead.

1. The title of the homestead of married persons may be in either the husband or the wife. *France v. Bell*..... 57

Homestead—*concluded.*

2. A valid mortgage on the homestead of married persons must be signed and acknowledged by both husband and wife, though they do not live together. *Id.*
3. The mere fact that grantor in a conveyance of a homestead is described therein as a single person does not estop him from asserting the homestead character of the premises. *Id.*

Husband and Wife. See CRIMINAL CONVERSATION. FRAUDULENT CONVEYANCES, 9, 10. HOMESTEAD.

A husband may gratuitously convey his property to his wife, except as against existing creditors and those to whom he contemplates becoming indebted. *Lavigne v. Tobin*..... 686

Impeachment. See WITNESSES, 7.

Improvements. See MUNICIPAL CORPORATIONS, 9, 10.

Indictment and Information.

1. An indictment or information is not rendered fatally defective by an omission to state the time at which the offense was committed where time is not of the essence of the offense. *Rema v. State* 375
2. Averments in an information of matters which are immaterial, and not necessary ingredients of the offense charged, may be rejected as surplusage. *Hurlburt v. State*..... 428
3. Where goods are stolen in one county and carried into another, it is sufficient to lay the offense in the county of the prosecution without setting out the transaction in the other county. *Id.*
4. Where an information contains two counts charging one offense, the prosecutor is not obliged to elect upon which count he will rely for a conviction. *Id.*
5. It is not essential, in an indictment for buying or receiving stolen cattle, that the name of the original thief be alleged. *Ream v. State* 727

Indorsements. See NEGOTIABLE INSTRUMENTS, 2.

Injunction. See JUDGMENTS, 7. TAXATION, 7, 8. VENDOR AND VENDEE, 1.

1. An order merely dissolving a temporary injunction is not appealable. *Meng v. Coffee* 44
2. In a county under township organization, the county may tax property for county purposes and a township may tax it for township purposes, and the enforcement of taxes thus assessed will not be restrained on the ground that the aggregate exceeds 15 mills on the dollar. *Chicago, B. & Q. R. Co. v. Klein* 258

Insolvency. See BANKS AND BANKING, 1.

A failing debtor may pay a creditor by conveying to him property of a value not materially greater than the debt, where the transaction is *bona fide* on part of the creditor. *Sunday Creek Coal Co. v. Burnham*..... 364

Instructions. See MUNICIPAL CORPORATIONS, 5. NEW TRIAL, 8. PLEADING, 1. REPLEVIN, 12. REVIEW, 25, 53.

1. Instructions are part of the record. *Bennett v. McDonald*.... 278

Assignments of Error.

2. Errors in respect to giving instructions must be separately assigned. *Adams-Smith Co. v. Hayward*..... 79
3. Where instructions are assailed on review by an assignment of error requiring an examination of the evidence, it may be overruled in absence of a bill of exceptions. *Sunday Creek Coal Co. v. Burnham*..... 364

Construction.

4. Upon review instructions should be considered together. *Learn v. Upstill* 278

Criminal Law.

5. Instruction defining reasonable doubt approved. *Catron v. State* 389
6. A party who improperly states to the jury a fact not in evidence, cannot, as a matter of right, demand an instruction directing the jury to disregard improper remarks of opposing counsel in reference to the same fact. *Id.*
7. Instruction applicable to the defense of alibi *held* not erroneous. *Id.*
8. Instruction *held* not to assume that a burglary had been committed. *Ferguson v. State* 432
9. In a prosecution for burglary it is not error to instruct the jury that it is sufficient to find that the crime was committed "on or about" the date charged in the information, or at any date, within the statute of limitations. *Id.*
10. An instruction which defined a reasonable doubt as being an actual, substantial doubt of guilt arising from the evidence or want of evidence in the case, upheld. *Id.*
11. Where defendant does not testify in his own behalf, it is not reversible error for the court to mention the fact in its instructions, when followed by a direction that nothing should be "taken against him" because he failed to testify. *Id.*

Evidence.

12. The court may refuse an instruction informing the jury that certain facts are entitled to great weight. *Smith v. Meyers*.. 71
13. Instruction *held* not objectionable as giving undue prominence to certain facts. *Eickhoff v. Eikenbary*..... 340
14. Instructions as to a contract between a teacher and her employer *held* erroneous. *Nebraska Wesleyan University v. Parker* 453
15. An instruction which invited the attention of the jury to the assumed existence of a warranty in the sale of personal property not pleaded in the petition, and as to which no breach was alleged, *held* prejudiciously erroneous. *Deere, Wells & Co. v. Heintz*..... 671

Instructions—*continued.*

Exceptions.

16. In the appellate court error cannot be predicated upon a ruling in giving or refusing of instructions, where there was no exception below. *Costello v. Kottas* 15
17. An exception noted by the court on the margin of an instruction is sufficient. *Bennett v. McDonald* 278
18. A judgment should not be reversed for the court's failure to mark an instruction given or refused, where the party complaining noted his exception on the margin, though it was accompanied by a special exception to the failure of the court to mark the instruction given or refused. *Eickhoff v. Eikenbary* 332
19. An instruction will not be reviewed unless the record affirmatively discloses that an exception was taken thereto in the trial court. *Rema v. State* 376
    Morsch v. Besack 502
20. Where there was no exception to the giving of an instruction its correctness will not be considered in the appellate court. *Anderson v. Beeman* 387
21. Sufficiency of exceptions. *Hanover Fire Ins. Co. v. Stoddard* .. 745
22. Exception to instructions as a whole is insufficient unless each paragraph is erroneous. *Adams-Smith Co. v. Hayward* .. 79
    Bennett v. McDonald 278

Harmless Error.

23. Instructions stating the law correctly as a whole, may be *held* sufficient, though one or more of them, taken separately, are inaccurate. *Smith v. Meyers* 70
24. A slight error in an instruction will not work a reversal where it is evident that the party complying was not prejudiced. *Ferguson v. State* 432
25. An instruction in favor of a party, though erroneous, is not ground for reversing a judgment against him. *Hanover Fire Ins. Co. v. Stoddard* 745
26. Instructions *held* not prejudicially erroneous in a case where a partner paid a note jointly executed by him and another partner and sued the latter for contribution. *Halleck v. Streeter* 827

Repetition.

27. It is not error to refuse instructions which are substantially the same as those already given. *Costello v. Kottas* 15
    Bryant v. Cunningham 717

Requests.

28. A party cannot predicate error upon a vague instruction unless he has requested a proper one. *Ferguson v. State* 432
29. A failure to instruct on the subject of an alibi is not reversible error where there was no request for an instruction on that subject. *Id.*
30. It is the duty of the trial court to instruct the jury on the

Instructions—*concluded.*

law of the case, whether requested by counsel to do so or not. *Sanford v. Craig* 483
Hanover Fire Ins. Co. v. Stoddard 745

31. Where the court, on its own motion, fails to instruct the jury as to the issues, a party desiring such an instruction should prepare and request one. *Sanford v. Craig* 483

32. A request for a charge on all the material questions at issue adds no force to the general obligation of the court to give such a charge. *Hanover Fire Ins. Co. v. Stoddard* 745

33. Refusal to give requested instructions which are not pertinent to any of the issues on trial is not error. *Id.*

Insurance. See PARTIES, 4.

Additional Insurance.

1. Breach of a condition that the policy shall be void if insured takes out additional insurance, does not render the first policy void, but voidable at the option of insurer. *Slobodisky v. Phenix Ins. Co* 395

2. Notice to an agent of insurer that insured has taken out additional insurance is notice to the company. *Id.*

3. Facts showing that an insurer, before a loss occurred, had knowledge of insured's breach of a condition against additional insurance, that no objection was made on account of the breach, and that the policy was not canceled, constitute evidence of a waiver of forfeiture. *Id.*

Attorneys' Fees.

4. Assessment of amount of attorney's fee and allowance thereof are not reviewable upon a record failing to show such allowance. *Hanover Fire Ins. Co. v. Stoddard* 746

Reformation of Policy.

5. An insurance policy may be impeached by either party for fraud or mistake. *Slobodisky v. Phenix Ins. Co* 395

6. In a suit to reform a policy, evidence *held* to sustain a finding that the policy represented the contract actually made. *Id.*

Storage of Gasoline.

7. Evidence *held* insufficient to show that a clause of a policy in regard to the storage of gasoline on the insured premises had been violated by insured. *Hanover Fire Ins. Co. v. Stoddard* 745

Value of Property.

8. In an action on a policy, a judgment for plaintiff was reversed as having been based upon a special finding unsupported by the evidence. *American Fire Ins. Co. v. Buckstaff Bros. Mfg. Co.* 680

9. Evidence *held* sufficient to sustain the findings of the jury as to the value of personalty destroyed by fire. *Hanover Fire Ins. Co. v. Stoddard* 746

Interest.

1. Where an obligation stipulates for a specified lawful rate of interest before maturity, and for a higher lawful rate thereafter, interest will be computed according to the terms of the contract. *Home Fire Ins. Co. v. Fitch*..... 88
2. In the absence of a contract upon the subject, unsettled accounts do not draw interest until six months after the date of the last item. *Garneau v. Omaha Printing Co*..... 383

Intervention. See MORTGAGES, 7.

A creditor seeking to enforce his rights as against his debtor's interest in money held by a clerk of a court in his official capacity, should intervene in the case in which the money was paid into court, and obtain an adjudication therein. *Anheuser-Busch Brewing Ass'n v. Hier*..... 426

Intoxicating Liquors.

1. An action cannot be maintained for the price of intoxicating liquors sold in violation of statute. *Wilson v. Parrish*..... 6
2. One purchasing the stock of a licensed saloon-keeper under an agreement to continue the business ostensibly in the name of, and by virtue of the license issued to, the seller, will not be heard to claim the property when seized on execution or attachment against such seller for a debt existing at the time of the transfer. *Hall v. Hart*..... 4

Joinder. See ACTIONS.

Journal Entry. See JUDGMENTS, 2.

Judgments. See EXECUTIONS, 1, 12. JUSTICE OF THE PEACE, 4. MECHANICS' LIENS, 17. REPLEVIN, 11, 13. RES JUDICATA.

Exemption.

1. Under section 531 of the Code an attorney cannot claim that his library is exempt as against an execution on a judgment recovered against him for moneys received for his client, though the judgment does not contain a finding that the moneys were thus received. *Shreck v. Gilbert*..... 813

Entry nunc pro tunc.

2. Where a judgment was in fact rendered but not journalized, the court may, at any time afterward in a proper proceeding and upon proper notice and showing, direct the judgment to be entered *nunc pro tunc*. *Hyde v. Michelson*..... 680
3. Section 609 of the Code limiting the time for assailing judgments does not apply to a motion to enter a judgment *nunc pro tunc*. *Id.*
4. A party to an action cannot prevent the entry of a judgment *nunc pro tunc* by showing that a third person, after the judgment was rendered, acquired an interest in the property involved in the litigation. *Id.*

Form.

5. Findings and judgment must conform to, and be supported

Judgments—*concluded.*

by, the allegations of the pleadings on which they are based. *Clemons v. Heelan* 288

6. A judgment must conform to the verdict, not only as to the amount, but as to the parties against whom the finding is made. *Morsch v. Besack* 503

Injunction.

7. Enforcement of a judgment at law will not be restrained unless plaintiff in the suit in equity has a defense not available in the former action or which by fraud or accident he did not present. *Losey v. Neidig* 167

Lien.

