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## ADOLPHUS F. LINTON V. JOHN W. COOPER.

FILED APRIL 8, 1898. No. 7964.

1. **Process: WITNESS: NON-RESIDENT.** A non-resident suitor, or witness, who comes into this state for the sole purpose of attending the trial of a cause pending therein, as a party or witness, is privileged from service of civil process not only while coming to, returning from, and attending upon, the court, but for a reasonable time after the hearing to prepare for his return home.

2. ——: ——: ——: QUESTION OF FACT. What constitutes a reasonable time for a party or witness to take his departure is a question of fact to be determined from the evidence adduced in each particular case.

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

The opinion contains a statement of the case.

*John T. Cathers* and *William A. Redick*, for plaintiff in error.

In arguing the point that defendant was not privileged from service of process at the time the summons was served upon him, reference was made to the following cases: *Palmer v. Rowan*, 21 Neb. 452; *Clark v. Grant*, 2 Wend. [N. Y.] 257; *Baldwin v. Emerson*, 15 Atl. Rep. [R. I.] 83; *Baisley v. Baisley*, 21 S. W. Rep. [Mo.] 29; *Page v. Randall*, 6 Cal. 32; *Bishop v. Vose*, 27 Conn. 1; *Capwell v. Sipe*, 23 Atl. Rep. [R. I.] 14; *Selby v. Hills*, 8 Bing. [Eng.] 165; *Spence v. Stuart*, 3 East [Eng.] 89; *Catlett v. Morton*, 4 Lit. [Ky.] 122; *Smythe v. Banks*, 4 Dall. [U. S.] 329; *Nichols v. Horton*, 14 Fed. Rep. 329; *Moletor v. Sinned*, 44 N. W. Rep. [Wis.] 1099.

*Charles A. Goss, contra:*

Parties and witnesses are exempt from service of process for a reasonable time, and the privilege extends to non-residents. (*Thompson's Case*, 122 Mass. 428; *Palmer v. Rowan*, 21 Neb. 452; *Ex parte McNeil*, 6 Mass. 245; *Wood*

*v. Neale*, 5 Gray [Mass.] 538; *May v. Shumway*, 16 Gray [Mass.] 86; *Parker v. Hotchkiss*, 1 Wall. Jr. [U. S.] 269; *Halsey v. Stewart*, 4 N. J. Law 420; *Watson v. Judge*, 40 Mich. 729; *Mitchell v. Huron*, 53 Mich. 541; *Person v. Grier*, 66 N. Y. 124; *Matthews v. Tufts*, 87 N. Y. 568; *Bolgiano v. Gilbert Lock Co.*, 73 Md. 132; *Capwell v. Sipe*, 17 R. I. 475; *Baisley v. Baisley*, 113 Mo. 544; *Page v. Randall*, 6 Cal. 32; *Bishop v. Vose*, 27 Conn. 1.)

Cases referring to question of what is a reasonable time: *Hatch v. Blisset*, Gil. [Eng.] 308; *Sidgier v. Birch*, 9 Ves. Jr. [Eng.] 69; *Ricketts v. Gurney*, 7 Price [Eng.] 699; *Persse v. Persse*, 5 H. L. Cas. [Eng.] 670; *Norris v. Beach*, 2 Johns. [N. Y.] 294; *Ex parte Hurst*, 1 Wash. C. C. Rep. [U. S.] 186; *Sahlinger v. Adler*, 25 N. Y. Sup. Ct. 704; *Jacobson v. Hosmer*, 42 N. W. Rep. [Mich.] 1110.

NORVAL, J.

This action was brought in the district court of Douglas county to recover the sum of $75,000. The defendant was personally served with summons in that county. He made special appearance in the cause and objected to jurisdiction of the court over his person, and moved to quash the service of the summons, on the ground that he was a non-resident and had been in attendance before the court in another cause as a witness, and a reasonable time had not elapsed after the trial thereof to enable him to return to his home. The service of process was set aside and the action dismissed.

The record discloses that the defendant is a British subject and a citizen and a resident of England; that on September 19, 1894, he came to Omaha solely as a party and witness to be present at the trial of a cause then pending in the district court of Douglas county, wherein Phœbe R. E. E. Linton and Adolphus Frederick Linton were plaintiffs, and John Whitaker Cooper and others were defendants, with the intent to depart from Omaha at the earliest possible moment after the conclusion of the trial, which was commenced on Monday, October 1,

1894, continued from day to day until Thursday, October 11, at about 5 o'clock P. M. of that day, when the cause was submitted to the court, by it taken under advisement, and the decision therein announced on October 20; that the defendant herein was present during the entire trial of that cause in the capacity of defendant and witness; that on October 11, and within fifteen minutes of the close of the trial, defendant was served with a summons in a suit brought against him before a justice of the peace of Douglas county by the said Phœbe R. E. E. Linton, and within an hour thereafter he was served with another summons in an action brought by said Phœbe in said district court, and that summons in the present action was served upon defendant on Saturday, October 13, 1894, between 3 and 4 o'clock P. M. in the court house of Douglas county.