8. A judgment of the district court in a suit commenced prior to the term at which it was rendered, unless entered by confession, is a lien on the debtor's realty from the first day of the term and is superior to a mortgage recorded during the term before rendition of the judgment. *Ocobock v. Baker* 447

Order of Sale.

9. A decree of foreclosure is sufficient authority for its execution without an order of sale. *Johnson v. Colby* 327

Payment to Clerk.

10. Where defendant paid the clerk of the court enough of money to satisfy the judgment, confirmation of a sheriff's sale subsequently made to plaintiff was properly refused, though the clerk failed to enter satisfaction of record. *Moore v. Boyer* 446

Pleadings.

11. A motion for judgment on the pleadings may be interposed before trial. *Kime v. Jesse* 606

Proceeding to Vacate.

12. A petition to vacate a decree under secs. 602 and 603 of the Code, must show the existence of a reason assigned in sec. 602, or aver facts sufficient to warrant the court in granting relief in the exercise of its general jurisdiction. *Kirkham v. Gibson* 23

Judicial Sales. See EXECUTIONS.

Jurisdiction. See BAIL AND RECOGNIZANCE. EVIDENCE, 11. JUSTICE OF THE PEACE, 1, 5. MANDAMUS, 4. PLEADING, 8. REVIEW, 72, 73. SUMMONS. VENDOR AND VENDEE, 3.

Jury. See COSTS, 3.

Bias.

1. The fact that a verdict for plaintiff was $5 in excess of the amount claimed by him does not justify the conclusion that it was the result of passion or prejudice. *Wainwright v. Satterfield* 403

Challenges.

2. Improper excusing of a juror for cause will not justify a reversal of a judgment, where the party complaining did not exhaust his peremptory challenges. *Smith v. Meyers* 70

Jury—*concluded.*

Right of Trial.

3. Where the record shows that a jury was waived at a preceding term, the waiver will be presumed to be general and not for the particular term at which it was made. *Boslow v. Shenberger* 164
4. Whether or not a right to trial by jury exists must be determined from the object of the action as determined by the averments of the petition, and in case of ambiguity by resort to the prayer. *Yager v. Exchange Nat. Bank of Hastings*.... 321
5. If an action is in its nature one triable by jury, the right to such trial will not be defeated because, in order to accomplish the main object of the action, it becomes necessary to determine issues as to the existence of equitable rights. *Id.*
6. Plaintiff *held* entitled to a jury trial where he alleged he had executed to defendant a deed absolute in form, but in fact a mortgage, and that defendant had sold the land receiving more than sufficient to pay the debt, the prayer being for judgment for the surplus. *Id.*
7. A jury for the trial of issues of fact presented in *mandamus* cannot be demanded as a matter of right. *Mayer v. State*.... 764

Sickness of Juror.

8. Excusing, on account of sickness, a juror sworn in a criminal case, and selecting another in his stead, will not justify the reversal of a conviction of defendant where he made no objection to the change, and his counsel consented thereto. *Catron v. State* 389

Jury Fee. See COSTS, 3.

Justice of the Peace. See COSTS, 1. COURTS, 11-13. REVIEW, 4.

1. The jurisdiction of a justice of the peace is co-extensive with the territorial limits of his county, and a judgment rendered by him in a precinct thereof other than the one for which he is elected is not void on that account. *Rema v. State*..... 376
2. A justice of the peace who issued an attachment against a resident before a bond had been given, is liable for nominal damages though defendant suffered no actual injury. *Head v. Levy* 456
3. A justice of the peace who conspires with plaintiff in a case and issues subpœnas for witnesses for the sole purpose of increasing defendant's costs on change of venue, is guilty of malfeasance and ought to be impeached. *Id.*
4. In a case before a justice of the peace only one final judgment can be rendered though several causes of action were stated in the bill of particulars. *Huffman v. Ellis*..... 688
5. In a suit for the recovery of money where defendant had absconded with intent to defraud creditors, if service of summons cannot be had within the county and his property has been seized in attachment, constructive service of process

Justice of the Peace—*concluded.*

may be had and jurisdiction acquired under section 932 of the Code. *Meyer v. Hibler* 823

6. Prior to the act of 1895 (Session Laws, ch. 72) a justice of the peace had no authority to allow a bill of exceptions embodying the evidence on a motion objecting to the jurisdiction of the court over the person of defendant. *Id.*

Laches. See ESTOPPEL, 7. PRINCIPAL AND SURETY. REVIEW, 73.

Landlord and Tenant. See BAILMENT.

1. A tenant, by surrendering possession to an adverse party, cannot deprive his landlord of his right to the possession of the leased premises. *Perkins v. Potts* 115
2. In an action for rent, it is sufficient to show a contract with plaintiff and a holding under it, plaintiffs' title or right of possession being immaterial. *Bartlett v. Robinson* 715
3. To an action for rent upon a lease at will, it is no defense to show that defendant was prevented from terminating the lease by legal proceedings to which plaintiff was not a party. *Id.*

Larceny.

1. The purpose of section 117*a* of the Criminal Code relating to cattle stealing was to create an independent substantive crime, and provide a penalty. *Granger v. State* 352
2. Evidence *held* sufficient to sustain a conviction under a charge that defendant stole certain cattle. *Catron v. State* .. 390
3. An information averring that defendant "unlawfully and feloniously did steal, take, and drive away one cow," sufficiently charges that the taking was with the felonious intent to permanently deprive the owner of his property. *Rema v. State* 376
4. The buying or receiving of cattle, knowing them to have been stolen, is an independent, substantive crime. *Ream v. State* 727
5. It is not essential, in an indictment for buying or receiving stolen cattle, that the name of the original thief be alleged. *Id.*
6. An information for larceny is not to be quashed because it alleges that the offense was committed "on or about" a certain date. *Rema v. State* 375
7. Evidence *held* to sustain a verdict against accused. *Id.* 376
8. When the owner of stolen chattels, or the person from whose immediate possession the same were taken, is examined as a witness, his testimony that he did not consent to the removal of the property is indispensable to a conviction for larceny. *Id.*
9. In a prosecution for larceny a verdict of guilty is fatally de-

Larceny—*concluded.*

fective where it contains no finding as to the value of the property stolen. *Fisher v. State*..... 531

10. Where property is stolen in one county and taken by the thief into another, he may be prosecuted and convicted in either county. *Hurlburt v. State*..... 428

Letters. See EVIDENCE, 15.

Levy. See EXECUTIONS, 19, 20. TAXATION, 1.

Library of Attorney. See EXEMPTION.

Liens. See EXECUTIONS, 18. JUDGMENTS. MECHANICS' LIENS. MORTGAGES.

Limitation of Actions. See EXECUTORS AND ADMINISTRATORS, 2. JUDGMENTS, 2, 3.

1. An action for the foreclosure of a tax lien cannot be maintained after the lapse of more than nine years from the date of the tax sale. *Hathaway v. Nelson*..... 109
2. The period of limitations for an action on a written contract is five years. *Denman v. Chicago, B. & Q. R. Co*..... 140
3. The statute of limitations begins to run against a mechanic's lien from the time of filing the claim. *Pardue v. Missouri P. R. Co.* 201
4. Since the enactment of the married woman's act permitting married women to sue in the same manner as if they were unmarried, the statute of limitations runs against women during coverture. *Murphy v. Evans City Steam Laundry Co*.. 593

Malfeasance. See JUSTICE OF THE PEACE, 3.

Mandamus.

1. The state printing board may be required to award a printing contract to the lowest competent bidder where he has complied with the statutory requirements. *State v. Cornell*..... 25
2. Where the district court has not been requested to direct its clerk to issue execution on a judgment, the supreme court will not *mandamus* the clerk to issue it. *State v. Frank*..... 553
3. A jury for the trial of issues of fact presented in *mandamus* cannot be demanded as a matter of right. *Mayer v. State*.... 764
4. Where issues of fact are presented for trial, a judge of the district court cannot allow a peremptory writ at chambers in vacation. *Id.*
5. In *mandamus* sufficient investigation may be made to ascertain whether relator has a *prima facie* title to an office in question. *Cruse v. State*..... 831
6. Where relator shows a *prima facie* title to an office he may have a writ to compel a former incumbent who has no color of title to deliver to relator the books, papers, and money belonging to such office. *Id.*

Marshaling Assets. See MORTGAGES, 11.

Master and Servant.

1. In a contract of employment, a provision for the retention by employer of one month's wages was *held* to be a penalty to secure the faithful performance of the stipulations on part of the employe. *Adams-Smith Co. v. Hayward* 79
2. In a suit by a servant against a master where uncontradicted evidence disclosed that injury to plaintiff resulted from negligence of another servant, there being no other evidence as to relationship existing between the servants, and the jury answered, "We don't know," to a special interrogatory as to whether they were fellow servants, it was *held* that a general verdict for plaintiff was not sustained by the evidence. *Norfolk Beet-Sugar Co. v. Koch* 197
3. In an action against a railroad company for negligence resulting in the death of an employe, evidence *held* insufficient to sustain a verdict for plaintiff. *Ecklund v. Chicago, St. P., M. & O. R. Co* 729

Mayor. See OFFICE AND OFFICER, 3.

Measure of Damages. See DAMAGES. CONTRACTS, 8.

Mechanics' Liens.

Claims. Time of Filing. Contracts.

1. One contracting directly with the owner may file his claim for a lien within four months of the time the labor was performed or the material furnished. *Pardue v. Missouri P. R. Co.* 201
2. The sworn statement of claim must contain a description of the land on which the building stands. *Western Cornice & Mfg. Co. v. Leavenworth* 418
3. Evidence *held* insufficient to prove that a statement of claim had been filed. *Cummins v. Vandeventer* 478
4. In foreclosure it must appear in evidence that the statement of claim was filed with the proper officer within the time prescribed by statute. *Id.*
5. To perfect a mechanic's lien, a duly verified claim must be filed in the proper office within four months from the date of the last article of material furnished or the last labor performed under the contract. *Nye v. Berger* 758
6. Evidence *held* sufficient to sustain a finding that items included in the claim were not furnished under the original contract and that the claim was filed too late. *Id.*
7. Whether all the items included in the claim were furnished under one contract is a question for the jury or, in a case tried without a jury, for the court. *Id.*
8. All materials for which there are charges in the claim must have been furnished under one contract. *Id.*

Mechanics' Liens—*concluded.*

Construction of Statute.

9. Section 2, article 1, chapter 54, Compiled Statutes, contemplates a contract between the owner of realty and the contractor, in and by which the former shall pay the latter money for an improvement. *Frost v. Falgetter* 692

Description.

10. A lien for materials used or labor performed in erecting a portion of the building on land not described in the statement of claim, cannot be enforced against described land on which the other portion of the building is situate. *Western Cornice & Mfg. Works v. Leavenworth* 418

Lien for Damages.

11. Where an owner wrongfully prevents a contractor from completing the work, the latter may have a lien for the reasonable value of the labor performed and material furnished, but he cannot have a lien for damages for breach of the contract. *Pardue v. Missouri P. R. Co* 201

Subcontractors.

12. Where a subcontractor complies with the mechanic's lien law, the effect is to garnish in the hands of the owner of the realty money owing from the contractor to the subcontractor, and to give the latter a lien to secure payment of the money thus garnished. *Frost v. Falgetter* 692
13. To entitle a subcontractor to a lien, the owner must be indebted in money to the contractor, and the latter must be indebted in money to the subcontractor. *Id.*
14. Where a contractor stipulates for payment in something else than money, subcontractors furnish him labor and material at their peril. *Id.*
15. Where a contractor agreed to accept realty in payment for improvements, a subcontractor who furnished him labor and materials cannot assert a lien on the property improved. *Id.*
16. Subcontractors are charged with notice of the terms of the contract between the owner of the realty and the contractor. *Id.*
17. The fact that a subcontractor is entitled to assert a lien against the realty does not entitle him to a personal judgment against the owner. *Id.*

Waiver of Lien.

18. A contractor agreeing to accept realty in payment for labor and materials is not entitled to a lien therefor in absence of fraud or of default of the owner in making the conveyance promised. *Id.*

Mesne Profits. See MORTGAGES, 13.

Metropolitan Cities. See MUNICIPAL CORPORATIONS, 9.

Mileage. See SHERIFFS AND CONSTABLES, 5.

Misconduct of Attorney. See NEW TRIAL, 6. TRIAL, 10, 11.

Misnomer. See PLEADING, 8.

Money. See COURTS, 4.

Mortgages. See ALTERATION OF INSTRUMENTS, 2, 3. ATTORNEY AND CLIENT, 2, 3. EXECUTIONS. HOMESTEAD. JURY, 6. SUBROGATION, 3. VENDOR AND VENDEE, 2, 3.

1. A mortgage does not convey title but merely creates a lien on the realty. *Orr v. Broad*..... 490

Acceptance.

2. Acceptance by grantee of a mortgage beneficial to him will be presumed, but the presumption may be rebutted by proof that he did not accept it. *Atwood v. Marshall*..... 173

Assumption of Debt.

3. Where one buys realty and, as part consideration for the purchase, assumes in the deed to pay a mortgage on the land, he is liable for the mortgage debt; and grantor, upon maturity of the mortgage, may recover from grantee the amount due thereon, though grantor paid no part of it. *Stichter v. Cox*..... 533
4. One purchasing realty and agreeing to pay a mortgage thereon is personally liable to mortgagee for any deficiency after foreclosure. *Gibson v. Hambleton*..... 601
5. After assumption of a mortgage by a purchaser of the realty, notice to mortgagee, and assent by him, his right of action on the covenant cannot be divested by a voluntary rescission by the contracting parties. *Id.*

Foreclosure.

6. In a foreclosure proceeding, an order adjudging the mortgage void and continuing the case for a hearing on defendant's liability for the debt, is appealable. *France v. Bell*..... 57
7. A lien-holder not a party to a foreclosure suit has no standing by intervention on motion for distribution to ask that the purchase money be applied to the satisfaction of his lien. *Clark & Leonard Investment Co. v. Way*..... 204

Liens. Priorities. Subrogation.

8. A second mortgagee, who in protecting his security pays an installment due on the first mortgage, may, upon payment by the mortgagor of the balance due on the prior mortgage, enforce by action the lien for the amount so advanced. *Skinkle v. Huffman*..... 20
9. A coupon bond reciting that it is secured by a real estate mortgage only to a fixed sum, *held* a limitation upon the amount of the mortgage lien. *Home Fire Ins. Co. v. Fitch*.... 88
10. A mortgage recorded during a term of court at which a judgment is rendered in a suit commenced prior to the term, is inferior to the judgment, unless entered by confession, though the mortgage was filed for record before rendition of the judgment. *Ocobock v. Baker*..... 447

Mortgages—*concluded.*

11. A mortgagee *held* not entitled to be subrogated to the rights of a judgment creditor holding a superior lien, the latter having released from the lien of his judgment lands not covered by the mortgage. *Id.*

Payment.

12. In an action to foreclose a mortgage, the defense being payment, evidence *held* insufficient to establish authority, or ostensible authority, in a third person, to whom the money was paid, to act for the holder of the note and mortgage. *Frey v. Curtis* 406

Rents and Profits.

13. A mortgagor is ordinarily entitled to possession of the realty until confirmation of foreclosure sale, and such a right of possession carries with it the proprietary interest in the rents and profits. *Orr v. Broad* 490

Motions.

It is within the discretion of the court to hear oral testimony on an issue raised by a motion. *Hamer v. McKinley-Lanning Loan & Trust Co* 705

Municipal Corporations. See ESTOPPEL, 6. OFFICE AND OFFICER, 3. STATUTES, 20, 21.

1. The legislature may create a municipality without providing in all particulars for its government. *State v. Stuht* 209

Claim Against City.

2. It is solely in actions against a city of the second class having more than 5,000 inhabitants, to recover damages for negligence, that filing with the city clerk of the detailed statement required by section 34, article 2, chapter 14, Compiled Statutes, is a condition precedent to recovery. *Dovey v. City of Plattsmouth* 642

Damages.

3. One who purchases a lot on a street with an established grade and makes improvements with reference to the natural grade, cannot recover damages resulting to the improvements by the streets being worked to the established grade. *City of Omaha v. Williams* 40

Dangerous Premises. Negligence.

4. A city creating a pond on private property not near a thoroughfare owes no duty to the general public, except that of a sanitary character, other than devolves on private owners of property similarly situated. *City of Omaha v. Bowman* 294
5. In an action against a city for the death of a child drowned in a pond created by the city on private property, an instruction that such evidence as would establish the liability of the city to a lot-owner for damages for flooding his lot, would be proper proof in support of a claim for compensation for personal injury to one who had no interest in the lot, *held* erroneous. *Id.*

Municipal Corporations—*continued.*

Fire and Police Commissioners.

6. Section 31 chapter 14, Session Laws of 1897, purporting to amend section 91, article 1, chapter 13*a*, Compiled Statutes of 1895, and providing for a board of fire and police commissioners, is unconstitutional and void because it contains subject-matter not expressed in the title of the act, nor germane to the original section, and is amendatory of prior laws. *State v. Tibbets* 228
State v. Stewart 243
7. Section 31, chapter 14, Session Laws of 1897, creating a board of fire and police commissioners, was the inducement for the passage of section 6 of the same act relating to the election of councilmen, and invalidates the latter section. *State v. Stewart* 244

Improvements. Taxation.

8. The record of a special assessment for a local improvement must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power. *Hutchinson v. City of Omaha* 348
9. Under the charter of metropolitan cities, as it existed in 1890, two or more streets could not be united in a single improvement, on petition of the owners representing three-fifths of the frontage, and the total expense distributed against the property abutting on all the streets improved. *Id.* 345
10. Where power to make an improvement is derived from a petition of property owners, the work must be done according to the petition in order to found a local assessment to pay therefor. *Id.*
11. The provision of a charter that no court shall entertain a complaint that the party was authorized to make, and did not make, to the board of equalization has no application where the tax complained of is void. *Id.*
12. A taxpayer is not estopped from resisting a tax because he has suffered the work on an improvement to proceed before complaining, when in so doing he was not guilty of laches. *Id.* 346

Municipal Court.

13. Chapter 25, Session Laws of 1897, establishing a municipal court in cities of the metropolitan class, is unconstitutional and void. *State v. Magney* 509

Township Organization.

14. In a county under township organization, a township, within the meaning of section 6, article 9, of the constitution, is a municipal corporation with power to assess taxes for township purposes. *Chicago, B. & Q. R. Co. v. Klein* 258

Wards.

15. The repeal by the legislature (Session Laws, 1897, ch. 14, sec. 32) of section 10, article 1, chapter 13*a*, Compiled Statutes of

Municipal Corporations—*concluded.*

1895, conferring upon city authorities the power to divide the municipality into wards, did not have the effect to abolish existing legally established wards. *State v. Stewart*..... 243

Water Commissioner.

16. The water commissioner of the city of Lincoln has not the power to remove a subordinate employe in the water department of the city, or to make appointments to fill vacancies occurring therein. *Percival v. Weir*..... 373

Municipal Courts. See MUNICIPAL CORPORATIONS, 13.

Negligence. See MASTER AND SERVANT, 2. MUNICIPAL CORPORATIONS, 2, 4. RAILROAD COMPANIES, 2.

1. The questions of defendant's negligence and of plaintiff's contributory negligence, unless conclusively established by the evidence, should be submitted to the jury. *Union P. R. Co. v. Evans* 51
2. The proximate cause of a personal injury is generally a question for the jury. *Id.*
3. Where there are several causes of a personal injury, the dominant cause is the question for determination. *Id.*
4. Negligence must be fairly inferable from the evidence. *City of Omaha v. Bowman*..... 294
5. The existence of negligence cannot be a mere matter of conjecture, and, to justify a recovery for damages, the negligence must be the proximate cause of the injury. *Id.*
6. Where plaintiff's undisputed evidence is insufficient to warrant an inference of negligence a verdict should be directed for defendant. *Ecklund v. Chicago, St. P., M. & O. R. Co*..... 729

Negotiable Instruments. See ALTERATION OF INSTRUMENTS. ESTOPPEL, 3.

1. A bank claiming rights through notes by virtue of a transfer from one to whom they had been indorsed for collection, was *held* chargeable with notice of the latter's want of ownership. *Lederer v. Union Savings Bank*..... 133
2. The indorsement of a note for collection and account does not pass title to indorsee nor confer upon him authority to transfer the note so as to charge former indorsers under the law merchant. *Boyer v. Richardson*..... 156
3. In a suit by an indorsee of a note, admission in evidence, over plaintiff's objection, of a published reward for payee's arrest, *held* prejudicial error. *Sanford v. Craig*..... 486
4. Where the terms of a note in suit are not disputed, the court may instruct the jury whether or not the note is negotiable. *Corry v. Klump*..... 592

New Trial. See REVIEW, 74.

1. The motion of a railroad company for a new trial on the ground of newly-di-co.ered evidence *held* properly overruled

New Trial—*concluded.*

where the facts disclosed by affidavits on the motion were within the knowledge of the company's servants who testified during the trial. *Burlington & M. R. R. Co. v. Kittridge,* 16

2. In a proper case, a court of equity may grant a new trial in an action at law, on application of a party who was unable to procure a bill of exceptions through failure of the stenographer to furnish a copy of the testimony. *Holland v. Chicago, B. & Q. R. Co.* 100

3. A new trial may be granted for failure of the stenographer to furnish a copy of the testimony, though a transcript of the evidence preserved in a former trial of the same case was obtainable. *Id.* 101

4. A motion for a new trial is indivisible. *Atwood v. Marshall.* . 173

5. Where an assignment of error in a motion for a new trial jointly made by two or more of the parties to the suit cannot be sustained as to all, it must be overruled. *Id.*

6. Conduct of counsel in making an improper remark in his opening statement and in his address to the jury, *held* not ground for a new trial, where the language was not objected to at the time, and counsel desisted upon the courts' warning the jury to disregard the remark. *Eickhoff v. Eikenbary* 341

7. An assignment that the verdict is too large presents the question of error in allowing interest before six months from the date of the last item of an account. *Garneau v. Omaha Printing Co.* 386

8. An assignment in a motion for a new trial, "Errors of law occurring at the trial," does not present to the district court the question of the correctness of its rulings in giving or refusing instructions. *Phœnix Ins. Co. of Hartford v. King* ... 563

9. Allegations of error as to giving instructions should be separately assigned in the motion for a new trial. *Hanover Fire Ins. Co. v. Stoddard* 745

Notes. See NEGOTIABLE INSTRUMENTS.

Notice. See DEEDS. EXECUTIONS, 21-25. INSURANCE, 2. MECHANICS' LIENS, 14.

Office and Officers. See MANDAMUS. QUO WARRANTO. STATE.