Public policy, the due administration of justice, and the protection of parties and witnesses demand that non-resident suitors and witnesses alike be protected from the service of civil process while necessarily in attendance upon court. This privilege or immunity extends to parties and witnesses not only while coming to, returning from, and in actual attendance upon, the court for the purpose of trial, but for a reasonable time after the hearing to prepare for departure. This is the settled doctrine of this and other courts. (*Palmer v. Rowan*, 21 Neb. 452; *Mayer v. Nelson*, 54 Neb. 434; *Fisk v. Westover*, 4 S. Dak. 233; *Wilson v. Donaldson*, 117 Ind. 56; *First Nat. Bank of St. Paul v. Ames*, 39 Minn. 179; *Mulhearn v. Press Publishing Co.*, 53 N. J. Law 150; *Parker v. Marco*, 136 N. Y. 585; *Andrews v. Lembeck*, 46 O. St. 38; *Jacobson v. Wayne Circuit Judge*, 76 Mich. 234; *Gregg v. Sumner*, 21 Ill. App. 110; *Christian v. Williams*, 35 Mo. App. 297; *Partridge v. Powell*, 180 Pa. St. 22; *Kinne v. Lant*, 68 Fed. Rep. 436; *Smythe v. Banks*, 4 U. S. 329.*) Judge Thompson, in *Christian v. Williams*, 35 Mo. App. 297, uses this language: "The reason which extends the immunity to a non-resident witness is, that he cannot be brought within the

jurisdiction to testify by compulsory process; and as his testimony may be needed in order to the due administration of justice, he ought not to be deterred from coming by the possibility of being entangled in other litigation by reason of coming. The same reason extends in a measure to the presence of a litigating party. The due administration of justice is presumptively promoted by his being present at the trial of a cause to which he is a party, in order to instruct his counsel, and it is therefore prejudicial to the administration of justice that a rule should exist which may deter him from coming." There is some conflict among the decided cases, but, in weight and reason, the decisions range themselves in strong array in support of the principle announced in the foregoing excerpt.

The testimony adduced in support of the motion to set aside the service of process herein tends to show that after the conclusion of the hearing on October 11, 1894, defendant had a large amount of business to transact with his counsel in connection with said cause as a party litigant; that important features were to be discussed and contingencies to be provided for in relation thereto, since the decision had not been announced; that his personal effects and baggage were to be packed; that hundreds of documents which he had brought with him from England to be used in the trial of said cause had become disarranged and scattered during the trial and it was necessary to gather these up, sort, and arrange them so a portion could be left with his counsel and the remainder packed for reshipment for England; that affidavits were required to be prepared for the purpose of supporting the motion to quash the service of the writs in the two other cases already mentioned which had been sued out against Cooper; that defendant and his counsel, immediately after the close of the hearing on October 11, began to make all necessary preparations to enable defendant to leave Omaha and the state at the earliest practicable moment consistent with the business which brought him

to the city, and both continued their efforts in that behalf incessantly, and with all due haste, up to the time the summons herein was served upon the defendant. The question is whether the service of process was had while Cooper was in attendance upon the district court of Douglas county as a suitor and witness, and before sufficient time had elapsed for him to depart from the county. No definite rule can be laid down as to the length of time a party or witness may have to return to his home other than that the law gives him a reasonable time to depart from the court. What is, and what is not, a reasonable time for such purpose is a question of fact to be ascertained from the evidence adduced and the circumstances surrounding each particular case. What would be reasonable for one person might be wholly unreasonable for another. We think, under the facts disclosed by this record, Cooper was privileged from service of summons in this action, especially since the cause in which he had appeared as a party and testified as a witness was undetermined when this service was had, and because a reasonable time after the hearing therein for him to take his departure from the state had not yet elapsed. The facts bring this case within the letter and spirit of the rule, and the reason upon which it is based, which protects parties and witnesses from the service of process in civil cases while attending court in a jurisdiction other than the one where they reside. (See *Jacobson v. Wayne Circuit Judge*, 76 Mich. 234; *Kinne v. Lant*, 68 Fed. Rep. 436; *Hatch v. Blisset*, Gilbert's Cas. [Eng.] 308; *Sidgier v. Birch*, 9 Vesey's Ch. [Eng.] 69; *Ricketts v. Gurney*, 7 Price's Rep. [Eng.] 699; *Lightfoot v. Cameron*, 2 Sir William Blackstone Rep. [Eng.] 1113.)

The motion to set aside service of process in this cause was properly sustained, and the judgment, therefore, must be

AFFIRMED.

## PHŒBE R. E. E. LINTON V. JOHN W. COOPER ET AL.

FILED APRIL 8, 1898. No. 7963.

**Process:** WITNESS: NON-RESIDENT. A party to a suit, or a witness at the trial, who is a non-resident of this state, is privileged from the service of summons in this state not only while necessarily and in good faith in attendance upon the court, but for a reasonable time after the hearing, to prepare for his departure and return to his home.

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

*John T. Cathers* and *William A. Redick*, for plaintiff in error.

*Charles A. Goss, contra.*

NORVAL, J.

The controlling facts herein are substantially the same as in *Linton v. Cooper*, 54 Neb. 438, decided herewith, and for the reason stated in the opinion filed in that case the judgment is

AFFIRMED.

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## EZRA E. HOWARD ET AL. V. BOARD OF SUPERVISORS OF CLAY COUNTY.

FILED APRIL 8, 1898. No. 7903.

1. **Highways:** DECISION OF COUNTY BOARD: REVIEW. The propriety or necessity of opening and working a section-line road is committed to the discretion of the county board, and its decision is not subject to review.

2. **Eminent Domain:** CONSTITUTIONAL LAW. Property is not taken for a public use without due process of law when an opportunity is afforded the owner to have his damages ascertained by adequate and appropriate judicial proceedings, and provision is made for the payment of the amount thereof prior to the time the property is taken.

3. **Statutes**: TITLES: SECTION-LINE ROADS. Section 46, chapter 78, Compiled Statutes, is embraced within the title of the act of which it forms a part, and is valid, although said section may operate incidentally to modify other laws.

4. **Highways**: DAMAGES: INSTRUCTIONS. Where land has been appropriated for a public highway, an instruction which directs the jury to allow the owner full compensation for land actually taken and such damages to the residue of the tract as are equivalent to the diminution of the value thereof is not unfavorable to him.

5. **Instructions**: REPETITIONS. A cause will not be reversed for the refusal of a proper instruction where an instruction fully as favorable to the complaining party covering the same point has been given by the court on its own motion.

6. **Highways**: DAMAGES: CONFLICTING EVIDENCE: REVIEW. Where there is a conflict in the evidence as to the amount of damages sustained by a land-owner by reason of the appropriation of his land for a public road, this court will not interfere with the verdict on the ground that the damages awarded by the jury are inadequate.

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

*S. W. Christy*, for plaintiffs in error.

*A. C. Epperson* and *William M. Clark, contra.*

NORVAL, J.

A petition was presented to the county board of Clay county praying the opening of a section-line road between sections 26 and 35, in township 5, range 6 west, and over and across the lands of Ezra E. Howard and Irenus V. Howard. The Howards filed with the county clerk of said county a remonstrance against the opening of the highway, upon various grounds, and set forth therein a claim for damages in the sum of $1,500. A suit in equity was subsequently brought by them in the district court to enjoin the county clerk and board of supervisors from opening the said section line as a public road. A demurrer to the petition was sustained, and the cause dismissed. An appeal was prosecuted to this court, which resulted in an affirmance of the judgment of the district court.

(*Howard v. Brown*, 37 Neb. 902.) Subsequently the county board, upon the hearing of the evidence adduced, made a finding, which was entered on the record of its proceedings, that the public good demands and requires the opening of said section-line road, and the same was ordered to be opened. The damages of the remonstrators were allowed at $170, and they prosecuted an appeal to the district court, where the jury assessed their damages at the sum of $315.

In the court below the Howards filed a petition setting forth therein, in addition to their claim for compensation, various grounds why the highway should not be opened. All averments presenting the question of the necessity and expediency of the establishment of the road were by the court, on motion of the county attorney, stricken from the pleading, which ruling is now assailed. It is asserted that plaintiffs had the right to appeal from the decision of the board ordering the opening of the road and have the jury determine whether the public good demanded such step to be taken. This position is unwarranted. By section 46, chapter 78, Compiled Statutes, it is provided: "The section lines are hereby declared to be public roads in each county in this state, and the county board of such county may, whenever the public good requires it, open such roads without any preliminary survey, and cause them to be worked in the same manner as other public roads; *Provided*, That any damages claimed by reason of the opening of any such road shall be appraised and allowed, as nearly as practicable, in manner hereinbefore provided." By this section the legislature has located potential roads on all section lines of the state, and vested exclusive discretion in county boards to cause the same to be opened and worked as public highways, whenever the public good demands that such steps shall be taken; but before a section-line road can be opened the damages of the land-owner must be ascertained. The statute authorizes an appeal to the district court from the award of damages sustained by

the establishment of a road, but makes no provision for the review on appeal of the decision of the board ordering the opening of a highway. We therefore conclude that that question is not open to contest on appeal; otherwise it would permit the appellate court to review the decision of an inferior tribunal upon a matter committed to its discretion, and that, too, in the absence of an express statute permitting such review. The propriety or necessity of opening and working section-line roads is committed to the discretion of the county board, and its decision is final. (*Throckmorton v. State*, 20 Neb. 647; *Cowles v. School District*, 23 Neb. 655; *Howard v. Brown*, 37 Neb. 902; *Pollock v. School District*, 54 Neb. 171; Elliot, Roads & Streets 276; *Weaver v. Templin*, 113 Ind. 329.) Whether a necessity existed or not for the opening of the road in question was a governmental question which did not concern plaintiffs, so long as they received compensation for their damages sustained.