1. In the absence of any constitutional prohibition or affirmative provision fixing the term of a public officer, his term may be shortened by legislative enactment. *State v. Stewart,* 243

2. The water commissioner of the city of Lincoln has not the power to remove a subordinate employe in the water department, or to make appointments to fill vacancies occurring therein. *Percival v. Weir* 373

3. The office of mayor of a city of the metropolitan class is an office of profit and trust under the laws of the state. *State v. Moores* 770

Office and Officers—*concluded.*

4. The word "eligible" relates to the capacity to be elected or chosen to office as well as to hold office. *Id.*
5. "Default," as used in section 2, article 14, of the constitution relating to officers, implies more than a mere civil liability; and to render one ineligible to hold office on account of such default, there must exist a willful omission to account and pay over, with a corrupt intention or such a flagrant disregard of duty as to fairly justify the inference that his conduct was willful and corrupt. *Id.*

Order of Sale. See EXECUTIONS, 27-30.

Parties. See CONTRACTS, 5, 12. INTERVENTION. JUDGMENTS, 4, 6. MORTGAGES, 7. PLEADING, 17. TORTS.

1. An action for the wrongful sale of property for taxes may be brought by the person to whom the certificates of tax sale and treasurer's deed were issued, and to whom the money invested belonged. *Alexander v. Overton*..... 283
2. Where plaintiff's interest is transferred pending litigation, the suit may be prosecuted to judgment in the name of the original plaintiff, or the transferee may be substituted in his stead. *Id.*
3. It is improper, unless in cases expressly provided by statute, to permit on motion, without consent of plaintiff, a new defendant to be substituted for the one originally sued. *Burlington Voluntary Relief Department v. Moore*..... 719
4. In a suit begun by an administratrix on a contract of life insurance, the petition not showing who was the beneficiary, it was not error to permit plaintiff to amend by alleging that she was the beneficiary in her own right, and by striking out the allegations of her representative capacity; and such an amendment amounts to neither a substitution of parties nor of causes of action. *Id.*

Partnership.

A partner may sue his copartner at law where the cause of action is not connected with the partnership accounts. *Halleck v. Streeter* 827

Payment. See CORPORATIONS, 4. COURTS, 4. MECHANICS' LIENS, 14. MORTGAGES, 8, 12.

1. Money voluntarily paid to a third person in discharge of the debt of another cannot be recovered back. *Boyer v. Richardson* 156
2. Evidence *held* to sustain a finding that a payment was a voluntary one. *Id.*
3. Payment is a matter of defense and cannot be proved unless pleaded. *Culbertson Irrigating & Water Power Co. v. Cox*.... 684

Penalty. See CONTRACTS, 1.

Perjury.

In making an affidavit for a change of venue, a defendant who swore that he could not have a fair and impartial trial before any one of twenty-seven justices of the peace in Douglas county, committed perjury. *Head v. Levy* 460

Personal Injuries. See MASTER AND SERVANT, 2.

Pleading. See CARRIERS, 5. CONTRACTS, 3. CORPORATIONS. CREDITOR'S BILL, 2. CRIMINAL CONVERSATION, 1-3. EJECTMENT. JUDGMENTS, 12. JURY, 6. REPLEVIN, 4, 10. RES JUDICATA, 1, 7. SALES, 4. SUBSCRIPTIONS.

1. Where the petition declares only upon a contract with defendant in his own behalf and his promise to pay, it is error to submit to the jury the theory that he was agent for another and had received from his principal money to the use of plaintiff. *Codding v. Munson* 580
2. A material allegation is one essential to a claim or defense, which cannot be stricken from the pleading without leaving it insufficient. *Culbertson Irrigating & Water Power Co. v. Cox* 684

Amendments.

3. The supreme court has no authority to permit a party to amend in the appellate court a pleading filed in the court below. *Thompson v. Nicholls* 312
4. In a proper case the court may permit a pleading to be amended to conform to the proof. *Hanover Fire Ins. Co. v. Stoddard* 745

Answer. New Matter. Review.

5. A defendant by answering over waives error in the overruling of his demurrer to a petition for defect of parties. *Lederer v. Union Savings Bank* 133
6. Plea quoted in the opinion construed and *held* to state a defense of usury in the inception of a note. *Farm-Land Security Co. v. Nelson* 624
7. Under section 134 of the Code, a plea of payment in an answer to a petition for a balance due on a contract is a material allegation of new matter to be taken as true unless controverted by the reply. *Culbertson Irrigating & Water Power Co. v. Cox* 684
8. Want of jurisdiction of the person of defendant, and misnomer, as well as matters in bar, must be pleaded by answer, where not earlier appearing on the face of the record. *Burlington Voluntary Relief Department v. Moore* 719
9. An answer verified on belief is not admissible as substantive evidence in favor of defendant. *Bourke v. Falck* 768
10. In a proceeding in error it is proper for defendant, by way of answer, to set up such facts subsequent to the judgment as are claimed to have the effect to waive the error complained of. *Shreck v. Gilbert* 813

Pleading—*concluded.*

Demurrer.

11. The objection that a petition praying equitable relief states a case for a legal remedy, cannot be raised by general demurrer. *Lederer v. Union Savings Bank*..... 133
12. A demurrer searches the entire record and is applicable to the first defective pleading. *State v. Stuht*..... 209
13. On demurrer judgment should go against the party whose pleading was first defective in substance. *State v. Moores*... 770

Election Between Counts.

14. Error in requiring plaintiff to elect between two counts is harmless, where the evidence discloses that the count abandoned could not lead to a recovery. *Boyer v. Richardson*.... 156

Motions.

15. The orderly method of attacking a pleading is by motion or demurrer. *Kime v. Jesse*..... 606
16. A motion for judgment on the pleadings may be interposed before trial. *Id.*

Parties.

17. A plaintiff who, in his petition, has been sufficiently described in the title of the case need only be referred to as plaintiff in the statement of the facts constituting his cause of action or in his prayer for relief. *Eiseley v. Taggart*..... 658

Petition.

18. Petition *held* to state a cause of action for rescission of a contract on the ground of deceit. *Griswold v. Hazels*..... 64

Reply.

19. A reply must be made to all the material allegations of new matter contained in the answer, or they will be taken as true. *Culbertson Irrigating & Water Power Co. v. Cox*..... 684

Police Magistrates. See BAIL AND RECOGNIZANCE.

Policemen. See STATUTES, 5.

Ponds. See MUNICIPAL CORPORATIONS, 4, 5.

Possession. See ADVERSE POSSESSION. REAL ESTATE.

Practice. See PLEADING, 10. REVIEW, 4, 13.

Preferences. See FRAUDULENT CONVEYANCES, 5.

Principal and Agent. See ATTORNEY AND CLIENT, 2, 3. FACTORS AND BROKERS. INSURANCE, 2.

Authority of Agent.

1. Where notes were indorsed to one for collection, his acts in disposing of them as his own property, were *held* not within the scope of his real or apparent authority as agent of the payees. *Lederer v. Union Savings Bank*..... 133
2. The indorsement of a negotiable note for collection and account constitutes the indorsee the agent of the indorser for the purpose only of collecting and remitting the proceeds. *Boyer v. Richardson*..... 156

Principal and Agent—*concluded.*

3. In an action to foreclose a mortgage, the defense being payment, evidence *held* insufficient to establish authority, or ostensible authority, in a third person, to whom the money was paid, to act for the holder of the note and mortgage. *Frey v. Curtis* 406
4. Where the authority of an agent to make a contract is in issue, and there is no evidence of such authority, it is error to instruct that the jury may determine whether the agent had authority to make the contract. *Nebraska Wesleyan University v. Parker* 453

Evidence of Agency.

5. Agency cannot be proved by declarations of one assuming to act as agent. *Learn v. Upstill* 271
6. Evidence *held* sufficient to establish agency. *Hanover Fire Ins. Co. v. Stoddard* 746

Non-Existent Principals.

7. Evidence in an action for labor performed on a highway at the request of persons claiming to act for a principal having no legal existence, *held* to sustain a verdict for plaintiff, except as to one defendant. *Learn v. Upstill* 271
8. One who, as agent, assumes to represent a principal having no legal existence or status is himself liable. *Id.* *Codding v. Munson* 580
9. The rule that one assuming to represent a non-existent principal is himself liable, is formed upon the presumption that the parties intended to create an enforceable obligation, and does not obtain where a different method of fulfillment was provided, and the agent was not to be held personally liable. *Codding v. Munson* 580

Ratification.

10. Where there is an issue as to a principal's ratification of an unauthorized contract of an agent, and there is no evidence that the principal knew of the existence of the contract at the time of the alleged ratification, it is error to instruct that the jury may find there was a ratification. *Nebraska Wesleyan University v. Parker* 453
11. A principal who accepts the fruits of an agent's act is chargeable with the burden of the instrumentalities employed by the agent. *Osborn Co. v. Jordan* 465
12. One is not permitted to ratify an unauthorized act in so far as it operates to his advantage and repudiate it in so far as it imposes burdens. *Id.*

Principal and Surety. See GUARANTY.

Mere forbearance by a creditor to sue a principal will not release the latter's sureties, though, by lapse of time, remedies may be lost against the principal. *Eickhoff v. Eikenbary* 332

Printers' Fees. See SHERIFFS AND CONSTABLES, 6.

Printing. See STATE.

Privity. See CONTRACTS, 12.

Process. See JUSTICE OF THE PEACE, 5. SUMMONS.

The district court has power to permit a sheriff to amend his return on a process to conform to the facts. *Phœnix Ins. Co. of Hartford v. King* 562

Property. See ACCESSION AND CONFUSION.

Public Lands. See CONTRACTS, 15.

1. The act of congress (26 Statutes at Large, p. 1098, ch. 561, sec. 7), protecting certain innocent purchasers and incumbrancers against cancellations of entries, refers only to entries in force when the act was passed, and not to those which had been previously canceled. *Pfund v. Valley Loan & Trust Co.* 474
2. After issuance of the final receipt and before patent, the commissioner of the general land office may cancel the entry for fraud. *Id.* 473
3. Where one claiming a patent seeks relief in court against the cancellation of an entry for fraud he assumes the burden of showing that he has earned a patent. *Id.* 474

Public Money. See CONSTITUTIONAL LAW, 5.

Public Policy. See CONTRACTS, 15, 16. FRAUDULENT CONVEYANCES, 1.

Publication. See EVIDENCE, 21. EXECUTIONS, 23-25.

Quantum Meruit. See CONTRACTS, 3, 7.

Questions for Jury. See MECHANICS' LIENS, 7. NEGLIGENCE, 1-3.

Questions of Law.

The construction of a written instrument is for the court. *Corry v. Klump* 592

Quieting Title.

Evidence *held* insufficient to sustain a finding for defendants. *Southard v. Behrns* 486

Quitclaim. See ESTOPPEL, 4, 5.

Quo Warranto.

1. A relator has no standing in court, where the reasons urged by him against the validity of the statute under which defendant claims title apply with equal force to the law relied upon by relator in asserting his right to the office. *State v. Stuht* 209
   State v. Moores 634
2. Where the relief sought rests on the invalidity of a statute, objections to detached portions, not affecting the validity of other portions of the act, need not be determined. *State v. Stuht* 210

Quo Warranto—*concluded.*

3. One seeking to obtain possession of a public office must show a better title than incumbent. *State v. Moores* 634
4. One who voluntarily surrenders an office to another will not afterward be permitted to assert title thereto as against the latter. *Id.*
5. Information *held* to state a cause of action. *Id.* 770
6. Answer to information *held* to state a defense. *Id.*

Railroad Companies. See CARRIERS.