It is insisted that the denial of an appeal to review the decision of the county board upon the proposition whether the public good required the opening of this highway is a violation of the state constitution which guaranties: "No person shall be deprived of life, liberty, or property without due process of law." The foregoing provision cannot be successfully invoked by these plaintiffs, since they have not been deprived of their property in an unconstitutional manner. The legislature has provided how the property of an individual may be taken for highway purposes, and designated a tribunal for determining the necessity of such appropriation, and for assessing the damages of the land-owner, besides making adequate provision for an appeal from the award. One's property is devoted to the public use by due process of law when an opportunity is offered him to have his damages ascertained by adequate and appropriate judicial proceedings, and suitable provision is made for the payment of the same prior to the taking of the property. (*Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549.)

It is next asserted that said section 46, chapter 78, Compiled Statutes, is unconstitutional, because the provisions of said section are not embraced within the title of the act and are inconsistent with, and repugnant to, prior statutes which have not been in terms repealed. The same objections were decided adversely to the foregoing contention in *Henry v. Ward*, 49 Neb. 392, it being there held that said section 46 was germane to the title and subject of the prior act amended, and is valid, though the amendment did operate incidentally to modify other statutes. (See *State v. Cornell*, 50 Neb. 526.) A discussion of the question anew is unnecessary at this time.

Complaint is made in the brief of the instructions given and refused on the measure of damages. The court directed the jury, substantially, that the measure of recovery is the market value of the land actually appropriated for the highway, together with a sum equal to the depreciation in value of the portion not taken, occasioned by the location and opening of the road. This rule was favorable to plaintiffs. As to the instructions tendered by them, all that need be said is that they were fully covered by those given by the court on its own motion; therefore it was not reversible error to refuse those requested.

We have carefully perused the testimony in the bill of exceptions, and find that it would have supported a verdict for a larger sum, as well as for a smaller amount, than was returned by the jury. Therefore the assignment that the damages assessed are inadequate must be overruled.

AFFIRMED.

# CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. WILLIAM SCHALKOPF.

FILED APRIL 8, 1898. No. 7955.

1. **Adverse Possession.** To establish title to real estate by adverse possession there must have been maintained, by the party asserting title, an actual, continuous, notorious, adverse, and exclusive possession of the premises, under claim of ownership, during the statutory period of ten years.
2. **Instructions: EVIDENCE.** It is error to give an instruction to the jury which assumes the existence of material facts which are unsupported by the evidence.

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

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

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

NORVAL, J.

This was ejectment by the Chicago, Burlington & Quincy Railroad Company to recover a part of lot 10, in block 5, of Mechanics' Addition to the city of Lincoln. The answer consisted of a general denial, and a plea of ten years of adverse possession of the property in the defendant and his grantors. In compliance with the provisions of the statute there were two trials of the cause in the court below, both of which resulted adversely to the plaintiff, and it has brought the record here for review.

It is alleged as a ground for reversal that the verdict is unsupported by the evidence. The defendant occupies the portion of the lot in controversy, and asserts title thereto through certain conveyances starting from the original patentee, and by reason of adverse possession for the statutory period, while plaintiff predicates the right of possession to the property by virtue of a war-

ranty deed from the patentee and certain condemnation proceedings. There is no material controversy over the facts. By letters patent issued by the United States on August 1, 1860, there was conveyed to Emerson H. Eaton the east half of the southeast quarter of section 27, in township 10 north, of range 6 east, in Lancaster county. A portion of said real estate has been platted as Mechanics' Addition to Lincoln by the then owner of the property, but prior to such platting plaintiff constructed its road over and across said lands. Lot 10, in said block 5, lies west of plaintiff's road-bed, and the east end of the lot is within the distance of fifty feet from the middle of the main track and the center of the right of way. On April 8, 1870, the railroad company filed an application with the probate judge of Lancaster county for the condemnation of right of way through said county. Commissioners were appointed, who returned to said judge their appraisement in writing, setting forth therein the width of the right of way to be 100 feet on either side of the center of the right of way, according to plats on file in the offices of the secretary of state and county clerk of said county, and assessing to E. H. Eaton $150 damages for the location of the right of way across the said east half of southeast quarter of section 27. Plaintiff paid said sum to the probate judge for the use of Eaton on May 9, 1870, but the money was afterwards withdrawn by the company. Subsequently, in July of the same year the condemnation proceedings were supplemented by the same commissioners, reassessing Eaton's damages in the premises in the sum of $150, upon prior personal service of notice on him of such proposed action. Eaton appealed to the district court from this last appraisement, and on June 6, 1871, the cause was dismissed out of said court pursuant to the stipulation of the parties. On the same day Eaton and wife, by deed of general warranty, conveyed to the railroad company a right of way 100 feet wide, being fifty feet on each side of the center line of said railroad as located and built across the aforesaid

eighty-acre tract, which deed was duly filed for record on December 11, 1871.

The rule is a familiar one in this state that to acquire title to real estate by virtue of the statute of limitations there must have been an actual, visible, exclusive, peaceable, and uninterrupted adverse possession of the premises under claim of ownership for the period of ten years. The evidence in this case is wholly insufficient to establish that the defendant and those through whom he claims title to the property had been in the actual occupancy or possession of that portion of the lot in dispute for the statutory period above stated. Defendant purchased the lot in 1887, and at the time it was vacant and unimproved. This suit was instituted in 1893. It is, therefore, very evident that the defense of adverse possession was not made out at the trial.

Both plaintiff and defendant claim title to the property from a common source. It is needless to state the various conveyances constituting defendant's chain of title, since plaintiff must recover alone on the strength of his own title or right to the premises, and cannot rely on the weakness or invalidity of that of his adversary. (*O'Brien v. Gaslin*, 24 Neb. 559; *Buck v. Gage*, 27 Neb. 306; *Gregory v. Kenyon*, 34 Neb. 640; *Bigler v. Baker*, 40 Neb. 325; *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592.) Plaintiff acquired, by the warranty deed from Eaton and wife to it, a perfect and complete title to a strip of land 100 feet in width, or fifty feet wide on each side of the center line of the right of way. And the evidence adduced on the trial in the lower court established beyond any dispute that a portion of the land sought to be recovered, to-wit, a strip five feet in width, is embraced within the description contained in the said deed to the company and is in possession of the defendant. These facts are established by the testimony of E. E. Harte, plaintiff's civil engineer, the maps and deed, and there is no testimony to be found in the record in opposition thereto. The verdict being unsupported by the evidence

as to a portion of the premises, it is unnecessary to express an opinion upon the sufficiency of the condemnation proceedings to entitle plaintiff to recover possession thereunder of the remainder of the property in dispute.

Complaint is made of the giving of the following paragraph of the charge of the court, to which exception at the time was taken by counsel for plaintiff:

"7. The defendant alleges in his answer that the cause of action set forth in the plaintiff's petition did not accrue to the plaintiff, nor to its grantors, within ten years next before the beginning of this action, and that for ten years immediately before the commencement of this action the defendant and his grantors were in open, notorious, adverse, and continuous possession of the lot described in the petition, and contends that plaintiff ought not to maintain this action against defendant, because the same is barred by the statute of limitations. You are instructed that where, in an action of ejectment such as this action is, the defendant in possession of the real estate, the subject of the action, relies upon the statute of limitations as a defense, the burden of proof is on him to show by a fair preponderance of the evidence that his possession and that of his grantors has been actual, open, continuous, adverse, and exclusive during the ten years last preceding the commencement of the action and with the purpose and intent of the occupants of the premises in controversy to assert their ownership of the property; hence, if the jury find from the evidence that the defendant and his grantors have been in actual, open, continuous, adverse, hostile, and exclusive possession of the premises in controversy, with the purpose and intent of asserting at all times their ownership of the property in question, for the full term of ten years or more prior to the 30th day of September, 1893, then your verdict should be for the defendant."

There is in the record before us no evidence to which this instruction could apply. It submitted to the jury for their determination the existence of the fact of ad-

verse possession without any evidence to support it. The instruction was prejudicial in the highest degree, and should not have been given. (*Morearty v. State*, 46 Neb. 652; *Williams v. State*, 46 Neb. 704; *City of York v. Spellman*, 19 Neb. 357.) The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

RYAN, C., not sitting.

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## LYDIA S. MILLER ET AL. V. N. H. MEEKER.

FILED APRIL 8, 1898. No. 7908.

1. **Justice of the Peace:** SUMMONS TO ANOTHER COUNTY. When an action is properly brought before a justice of the peace of one county summons may issue to any other county to bring in other parties defendant.
2. ———: ———. In a personal action service of summons in a county where a suit is brought upon a nominal defendant merely, who has no substantial interest in the subject of the suit adverse to the plaintiff, does not confer authority upon the court to issue a summons to another county for a real defendant.
3. ———: JURISDICTION. The jurisdiction of a justice's court is inferior and limited, and to support a judgment of that court the record must affirmatively show jurisdiction over the person of the defendant.

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

*A. D. McCandless* and *G. M. Spurlock*, for plaintiffs in error.

*George W. Clark* and *D. K. Barr, contra.*

NORVAL, J.

This suit was instituted before a justice of the peace of Cass county by N. H. Meeker against P. A. Fisher,

Lydia S. Miller, and William Fisher for the recovery of money. Service of summons was made upon P. A. Fisher in that county, and upon the other two defendants in Gage county. Lydia S. Miller and William Fisher made special appearance before the justice, and objected to the jurisdiction of the court over their persons, which motion was overruled, and thereupon judgment was entered against all the defendants for $150 and costs. Lydia S. Miller and William Fisher alone prosecuted a petition in error to the district court, where the judgment of the justice was affirmed, and they have brought the record to this court for review by proceeding in error.