1. It is the duty of a railroad company to keep in safe repair the approaches to its platforms at stations. *Union P. R. Co. v. Evans* 50
2. Where it is shown in a suit against a railroad company that damage was caused by the escape of fire from an engine, the burden is on defendant to show that the engine was properly constructed, equipped, and operated. *Rogers v. Kansas City & O. R. Co.* 86

Ratification. See ATTORNEY AND CLIENT, 2, 3. PRINCIPAL AND AGENT, 10-12. TROVER AND CONVERSION, 3-5.

Real Estate. See DESCENT. PUBLIC LANDS. VENDOR AND VENDEE.

The holder of the legal title to land, of which there is no actual occupancy, is deemed to be in possession. *Troxell v. Johnson,* 46

Real Estate Agents. See FACTORS AND BROKERS, 2.

Real Property. See REAL ESTATE.

Reasonable Doubt. See INSTRUCTIONS, 10.

Instruction defining reasonable doubt approved. *Catron v. State,* 389

Receivers. See CORPORATIONS, 2.

Receiving Stolen Property. See LARCENY.

1. The buying or receiving of cattle, knowing them to have been stolen, is an independent, substantive crime. *Ream v. State* 727
2. It is not essential, in an indictment for buying or receiving stolen cattle, that the name of the original thief be alleged. *Id.*

Recitals. See DEEDS.

Recognizance. See BAIL AND RECOGNIZANCE.

Records. See EVIDENCE, 1.

Reference.

In a trial before a referee, the latter only has power to certify as to exceptions. *Disbrow v. McNish* 309

Reformation of Instruments.

To authorize the reformation of a written contract it must appear what the actual contract was; that the writing does not express the contract made; and these facts must be established by clear, convincing, and satisfactory evidence. *Slobodisky v. Phenix Ins. Co.* 395

Relation. See EXECUTIONS, 18.

Release and Discharge. See GUARANTY.

Relief Department. See PARTIES, 3, 4.

Remittitur.

1. Where the judgment is excessive and the amount of excess appears from the record, the judgment may be affirmed, in absence of other error, upon the filing of a remittitur for the proper amount by defendant in error. *Harshman v. Ingwerson* 116
Garneau v. Omaha Printing Co 383
2. An excessive verdict not resulting from the jury's passion or prejudice may be cured by a remittitur. *Wainwright v. Satterfield* 403

Rents and Profits. See MORTGAGES, 13.

Repeal. See STATUTES, 2, 6, 18.

Replevin.

1. In replevin the question for adjudication is that of the rights of the parties with respect to the possession of the property when the action was begun. *Shreck v. Gilbert* 813

Bond.

2. Section 189 of the Code requiring defendant in replevin to give notice that he excepts to the sufficiency of a replevin bond, is not applicable to such a bond taken by a constable in an action pending before a justice of the peace. *Busch v. Moline, Milburn & Stoddard Co* 83
3. The condition of a replevin bond is that plaintiff shall comply with the judgment. *Eickhoff v. Eikenbary* 332
4. In replevin against an officer who justifies under writs of attachment, it is necessary for him to prove the debt and the regularity of the proceedings; and, therefore, after judgment for defendant, it is unnecessary in a suit on the replevin bond for the officer to plead those facts, it being sufficient to plead the replevin judgment. *Id.*
5. Insertion in a replevin bond of the name of the levying officer as obligee, *held* surplusage, and that it could be rejected, leaving a sufficient bond running to defendant. *Id.*

Conditional Sale. Confusion of Goods.

6. One who conditionally sold a drug store under a contract requiring the buyer to dispose of goods at retail and buy other goods to prevent a depletion of the stock, can recover only, upon failure of the buyer to pay the purchase price, the remaining portion of the original stock. *Richardson Drug Co. v. Teasdall* 698

Dismissal of Action.

7. A plaintiff who obtained possession of the property under the writ cannot dismiss the action without defendant's consent. *Saussay v. Lemp Brewing Co* 627

Replevin—*concluded.*

8. Plaintiff may dismiss his action where the property has not been taken under the writ. *Id.*

9. Plaintiff may dismiss his action where the property was returned to defendant after plaintiff's failure to furnish a bond. *Id.*

Pleading.

10. A petition by a mortgagee of chattels alleging that he has a special interest in the property by virtue of his mortgage and that he is entitled to possession, without alleging the facts in reference to such ownership and right of possession, does not state a cause of action. *Thompson v. Nicholls*..... 312

Return of Property.

11. A plaintiff in replevin against whom judgment has been rendered, must, in order to satisfy it for a return of the property, return, or offer to return, the identical property replevied and not other property of like kind and value. *Eickhoff v. Eikenbary* 332

12. Where property replevied was of such a character that delivery was impracticable, and a return could be had only by surrendering possession of the place where the property was situated, it was not error to instruct the jury, the fact of an offer to return being in issue, that they should inquire whether that offer had been made in good faith. *Id.*

13. A plaintiff in replevin against whom judgment has been rendered owes the affirmative duty of returning the property, and if he fail so to do, the defendant may proceed to enforce the alternative judgment by an ordinary execution, and it need not be in the alternative. *Id.*

14. Where the property was returned to defendant after plaintiff's failure to furnish a bond, the action may proceed as one for damages. *Saussay v. Lemp Brewing Co*..... 627

Reply. See PLEADING, 19.

Rescission. See CONTRACTS, 17. MORTGAGES, 5.

Residence. See SUMMONS, 3.

Res Judicata.

1. On demurrer to a petition, dismissal for want of a material averment is not a bar to a subsequent petition supplying the defect, though both actions were brought to enforce the same right. *State v. Cornell*..... 25

2. After the entry of a decree, judicial sale, and distribution of proceeds, in a suit to foreclose a contract for the sale of realty, neither party, on an application for a deficiency judgment against vendee, can relitigate any material issue determined by the decree. *Kloke v. Gardels*..... 117

3. Where a decree foreclosing a contract for the sale of realty is rendered upon default of vendee, its effect is the same as

Res Judicata—*concluded.*

if he had personally appeared and litigated the issues tendered by the petition. *Id.* 118

4. Where one to whom notes were indorsed for collection presented them as claims against the maker's estate, caused them to be allowed in his own name, and assigned the judgment to a bank, it was *held* that the allowance of the claim was not, as against the real owners, an adjudication that the claimant owned the notes. *Lederer v. Union Savings Bank* .. 133

5. A county board in passing on claims acts judicially, and its judgment is final unless reversed on appeal. *Gage County v. Hill* 444

6. A judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties; but, to this operation of the judgment, it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. *Morgan v. Mitchell* 667

7. In a case where a justice of the peace rendered judgment for plaintiff on one cause of action and for defendant on another cause of action, the latter cannot plead the judgment in his favor as *res judicata* upon his appeal from the judgment against him. *Huffman v. Ellis* 688

Review. See BAIL AND RECOGNIZANCE. BILL OF EXCEPTIONS. INSTRUCTIONS. JURY, 8. MASTER AND SERVANT, 2. NEW TRIAL. REMITTITUR.

1. From a decree in equity, either party may appeal to the supreme court. *France v. Bell* 57

2. A distinction exists between an appeal and a proceeding in error. *Western Cornice & Mfg. Works v. Leavenworth* 418

3. On appeal the decree below may be affirmed in part and reversed in part. *Id.*

4. Where a judgment is taken on error from a justice of the peace to the district court and reversed, the cause should be retained for trial and judgment. *Saussay v. Lemp Brewing Co.* 627

5. In a proceeding in error it is proper for defendant, by way of answer, to set up such facts subsequent to the judgment as are claimed to have the effect to waive the error complained of. *Shreck v. Gilbert* 813

Abstracts.

6. In reviewing a case on an agreed printed abstract, the court will not look beyond the abstract. *Zink v. Westervelt* 90

7. A stipulation identifying a record for submission on an agreed printed abstract must show the rendition of a final judgment. *Id.*

8. In a case submitted on an agreed printed abstract, the court

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will not look beyond the abstract. *Shewell v. City of Nebraska City* 138

9. Where it appears from an agreed printed abstract that evidence was introduced, the nature of which is not disclosed, it will be presumed to have been of such a character as to sustain the finding below. *Id.*

Appeal Bond.

10. The statutes requiring one who appeals from a judgment of the county court to give a bond are constitutional and valid. *Hier v. Anheuser-Busch Brewing Ass'n* 144

11. The statutory requirements that a bond for appeal from a judgment of a county court shall be filed within 10 days, and that it shall be approved by the county judge, are mandatory, and are not satisfied by the tender of a bond in the district court at a later time. *Id.*

Arguments.

12. An assignment of error not argued will be deemed waived. *Adams-Smith Co. v. Hayward* 79

13. A fundamental question ignored in the briefs may be decided, where it affects other questions presented for determination. *Pardue v. Missouri P. R. Co* 201

14. Assignments of error not argued will be disregarded. *McCord v. Hamel* 286

15. Assignments of error not argued are waived. *Hurlburt v. State* 431

Assignments of Error.

16. An assignment in a petition in error, "Errors of law occurring at the trial," presents nothing for review. *Boyd v. Mains* 314

17. Alleged errors in the admission or rejection of testimony are not reviewable where the particular rulings are not pointed out in the petition in error. *Morsch v. Besack* 502

18. An assignment in a petition in error, as to the admission or exclusion of testimony, which does not indicate what particular testimony out of a great mass is referred to, is too indefinite for consideration. *Phœnix Ins. Co. of Hartford v. King* 562

19. Errors in respect to giving instructions must be separately assigned. *McCord v. Hamel* 286

20. An assignment that the court erred in overruling a motion for a new trial, when such motion is based upon several distinct grounds, is too general. *Id.*

21. Where instructions are assailed by an assignment of error requiring an examination of the evidence, it may be overruled in absence of a bill of exceptions. *Sunday Creek Coal Co. v. Burnham* 364

22. Upon review, an assignment of error that the court erred in

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overruling a motion for a new trial, where the motion is based on several distinct grounds, is too general. *McCord v. Hamel* 286
Phœnix Ins. Co. of Hartford v. King 563

23. An assignment of error relating to a group of instructions, where the ruling as to any one of the group against which the assignment is directed is without error, may be overruled. *Atwood v. Marshall* 173
Aitken v. Rawlings 539
Corry v. Klump 592

24. Where the refusal of an instruction is not excepted to or assigned as error in the motion for a new trial, objections to the ruling are waived. *Sanford v. Craig* 483

25. Rulings of the trial court in giving or in refusing instructions will not be reviewed unless specially assigned as error in the motion for a new trial. *Phœnix Ins. Co. of Hartford v. King* 562

26. Instructions not pointed out in the motion for new trial or petition in error will be disregarded. *Morsch v. Besack* 502

27. Instructions not assailed in the motion for a new trial will be disregarded in the appellate court. *Farwell v. Chicago, R. I. & P. R. Co.* 614

28. Alleged errors in giving instructions should be separately assigned in the motion for a new trial and in the petition in error. *Hanover Fire Ins. Co. v. Stoddard* 745

29. Instructions not assailed by proper specific assignments of objections or exceptions will not be examined under an assignment alleging a refusal of the general request to charge the jury on the issues of law or on the material questions in the case. *Id.*

Bill of Exceptions.