The first question presented is whether, under the legislation in this state, a justice of the peace has authority to issue a summons to any county in the state. The solution of this question requires an examination and construction of certain sections of the Code of Civil Procedure. Section 904 declares that "the jurisdiction of justices of the peace in civil cases shall, unless otherwise directed by law, be limited to the county wherein they may have been elected, and where they shall reside." The foregoing limits the territorial jurisdiction of justices of the peace to their respective counties in all cases where the legislature has not in express terms, or impliedly, otherwise ordered. Such justice must perform his acts within the territorial boundaries of his county, and it must be conceded that the section quoted confers no authority upon such an officer to issue process to a county other than that in which he was elected or appointed. Has such power been given by any other statutory provisions? Section 65 of said Code provides: "Where the action is rightly brought in any county, according to the provision of title four, a summons shall be issued to any other county, against any one or more of defendants, at plaintiff's request." Section 1085 declares that "the provisions of this Code, which are in their nature applicable, and in respect to which no special provision is made by statute, shall apply to proceedings be-

fore justices of the peace." This last section, of itself, may be insufficient to make said section 65 applicable to actions instituted before justices of the peace, but the provisions of said section 1085, when construed in connection with the fact that the justice act is a part of the Code of Civil Procedure, adopted therewith, and such act contains no special provision relating to the county to which a justice's summons shall be issued, except as contained in section 910 of the Code of Civil Procedure, which declares that the same shall "be directed to the constable or sheriff of the proper county," there is plausible ground for holding that when an action is properly brought in a justice's court of the county where one of the defendants resides or may be served with process, summons may lawfully issue to a county other than that in which suit is brought for other defendant or defendants. This construction has been given the statute by the bench and bar for years, and is supported by a *dictum* of this court in *Bair v. People's Bank*, 27 Neb. 577. It is doubtful whether the court as now constituted would adopt this construction were it not for the fact that the case referred to has been so long acquiesced in as to now become a rule of property, and which, if changed, should be by the legislature and not by the courts.

It is urged that the justice of the peace did not acquire jurisdiction over the persons of Lydia S. Miller and William Fisher, for the reason P. A. Fisher, the defendant upon whom process was served in Cass county, had no substantial interest in the subject of the suit adverse to the plaintiff below. Under the statute of this state, an action like the one at bar must be instituted in the county in which the defendant or some one of the defendants resides, or may be summoned. (Code of Civil Procedure, sec. 60.) And section 65, quoted above, authorizes, where an action is properly brought in one county, the issuing of summons to any other county in the state. The word "defendant," as used in said section 60, does not mean a nominal defendant merely, but one who has a substantial

interest in the subject of the suit adverse to the plaintiff. (*Dunn v. Haines*, 17 Neb. 560; *Cobbey v. Wright*, 23 Neb. 250, 29 Neb. 274; *Hanna v. Emerson*, 45 Neb. 708.) It is obvious if a suit is not rightly planted in the county whence the summons issued, there is no authority for bringing a defendant from another county by a summons directed to, and served in, that county. In this state the jurisdiction of a justice of the peace is inferior and limited, and to sustain a judgment of his court the record must affirmatively show that jurisdiction over the person of the defendant was obtained. (*Robbins v. Clemmons*, 41 O. St. 285.) In the light of the principles stated above it is plain the justice in the case before us acquired no jurisdiction over Lydia S. Miller and William Fisher, and that the judgment rendered against them is void, since they were served with process in Gage county, made no general appearance in the cause, and their co-defendant, P. A. Fisher, was a mere nominal party, having no real interest in the controversy adverse to the plaintiff. The bill of particulars states no cause of action against him. It merely avers that the contract sued upon was made by him as agent for the other defendants, without alleging a single fact from which an inference could even be drawn that P. A. Fisher was personally liable upon the contract which it is alleged he entered into for and on behalf of his co-defendants. The record discloses that the suit was improperly brought in Cass county, and there was no right to serve the defendants in another county.

It is argued by counsel for plaintiff below that all the defendants made a general appearance before the justice. This contention is not borne out by the record, at least so far as Lydia S. Miller and William Fisher are concerned. The jurisdiction of the justice over their persons was sufficiently challenged by the special appearance which they made; but whether this is true or not is of no importance, because the want of jurisdiction appeared on the face of the record, and was available to them at any time. The

judgment of the district court is reversed and the cause remanded with directions to reverse the judgment of the justice of the peace as to Lydia S. Miller and William Fisher and to dismiss the action as to them.

REVERSED AND REMANDED.

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## WESTERN MANUFACTURING COMPANY v. J. J. ROGERS ET AL.

FILED APRIL 8, 1898. No. 7918.

1. **Evidence Contradicting Terms of Note.** A promissory note or contract cannot be varied, qualified, or contradicted by evidence of a prior or contemporaneous agreement resting in parol.
2. **Note: INDORSEMENT OF CONDITIONS: WAIVER.** A memorandum indorsed on a promissory note, to the effect that the promise may be discharged by substitution of other obligations of the makers within a given time, is for the benefit of the makers, and if they fail to avail themselves of the privilege or option, within the prescribed period, the note becomes absolute, and a recovery may be had thereon, after maturity, according to its legal import.
3. **Action: ADMISSION OF LIABILITY: INSTRUCTION.** Where, on the trial, the defendant admits on the record full liability on a cause of action set forth in the petition it is error to refuse an instruction tendered to find for plaintiff as to such cause of action.
4. **Construction of Contract.** The interpretation of a written contract is for the court and not for the jury, when it is capable of being construed by its terms alone, unaided by extrinsic facts.

ERROR from the district court of Hall county. Tried below before KENDALL, J. *Reversed.*

*George H. Thummel* and *Lamb, Adams & Scott*, for plaintiff in error.