30. Alleged error in admitting an account-book in evidence was disregarded, where the party complaining failed to make the book or its contents a part of the bill of exceptions. *Anderson v. Beeman* 387

31. Where a material part of the evidence was omitted from the bill of exceptions, the judgment below will not be reversed for alleged insufficiency of the evidence to sustain the verdict. *Id.*
Dunn v. Eberly 468

32. In absence of a bill of exceptions it will be assumed that the district court was fully justified by the proofs in so ruling on various motions as to require the enforcement of its judgment which previously had been affirmed by the appellate court. *Tolerton & Stetson Co. v. German-American Savings Bank* 194

33. Findings of fact cannot be reviewed where the evidence has not been preserved by an authenticated bill of exceptions. *Kroeger v. Nieman* 285

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34. Questions involving an examination of the evidence will be disregarded in absence of a bill of exceptions. *Aitken v. Rawlings* 539

35. A litigant should not be deprived of the right to have his case heard in a court of last resort on account of the failure of the official stenographer to furnish him with a copy of the testimony. *Holland v. Chicago, B. & Q. R. Co* 101

36. An unauthenticated bill of exceptions will be disregarded. *Hale v. Shechan* 184

37. Affidavits used on the hearing of a motion in the trial court, to be available on review, must be included in a bill of exceptions. *Morsch v. Besack* 502

38. Where the sole question presented in the district court was the regularity of the appointment of a person to act specially as a county judge, the affirmance of the judgment of the county court by such district court must be approved in the supreme court as being the only judgment which the district court could have rendered in view of the impossibility of perpetuating the evidence adduced in the county court upon the question therein presented. *Lowe v. Bishop* .. 552

39. The supreme court will not examine a bill of exceptions for the purpose of ascertaining if the verdict is sustained by sufficient evidence unless that question is specifically assigned in the petition in error. *Phœnix Ins. Co. of Hartford v. King* 562

Discretion of Trial Court.

40. An order allowing a sheriff to amend his return on a process will not be disturbed on review where there was no abuse of discretion on part of the trial court. *Id.*

41. Rulings of the trial court in refusing or in submitting questions for special findings of the jury will not be disturbed, where there was no abuse of discretion. *Id.*

Election of Remedies.

42. By filing a petition in error a party abandons his right to be heard on appeal. *Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co* 410

Evidence.

43. Where the evidence is conflicting a finding or verdict thereon will be affirmed unless clearly wrong. *Griswold v. Hazels* 64
Reuland v. Waugh 358
Garneau v. Omaha Printing Co 383
Patrick v. Commercial Nat. Bank of Fremont 416
Western Cornice & Mfg. Works v. Leavenworth 418
Burlingim v. Equitable Trust Co 480
Morsch v. Besack 502

44. Where there is involved only a question of fact, and the evidence is sufficient to sustain the finding below, the judgment may be affirmed. *Klose v. Bogue* 427

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45. In reviewing the rulings in a trial to the court without a jury, the appellate court will presume that proper evidence only was considered. *McKee v. Bainter* 604
46. Where there is sufficient competent evidence to sustain the findings in a case tried to the court without a jury, the judgment will not be reversed for error in the admission of evidence. *Id.*
47. In reviewing on error the sufficiency of evidence to sustain a decree in an equity case tried to the district court without a jury, it will be assumed that only competent evidence was considered below. *Smith v. Perry* 738
48. In reviewing on error the sufficiency of evidence to sustain a decree in an equity case tried to the district court without a jury, only competent evidence in the record will be considered, and incompetent evidence will be disregarded, though it was considered competent by the court below. *Id.*
49. A decree in an equity case tried to the district court without a jury, may be reversed in the supreme court, where the competent evidence in the record is insufficient to sustain the decree. *Id.*
50. A judgment in an equitable action may be affirmed where the only question presented is based on an unfounded assignment of error that the evidence is insufficient. *Boyd v. Felber,* 91
51. A verdict may be set aside when not based on any evidence directed to the issues presented. *Esterly Harvesting Machine Co. v. Berg* 147
52. Exclusion of competent evidence *held* reversible error. *Atwood v. Marshall* 174
53. A verdict rendered in disregard of the instructions and the evidence may be reversed. *Marrow v. Gilbert* 197
54. Admission of evidence of the contents of a paper, without a proper foundation, *held* harmless error, where the same facts were established by other testimony admitted without objection. *Learn v. Upstill* 275
55. A decree in equity may be affirmed where it is the only one that should be rendered under the evidence. *Manning v. Connell* 315
56. A finding unsupported by the evidence is manifestly wrong, and a judgment based thereon may be reversed. *Southard v. Behrns* 486
57. Where the record does not disclose by whom certain evidence was offered or that anyone objected thereto, it will not be assumed in the supreme court that such evidence was improperly considered. *Morgan v. Mitchell* 667
58. A judgment dependent upon a special finding unsupported by the evidence may be reversed. *American Fire Ins. Co. v. Buckstaff Bros. Mfg. Co* 676
59. A judgment based solely on an answer verified on belief may

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be reversed as not sustained by the evidence. *Bourke v. Falck* 768

Final Order.

60. Neither error nor appeal can be prosecuted from an order merely dissolving a temporary injunction. *Meng v. Coffee*... 44

61. In a foreclosure proceeding, an order adjudging the mortgage void and continuing the case for a hearing on defendant's liability for the debt is appealable. *France v. Bell*..... 57

62. A finding that an order granting a new trial was prejudicially erroneous and a recital that the court would set the order aside had it jurisdiction, do not constitute an appealable or final order. *Marrow v. Gilbert*..... 195

63. An appeal by a party from a justice of the peace brings up the whole case, though judgment was rendered for plaintiff on one count and for defendant on another count. *Huffman v. Ellis* 688

Harmless Error.

64. Erroneous rejection of evidence subsequently admitted is harmless error. *Union P. R. Co. v. Evans*..... 51

65. Rejection of evidence *held* not ground for reversal where substantially the same testimony was given afterward by the witness. *Atwood v. Marshall*..... 174

66. Erroneous admission of evidence to prove facts admitted of record *held* harmless error. *Eickhoff v. Eikenbary*..... 337

67. Where a pleading open to an objection presented by a motion was sustained, it was *held* that the ruling should not be reversed because such a motion was not proper. *Kime v. Jesse* 606

68. Admission of incompetent evidence to prove a fact established by other uncontradicted evidence is harmless error. *Hanover Fire Ins. Co. v. Stoddard*..... 746

69. A judgment will not be reversed for the erroneous admission of testimony, where the same testimony, or ample testimony of the same nature, was admitted without objection. *Id.*

70. Admission of incompetent or immaterial evidence not prejudicial to the complaining party is not ground for reversal. *Id.*

Issues.

71. To make error available in the supreme court on objection that an appeal from the county court to the district court was tried on issues different from those originally involved, the record must show that the question was presented to the district court and decided, and that an exception was preserved. *Stichter v. Cox* 533

Jurisdiction.

72. In an error proceeding in the district court questioning the

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sufficiency of the service of summons in the county court an affidavit was *held* incompetent as evidence for the purpose of impeaching the jurisdiction of the county court. *Nelson v. Keith* 549

73. The supreme court does not acquire jurisdiction of an error proceeding commenced more than a year after rendition of the judgment below, and the time cannot be extended by stipulation of the parties. *Tootle, Hosea & Co. v. Shirey* 674

New Trial. (See also Assignments of Error, *ante*, p. 891.)

74. An objection that the findings and judgment are not sustained by the evidence may be disregarded where the record fails to show that a motion for a new trial was filed and ruled on below. *Gretna State Bank v. Grabow* 354

Transcripts.

75. Documents accompanying the transcript will be disregarded by the supreme court unless authenticated by certificate of the clerk below. *Chicago, R. I. & P. R. Co. v. Ringo* 163

76. A petition in error will be dismissed unless the transcript, properly authenticated, contains a copy of the judgment assailed. *Union P. R. Co. v. Young* 190

77. Instructions may be reviewed when properly certified in the transcript, and need not be embodied in the bill of exceptions. *Bennett v. McDonald* 278

78. The statutes neither command nor authorize the supreme court to amend the record of the trial court in a case brought up for review. *Thompson v. Nicholls* 312

79. The appellate court will not draw an inference contradicting the record in order to sustain an assignment of error. *Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co* 410

80. In absence of a transcript of the proceedings below, assignments of error may be overruled and the judgment affirmed. *Smith v. People's Building, Loan & Savings Ass'n* 445

81. The supreme court does not acquire jurisdiction of a cause brought up for review, where the transcript of the judgment below has not been properly authenticated by the clerk of the district court. *Brockman Commission Co. v. Sang* 506

82. Where the judgment assailed has not been authenticated by the certificate of the clerk of the district court, the proceeding in the appellate court may be dismissed. *First National Bank of Pierce v. Noble* 507

83. Assessment of amount of attorney's fee and allowance thereof are not reviewable upon a record failing to show such allowance. *Hanover Fire Ins. Co. v. Stoddard* 746

Trial.

84. Prejudicial error cannot be predicated upon counsel's improper statements to the jury where there was no exception

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to the ruling on objection to the alleged misconduct. *Catron v. State* 389

Witnesses.

85. A judgment will not be reversed because the cross-examination of a witness was restricted unless there was an abuse of discretion on part of the trial court, prejudicial to the party complaining. *Atwood v. Marshall* 174

86. The sustaining of an objection to a question put by a party to his own witness will not be considered unless the party made an offer indicating what he expected to prove by such witness. *Morsch v. Besack* 502

87. Where the testimony of a party to an alleged fraudulent conveyance was of such a character as to make his good faith impossible of belief without reasoning abnormally, a verdict in his favor was set aside in the supreme court. *Smith v. Logan* 590

Sales. See BANKS AND BANKING, 2. CHATTEL MORTGAGES, 3. ESTOPPEL, 3. EXECUTIONS. FACTORS AND BROKERS, 2. FRAUD. FRAUDULENT CONVEYANCES. INSTRUCTIONS, 15. INTOXICATING LIQUORS.

Breach of Agreement for Delivery.

1. Damages assessed by the jury in an action by a purchaser for breach of contract for the sale of corn, *held* inadequate. *Forbes v. McClatchey* 182

2. In a suit against a seller for breach of a contract to deliver notes, plaintiff is restricted in his recovery to the value of the notes at the time when and the place where they should have been delivered. *Winside State Bank v. Lound* 469

3. The rule that, where a vendor of land fails to convey it, the vendee may at his election recover payments of purchase money with interest, or damages for breach of the contract, is applicable to sales of personalty. *Id.* 473

Breach of Warranty. Damages. Evidence.

4. In an action for breach of warranty respecting the quality of corn sold and delivered under an agreement sued on as a completed contract, it was *held* that plaintiffs could not contradict the allegations of their petition by asserting that the contract was executory merely, and that the title of the corn did not pass upon delivery thereof. *McKee v. Wild* 9

5. In a suit for breach of warranty respecting the quality of corn sold, a provision of the contract, "3 or better, f. o. b. Stockham, Toledo weights and grades," *held* satisfied by proof of delivery free on board at Stockham of corn which would grade No. 3 or better, according to the Toledo standard. *Id.*

6. Where breach of warranty was alleged by defendant in a suit for the purchase price of bicycles, admission in evidence

Sales—*concluded.*

of a catalogue and price-list containing a warranty different from that pleaded, *held* prejudicial error. *Burr v. Redhead*... 617

7. Consequential damages, when certain and determinable in nature or amount, may be recovered in an action for a breach of warranty. *Id.*

8. All damages in contemplation of the parties to a contract of sale, or which may result from a breach of warranty, accrue in favor of the party injured. *Id.*

9. Positive affirmations of fact as to the quality and condition of the property sold *held* to constitute a warranty. *Id.*

Deceit.

10. Evidence *held* insufficient to sustain a verdict that a sale was made in good faith. *Smith v. Logan*..... 585

Delivery to Carrier.