*Abbott & Caldwell, contra.*

NORVAL, J.

The Western Manufacturing Company set forth in its petition in the court below two causes of action, the first

of which was to recover the sum of $76.66 with seven per cent interest thereon, as a balance alleged to be due from defendants for goods sold and delivered. The second count of the petition was upon a promissory note for $208.50, executed by the defendants on October 1, 1891, due one year thereafter, and payable to the order of plaintiff, with interest at eight per cent from maturity. The note at the time it was signed and delivered contained the following indorsement:

"This note is given for six mowers and two hay rakes on hand with J. J. & B. J. Rogers, October 1, 1891. The same are to be sold by said J. J. & B. J. Rogers during the season of 1892, and at the maturity of this note we are to accept in payment of the same their notes due on the average time on which said mowers and rakes were sold.

"WESTERN MFG. CO.,
"M. D. WELCH, *Sec'y and Treas.*"

The petition charges that the foregoing indorsement gave the defendants an option or privilege to take up the note in a certain manner, and that they neglected and refused to avail themselves of such option, wherefore they are liable for the face of the note and interest. The defendants answered by a general denial of the averments of the petition, and pleaded that in 1890 plaintiff appointed the defendants its agents to sell certain farm machinery, principally mowers and rakes, and repairs therefor, and that under said agreement they received certain machines and repairs, including the goods described in the petition, also the six mowers and two rakes mentioned as being the consideration for said note; that for the purpose of keeping true and correct accounts between the parties books were opened and all goods shipped to defendants were charged to them; that in October, 1891, M. D. Welch, plaintiff's secretary and treasurer, represented to defendants that plaintiff was dispensing with certain portions of its book-keeping, and requested defendants to execute the note sued on, and

Welch indorsed thereon the said memorandum, promising at the time and before said note was executed that it would show said machines were held as commission goods in the hands of defendants, which would not have to be paid for unless sold; that under such representations they signed and delivered said note to plaintiff; that no part of the same was to be paid unless said goods were sold; that defendants paid freight on the machines on hand to the amount of $50 and that their storage was of the value of $50, for which they asked compensation. The reply was a general denial. Plaintiff obtained a verdict for $101.60, and to obtain a review of the order and judgment denying its motion for a new trial is the purpose of this proceeding.

On the trial the defendants, over the objection of plaintiff, were permitted to introduce parol testimony tending to prove that the note in controversy was given for the sole purpose of showing the amount of unsold goods which the defendants had belonging to plaintiff; that it was the distinct agreement between the parties, when the note was executed, that defendants would not have to pay the same if the goods were not sold, and that defendants subsequently sold two rakes and one mower. It is argued that the admission of the testimony just indicated was erroneous, for the reason it was an attempt to defeat the legal effect of the note in suit by an alleged parol contemporaneous agreement. It is a familiar rule that such evidence is inadmissible to vary, modify, or contradict a written instrument. The note and memorandum indorsed thereon are parts of the same contract and must be construed together. When thus interpreted, it is obvious the agreement was that defendants were to pay plaintiff, in consideration of the six mowers and two hay rakes, the sum of $208.50 one year after the date of the note, with interest, with an option to the payors to make settlement by giving their own notes due on the average time on which said machinery should be sold by them during the season of 1892. There

is no room to doubt that the title to the property vested in the defendants, and that no inference can be properly drawn from the note and memorandum that after the execution and delivery thereof the relation of principal and agent existed between the parties. It was clearly incompetent for the defendants to introduce parol proofs for the purpose of contradicting the written agreement expressed in the note and memorandum, by showing that the machinery was held by the defendant for sale on commission and was not to be paid for until the same was disposed of. (*Newton Wagon Co. v. Diers*, 10 Neb. 284; *Clarke v. Kelsey*, 41 Neb. 766; *Kaserman v. Fries*, 33 Neb. 427; *Waddle v. Owen*, 43 Neb. 489; *Van Etten v. Howell*, 40 Neb. 850.) The option contained in the memorandum in question was a stipulation for the benefit of the defendants, which they could avail themselves of or not as they might elect. They neglected to discharge the obligation by the substitution of other notes according to the privilege given them; therefore the note in suit, upon its maturity, became an absolute promise of the defendants to pay the sum therein mentioned with interest. (*M'Rae v. Raser*, 9 Port. [Ala.] 122; *Nesbit v. Pearson*, 33 Ala. 668; *State v. Shupe*, 16 Ia. 36; *Schnier v. Fay*, 12 Kan. 184.)

An instruction was tendered, which was refused, directing the jury that plaintiff was entitled to recover on its first cause of action the sum of $76.66 and interest thereon at seven per cent. The refusal to so instruct the jury was reversible error, since it was admitted by defendants, in open court on the trial, that there was a balance due plaintiff for the items set out in the first cause of action, $76.66, on October 14, 1892, and that the same had not been paid. No instruction of like import was given by the court, while, on the contrary, the jury were told in one instruction that every allegation of the petition was denied by the answer, and in another paragraph of the charge it was stated that the burden was on the party alleging a fact to prove its existence by a

preponderance of the evidence. The refusal of the request, under the circumstances, was prejudicial to plaintiff.