11. In a contract for the sale of corn, the provision, "f. o. b. Stockham, twenty days' shipment, to be shipped within —— days, Toledo weights and grades," *held* not of necessity to imply delivery at Toledo at seller's risk. *McKee v. Wild*..... 9

12. A seller fully completed his contract, and was not liable for a loss in transportation, where he delivered a car of wheat, pursuant to agreement, at his place of business, consigned it to the buyer, and surrendered it to the carrier, the buyer having agreed to accept the seller's weights and grades. *McKee v. Bainter* 604

Conditional Sales.

13. Contract *held* one of conditional sale. *Bronson v. McCormick Harvesting Machine Co.* 344

14. Contract set out in the opinion *held* one of conditional sale. *Richardson Drug Co. v. Teasdall*..... 698

15. The sale of a ricker became absolute where the buyer failed to notify the seller, pursuant to contract, of the failure of the machine, upon trial, to comply with the warranty. *Moline Milburn & Stoddard Co. v. Pereau*..... 577

16. Under a contract providing that the title shall remain in the seller until the purchase price is paid, default of the buyer vests the seller with the right of possession of the property conditionally sold. *Richardson Drug Co. v. Teasdall*..... 698

Schools and School Districts.

A school district treasurer, by a general deposit of funds held by virtue of his office, cannot create between the district and his banker the relation of debtor and creditor. *State v. Midland State Bank* 1

Seduction. See CRIMINAL CONVERSATION.

Settlement of Estates. See DESCENT. EXECUTORS AND ADMINISTRATORS.

Sheriffs and Constables. See EXECUTIONS. PROCESS. SUMMONS, 5. TROVER AND CONVERSION, 2-5.

Approval of Insufficient Bond.

1. Under sec. 1040 of the Code, a constable who takes insufficient security on an undertaking in replevin is liable in damages to defendant in the replevin suit. *Busch v. Moline, Milburn & Stoddard Co* 83
2. Evidence *held* insufficient to establish that a constable accepted an insufficient undertaking in replevin. *Id.*

Deputy Sheriff.

3. A deputy sheriff may act for his principal in appraising and selling land under a decree of foreclosure. *Johnson v. Colby,* 328

Fees. Amercement.

4. The fees which a sheriff may charge and receive for official services are prescribed and limited by statute. *Phœnix Ins. Co. of Hartford v. McEvony* 567
5. The mileage of a sheriff in levying upon and in appraising realty is limited to five cents for each mile actually and necessarily traveled. *Id* 566
6. A sheriff cannot legally charge as costs for printing a notice of sale any greater sum than he actually paid the printer therefor. *Id.*
7. A sheriff is not entitled to the fees of an appraiser for assisting in the appraisal of realty seized on execution. *Id* 567
8. In a suit against a sheriff and his sureties to recover illegal fees collected from plaintiff, the latter may join in his petition a cause of action to recover the statutory penalty for charging and taking illegal fees. *Id.*
9. A sheriff cannot make a valid agreement with a litigant for a greater compensation for official services than that prescribed by statute. *Id.*

Special Findings. See REVIEW, 58. TRIAL, 17.

Special Legislation. See STATUTES, 19-21.

State.

1. Under sec. 2, ch. 68, Comp. Stats., the printing and binding of reports of state officers should be let under a single contract to the lowest competent bidder. *State v. Cornell* 25
2. A reservation by the state printing board of the right to reject any and all bids cannot be exercised arbitrarily. *Id.*
3. Where a statute requires printing to be let under a single contract, an attempt of the printing board to sever the contract and to let portions of it to different bidders does not constitute a rejection of any or all of the bids. *Id.*

State Board of Agriculture. See SUBSCRIPTIONS.

State Fair. See SUBSCRIPTIONS.

Statement of Claim. See MECHANICS' LIENS; 10.

Stations. See RAILROAD COMPANIES, 1.

Statute of Frauds.

A promise to pay for the improvement of a highway *held* not a conditional contract to answer for the debt of another, but an original undertaking. *Learn v. Upstill* 271

Statute of Limitations. See LIMITATION OF ACTIONS. MECHANICS' LIENS, 5.

Statutes. See COURTS, 3. TABLE, *ante*, p. lxv.

Amendments.

1. An amendment of a section of a statute is void where there is, in the amendatory act, no mention of, or reference to, the amended section. *Douglas County v. Hayes* 191
2. An act not complete in itself, but which is clearly amendatory in its nature and scope, must set forth the section or sections as amended, and repeal the original section or sections. *State v. Tibbets* 228
3. Under a title, "An act to amend sections 3, 8, 9, 11, 12, 13, * * * 91, and 115" of a prior act, the amendment of any section must be germane to the particular original section proposed to be changed. *Id.*
4. The legislature may amend a statute by a proper reference to its title, or to the number of the chapter and section in the Compiled Statutes. *State v. Stewart* 243
5. Section 31, chapter 14, Session Laws of 1897, purporting to amend section 91, article 1, chapter 13*a*, Compiled Statutes of 1895, and providing for a board of fire and police commissioners, is unconstitutional and void because it contains subject-matter not expressed in the title of the act, nor germane to the original section, and is amendatory of prior laws. *State v. Tibbets* 228
   State v. Stewart 243
6. An amendatory act containing a clause which plainly indicates a purpose to repeal the sections amended, conforms to section 11, article 3, of the constitution relating to repeal, though the intent may be awkwardly expressed in a clause in the form of an amendment of the repealing clause of the act amended. *Id.*
7. Section 117*a* of the Criminal Code making cattle stealing a crime did not amend sections 114, 119, and 120 of the Criminal Code relating to larceny and to concealing stolen property. *Granger v. State* 352

Appeal Bonds.

8. The statutes requiring one who appeals from a judgment of the county court to give a bond are valid. *Hier v. Anheuser-Busch Brewing Ass'n* 144

Courts. Uniformity of Laws.

9. Within the limits of the constitution the legislature may

Statutes—*continued.*

enact laws defining the jurisdiction and powers of all courts in the state, but such a law, to be valid, must be uniform as to all courts of the same grade. *State v. Magney*..... 509

10. Chapter 25, Session Laws of 1897, establishing a municipal court in cities of the metropolitan class, violates section 19, article 6, of the constitution and is void. *Id.*

11. Legislation of the state (Compiled Statutes, ch. 28, sec. 40; ch. 80, art. 2, sec. 1), in so far as it attempts to divest of title the owners of unclaimed witness fees and costs remaining in the hands of the clerk of the district court, is unconstitutional and void. *State v. Moores*..... 770

Effect of Invalid Portions of Acts.

12. Where the relief sought by plaintiff rests on the invalidity of a statute, objections to detached portions not affecting the validity of other portions of the act need not be determined. *State v. Stuht*..... 210

13. When it is apparent that an unconstitutional section of a legislative act was the sole inducement to the enactment, the whole law will be held void. *State v. Magney*..... 509

14. Where a separable, unconstitutional portion of a statute was not an inducement to the passage of an enforceable, valid portion, the latter should be upheld, and the rule may apply to a section of a law. *State v. Stuht*..... 209

15. The unconstitutionality of a portion of a statute does not invalidate the remainder where the different parts are separable, and the void portion was not the inducement to the passage of the valid part. *State v. Stewart*..... 243

16. Where an act may not be operative with a void portion eliminated, or where the invalid part was the inducement to the passage of the remainder, the whole act fails. *Id.*

Expediency.

17. A statute will not be declared invalid merely because the court may deem the provisions thereof unwise or inexpedient. *Granger v. State* 352

Repeal.

18. A complete and valid legislative enactment containing a provision repugnant to another existing law, repeals such law by implication. *State v. Magney*..... 509

Special Legislation.

19. In determining whether an act of the legislature is general or special in its character, the substance alone should be considered. *State v. Stuht*..... 209

20. An act of a general nature establishing a class of cities may be constitutional, though the provisions of the act at the time of its adoption were applicable to one city alone. *Id.*

21. Where the provisions of a law establishing a class of cities on the basis of population are such that other cities may in

Statutes—*concluded.*

the future, without additional legislation, enter the specified class, the law is general. *Id.*

Time of Taking Effect.

22. Statute *held* not open to the criticism that separate provisions took effect at different times, where the act as an entirety became operative on a fixed date. *Id.* 210

Titles of Bills.

23. The test of the sufficiency of a title is whether it fairly indicates the scope and purpose of the act. *Id.*
24. Under the provisions of section 11, article 3, of the constitution, the title to an act must fairly express the subject of legislation. *State v. Tibbets* 228
25. Where the title to a bill is to amend an existing act, or a section thereof, no amendment is permissible which is not germane to the subject-matter of the original act or section indicated. *Id.*
26. The title of an amendatory act referring to the statute containing the sections amended as "chapter 13*a* of article 1 of Compiled Statutes," *held* to designate article 1 of chapter 13*a*. *State v. Stewart* 243
27. Chapter 77, Session Laws of 1895 (Criminal Code, sec. 117*a*), making cattle stealing a crime, embraces but one subject of legislation, and the same is expressed with sufficient clearness in the title. *Granger v. State* 352
28. The act entitled "An act to punish cattle stealing and to punish persons receiving or buying stolen cattle, and to punish all persons harboring or concealing cattle thieves" (Session Laws, 1895, p. 317, ch. 77), embraces a single subject of legislation, and the same is, with sufficient clearness, expressed in the title. *Ream v. State* 727

Stenographers. See NEW TRIAL, 3.

Stipulations. See REVIEW, 73.

Streets. See MUNICIPAL CORPORATIONS, 3.

Subrogation.

1. The right of subrogation does not exist in favor of the holder of a second mortgage, to the prejudice of the holder of the paramount lien. *Skinkle v. Huffman* 20
2. A second mortgagee, who in protecting his security pays an installment due on the first mortgage, may, to the extent of the payment, be subrogated to the rights of the holder of the first mortgage as against the mortgagor. *Id.*
3. Where mortgagor conveyed a half interest in the realty to one who promised to pay the mortgage and failed to do so, and it was paid by mortgagor, the latter was *held* entitled to subrogation as against the rights of a mortgagee of the purchaser. *Hubbard v. Knight* 400

Subrogation—*concluded.*

4. A mortgagee *held* not entitled to be subrogated to the rights of a judgment creditor holding a superior lien, the latter having released from the lien of his judgment lands not covered by the mortgage. *Ocobock v. Baker* 447

Subscriptions.

In an action on a subscription to procure the location of the state fair at a certain place it was *held* that a general denial did not put in issue the illegality of the subscription as being an attempt to improperly influence the state board of agriculture,—the body determining the location. *Kelly v. Nebraska Exposition Ass'n* 356

Substitution of Parties. See PARTIES, 3, 4.

Summons. See JUSTICE OF THE PEACE, 5. REVIEW, 72.

1. A sheriff may be permitted to amend his return to conform to the facts. *Phœnix Ins. Co. of Hartford v. King* 562
2. In a personal action having but one defendant a summons issued to a county other than the one in which the suit was brought, and served upon him therein, is void, and confers no jurisdiction over the person of the defendant. *Walker v. Stevens* 653
3. Service by leaving a copy of the summons at defendant's usual place of residence may be sufficient to confer jurisdiction upon the court, though, at the time of service, defendant was imprisoned in another county. *Id.*
4. When a void summons is issued, another writ may issue without either an order of the court or the return of the first "not summoned." *Id.*
5. The return of a sheriff to a summons that he served the same by leaving a copy at the usual place of residence of the defendant, while not conclusive as to residence, is *prima facie* evidence of such fact. *Id.*

Tax Liens. See LIMITATION OF ACTIONS, 1.

Taxation.

1. To assess a tax is to determine what proportion of his property the taxpayer shall contribute to the public, and to levy a tax is to make a record of the assessment and to extend it against the property. *Chicago, B. & Q. R. Co. v. Klein* 259
2. The levying of a tax is not a judicial act. *Hutchinson v. City of Omaha* 346
3. Under township organization, a county may assess property for county purposes and a township may assess it for township purposes, though the aggregate of the taxes thus assessed exceeds 15 mills on the dollar. *Chicago, B. & Q. R. Co. v. Klein* 259
4. A suit against a county treasurer and his sureties for the wrongful sale of property may properly be brought in the

Taxation—*concluded.*

name of the person to whom the certificates of tax sale and treasurer's deed were issued, and to whom the money invested belonged. *Alexander v. Overton* 283

5. A board of equalization must be and remain in session ready to hear complaints during the hours advertised for its meeting. *Hutchinson v. City of Omaha* 345

6. The record of a special assessment for a local improvement must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power. *Id* 348

7. The court cannot impose, as a condition of relief against a void tax, the payment of such tax as would be lawful, where new proceedings and a different basis of assessment are necessary to ascertain what tax is lawful. *Id* 346

8. A landowner who recovered by suit the value of property appropriated by a city for a street cannot, on the ground of invalidity of the condemnation proceedings, maintain an action to restrain collection of an assessment on his abutting land to pay for grading and improving the street. *Hawver v. City of Omaha* 734

Time. See BURGLARY, 3. INDICTMENT AND INFORMATION, 1. JUDGMENTS, 8.

Titles. See STATUTES, 23-28.

Torts. See ELECTION OF REMEDIES, 1.

All who contribute to the wrong are liable, and may be sued jointly, or plaintiff may proceed against such as he sees fit. *Cole v. Edwards* 713

Townships. See COUNTIES, 2.

1. What is a township purpose, and what taxes may be assessed therefor, and by whom assessed, are matters for determination by the legislature. *Chicago, B. & Q. R. Co. v. Klein* 258

2. In a county under township organization, a township, within the meaning of section 6, article 9, of the constitution, is a municipal corporation with power to assess taxes for township purposes. *Id.*

Transcripts. See REVIEW, 75-83.

Treasurers. See TAXATION.

Trial. See EVIDENCE, 13. INSTRUCTIONS. JURY. NEW TRIAL. PLEADING, 4. QUO WARRANTO, 2.

1. A motion for judgment on the pleadings may be interposed before trial. *Kime v. Jesse* 606

2. The issues in equity causes are, as a rule, triable to the court without a jury. *Smith v. Perry* 738

3. Where issues of fact are presented in *mandamus* there must be a trial at a session of court. *Mayer v. State* 764

Election of Remedies.

4. Error in requiring plaintiff to elect between two counts *held*

Trial—*continued.*

harmless where the count abandoned could not, under the facts, lead to a recovery. *Boyer v. Richardson* 156

Rulings as to Evidence.

5. Erroneous rejection of evidence subsequently admitted is harmless error. *Union P. R. Co. v. Evans* 51

6. The rule that parties, who voluntarily submit to the introduction of irrelevant testimony cannot urge afterward its irrelevancy, does not apply to a case where the court confined the jury to the consideration of a single issue, the verdict on which there was no evidence to support. *Esterly Harvesting Machine Co. v. Berg* 147

7. Admission of testimony *held* to cure error in a previous rejection thereof. *Atwood v. Marshall* 174

8. To make error available in a ruling sustaining an objection to a question put by a party to his own witness, the party must make an offer indicating what he expected to prove. *Morsch v. Besack* 502

9. In a case tried to the court without a jury the admission of incompetent evidence is not prejudicial error, where the findings are sustained by sufficient evidence. *McKee v. Bainter* .. 604

Misconduct of Counsel.

10. In the appellate court, prejudicial error cannot be predicated upon counsel's improper statements to the jury where there was no exception to the ruling on objection to the alleged misconduct. *Catron v. State* 389

11. A party who improperly states to the jury a fact not in evidence, cannot, as a matter of right, demand an instruction directing the jury to disregard improper remarks of opposing counsel in reference to the same fact. *Id.*

Verdicts and Findings.

12. Where the evidence tends to sustain the averments of the petition it is error to direct a verdict for defendant. *Rogers v. Kansas City & O. R. Co* 86

13. A verdict may be set aside when not based on any evidence directed to the issues presented. *Esterly Harvesting Machine Co. v. Berg* 147

14. Refusal of court to make findings upon immaterial issues *held* proper. *Boyer v. Richardson* 156

15. Error cannot be successfully assigned upon the admission or exclusion of evidence, where no exception was taken to the ruling at the time it was made. *Bennett v. McDonald* 278

16. An excessive verdict in an action *ex contractu* may be cured by a remittitur, where it does not appear that the verdict was the result of the jury's passion or prejudice. *Wainwright v. Satterfield* 404

17. It is within the discretion of the trial judge to submit or to

Trial—*concluded.*

refuse questions for special findings of the jury. *Phœnix Ins. Co. of Hartford v. King* 562

18. In a suit for negligence, where plaintiff's undisputed evidence is insufficient to warrant an inference of negligence, a verdict should be directed for defendant. *Ecklund v. Chicago, St. P., M. & O. R. Co* 729

Trover and Conversion. See JURY, 6.

1. Rejection of competent evidence of the value of the property *held* prejudicial error. *Atwood v. Marshall* 174
2. Where an officer levies writs of attachment on the goods of a stranger, the plaintiffs in the attachment cases will be liable in trover, jointly with the officer, not only when they directed the wrongful levy, but also when they subsequently adopted or ratified his acts. *Cole v. Edwards* 711
3. Where the goods of a stranger have been seized under a writ of attachment, and plaintiff, with knowledge of that fact, refuses on demand to release them, the refusal constitutes a ratification of the wrongful levy. *Id.*
4. Where plaintiff in attachment knows that goods owned by a stranger were seized under the writ and sold, the acts of the former in buying the goods at the sale, and in converting them to his own use, constitute a ratification of the wrongful acts of the officer. *Id.*
5. Where plaintiff in attachment knows that goods owned by a stranger were seized under the writ and sold, the act of the former in receiving the proceeds of the sale constitutes a ratification of the wrongful acts of the officer. *Id.*

Trusts. See BANKS AND BANKING.

1. A petition which states facts showing that plaintiff is the equitable owner of a judgment in favor of another, and asking that a trust be declared, states a case for equitable relief. *Lederer v. Union Savings Bank* 133
2. Where one to whom notes had been indorsed for collection procured judgment thereon in his own name and assigned it to a bank, it was *held* that the real owners of the notes were entitled to have a trust declared in their favor as against the bank. *Id.*

Usury. See INTEREST.

Plea quoted in the opinion construed and *held* to state a defense of usury in the inception of a note. *Farm-Land Security Co. v. Nelson* 624

Vendor and Vendee. See ESTOPPEL, 4, 5. MORTGAGES, 4, 5. PUBLIC LANDS. SUBROGATION, 3.

1. Where vendee in default of a payment of purchase-money leased the premises to one not subsequently evicted, vendor's application for a perpetual injunction to restrain vendee from entering upon the land, and from removing a portion

Vendor and Vendee—*concluded.*

of the crops raised by the tenant, was properly denied, though a forfeiture of the contract of purchase had been declared by vendor. *Perkins v. Potts* 110

2. In a proceeding to foreclose a contract for the sale of realty, the execution of the contract, the identity of the realty described therein, the breach of contract, and the amount remaining due, are material issues. *Kloke v. Gardels* 117

3. Where a formal petition for a deficiency judgment is filed in a case in which a contract for the sale of land has been foreclosed, the district court, upon the filing of vendee's answer, has jurisdiction, and may try and determine the issues presented by the pleadings. *Id* 118

4. Where a vendor of land cannot make title, the vendee may at his election recover payments of purchase-money with interest, or damages for the loss of his bargain. *Seaver v. Hall,* 316

5. Where two or more persons have contracted to convey land to a third person, the vendors cannot, by contract or conveyance among themselves, release any of them from the obligation to respond to the vendee for damages arising from a breach of the contract. *Id.*

6. Where time is not of the essence of the contract, a vendor who is unable to make title at the time he should convey, may have specific performance by tendering good title at any time before decree, provided he has acted in good faith and specific performance can be enforced without injustice to the vendee, and in such case an awarding of rents to the vendee together with costs, in the absence of special circumstances, adjusts the equities. *Id.*

7. Where a claim to real estate can be sustained only upon the ground that the person asserting it is a subsequent purchaser in good faith, such person is required to show affirmatively that he purchased without notice of the equities of another, and relying upon the apparent ownership of his grantor. *Pfund v. Valley Loan & Trust Co* 474

8. Where one buys realty and, as part consideration for the purchase, assumes in the deed to pay a mortgage on the land, he is liable for the mortgage debt; and grantor, upon maturity of the mortgage, may recover from grantee the amount due thereon, though grantor paid no part of it. *Stichter v. Cox* 533

Venue. See LARCENY, 10. SUMMONS, 2.

Where a change of venue is granted by a justice of the peace on application of defendant, the latter can only be taxed with costs for issuing and serving subpœnas, witness fees, and costs of the justice for transferring the cause. *Head v. Levy* 456

Verdict. See LARCENY. MASTER AND SERVANT. TRIAL.

Verification. See PLEADING, 9.

Waiver. See CHATTEL MORTGAGES, 3. INSURANCE, 3. JURY, 3. PLEADING, 5, 10.

Wards. See MUNICIPAL CORPORATIONS, 15.

Warranty. See ESTOPPEL, 3. SALES, 4-9, 15.

Water Commissioner. See OFFICE AND OFFICERS.

Waters. See MUNICIPAL CORPORATIONS, 4, 5.

Weights and Measures. See SALES, 5, 11.

Witnesses. See CONSTITUTIONAL LAW, 5. EVIDENCE, 10. INSTRUCTIONS, 11.

1. In a suit for criminal conversation the wife of plaintiff is a competent witness in his behalf. *Smith v. Meyers* 70
2. The cross-examination of a witness should be restricted to the facts and circumstances drawn out on his direct examination. *Atwood v. Marshall* 173
3. Where relatives are parties to a conveyance alleged to be fraudulent, and testify as witnesses in a suit involving the validity of the transfer, a wide latitude should be given upon cross-examination, and a violation of the rule may be prejudicial error. *Bennett v. McDonald* 278
4. A wide latitude should generally be allowed when a witness is cross-examined on the subject of fraud. *Atwood v. Marshall,* 173
5. It is within the sound discretion of the trial judge to limit the cross-examination of a witness. *Id.* 174
6. Subdivision 18, sec. 167, ch. 12*a*, Comp. Stats., 1893, providing that policemen shall not be allowed witness fees, is void. *Douglas County v. Hayes* 192
7. A party calling a witness impliedly recommends him as worthy of belief, and afterward cannot be permitted to introduce evidence which has no tendency other than to impeach him. *Nathan v. Sands* 660
8. One who has a direct legal interest in the result of an action in which the adverse party is the representative of a deceased person is not a competent witness therein, except as provided by statute, and liability for costs in the suit is such an interest. *Smith v. Perry* 738
9. Definition of "transaction" as used in section 329 of the Code relating to competency of witnesses. *Id.*

Witness Fees. See CONSTITUTIONAL LAW, 5.

Words.

1. "Maintenance." *Harshman v. Ingwerson* 116
2. "Default." *State v. Moores* 770
3. "Eligible." *State v. Moores* 770
4. "Transactions." *Smith v. Perry* 738

Work and Labor. See CONTRACTS, 2. MECHANICS' LIENS.

Writs. See ATTACHMENT.