Complaint is made of the following instructions given by the court on its own motion:

"No. 5½. If you find from the evidence that the defendants gave the note sued upon simply as a memorandum note at the suggestion of the plaintiff's duly authorized agent, as claimed by defendants, and not as a settlement in full for said machines, then defendants would be liable to plaintiff on said note only for such sum as you find is the value of the goods sold after giving said note, if any such have been sold and not settled for."

"No. 7. You are instructed that if you find that the defendants were selling the goods of the plaintiff on commission and did not own them, and that they have sold any of said goods and have not settled for all the goods sold, then your verdict should be for the plaintiff for the value of the goods you find from the evidence have been sold and not settled for, including mowers, rakes, and repairs, less such sum as you find the defendants entitled to for freight paid or for storing said machinery, if you find they are entitled to anything."

The giving of these instructions constituted grounds for reversal. They left it for the jury to construe the agreement of the parties. The contract was unambiguous, and required no extrinsic facts to aid in ascertaining its true meaning; therefore it was the province of the court to have interpreted it. (*Sims v. Summers*, 39 Neb. 781; *Ricketts v. Rogers*, 53 Neb. 477.) It follows that the judgment should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

# R. A. STEWART V. AMERICAN EXCHANGE NATIONAL BANK OF LINCOLN.

FILED APRIL 8, 1898. No. 7894.

1. **Pleading and Proof.** All material averments of new matter in an answer which are not denied by the reply will be taken as admitted, and need not be proved.
2. ——: AMENDED ANSWER: REPLY. Where, after reply, an amended answer is filed setting up the defense interposed in the original answer and, in addition, facts which constitute a new and distinct defense, the plaintiff may reply anew if he so elects, but if he does not, the reply to the original answer will not stand as a reply to such new or additional defense.
3. **Judgment Non Obstante Veredicto.** Section 440 of the Code of Civil Procedure requires judgment to be rendered in favor of the party entitled thereto by the pleadings, notwithstanding a verdict has been returned against him.
4. **Principal and Surety:** SECURITY: NEW TRIAL. A creditor who without the consent of the surety voluntarily parts with security thereby releases the surety to the extent he has been thereby damaged.

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

*Willard E. Stewart,* for plaintiff in error.

*Sawyer, Snell & Frost, contra.*

NORVAL, J.

This suit was brought in the court below by the American Exchange National Bank of Lincoln against Lou L. E. Stewart and R. A. Stewart on a promissory note for $1,000, bearing date May 15, 1893, due in ninety days, with interest at ten per cent per annum from date until paid. Lou L. E. Stewart made default. R. A. Stewart for answer alleged that he signed the note as surety merely, and that, without his consent, plaintiff, for a valuable consideration received from Lou L. E. Stewart, extended the time of payment of the note. The bank re-

plied by a general denial. Prior to the trial R. A. Stewart, by leave of court, filed an amended answer, which set up the same defense as contained in the original answer and, in addition, pleaded that the bank held certain notes, aggregating $3,000, as collateral to the one sued on, which it surrendered to the principal maker, Lou L. E. Stewart, to the damage of the answering defendant. No reply was filed to the amended answer. Verdict and judgment for plaintiff; and defendant R. A. Stewart prosecutes an error proceeding to this court.

One ground urged for reversal is that the defendant surety was, by the pleadings, entitled to recover judgment, which proposition is unanswerable. Under section 134 of the Code of Civil Procedure every material allegation of new matter contained in the answer, not put in issue by a reply, must be taken as true. (*Dillon v. Russell*, 5 Neb. 484; *Williams v. Evans*, 6 Neb. 216; *Payne v. Briggs*, 8 Neb. 75; *Consaul v. Sheldon*, 35 Neb. 247; *National Lumber Co. v. Ashby*, 41 Neb. 292; *Van Etten v. Kosters*, 48 Neb. 152; *Scofield v. Clark*, 48 Neb. 711; *Culbertson Irrigating & Water Power Co. v. Cox*, 52 Neb. 684; *Hartzell v. McClurg*, 54 Neb. 313.) Two defenses were well pleaded in the amended answer—the release of the surety by the payee extending the time for the payment of the note to the principal maker, and the surrender and release of collaterals held as security for the payment of the note. By the plaintiff failing to reply to the amended answer, the second defense, under the statute and authorities, must be regarded as confessed. It is suggested, in argument, by counsel for plaintiff below that the reply to the original answer should be treated as a reply to the amended one. Possibly it might have been thus regarded had it been refiled as a reply; but without such refiling it certainly cannot be so considered as to the new defense which was not interposed in the first or original answer. An amended answer having been filed, plaintiff had the undoubted right to plead over if it so desired, or to stand upon its reply previously

filed. Having elected to adopt the latter course, the reply to the original answer should not be considered as a reply to the amended answer, as to the new or additional facts, or cause of action, set forth in the amended pleading, which were not contained in the original. (*Eslich v. Mason City & F. D. R. Co.*, 75 Ia. 443; *Wilson v. Preston*, 15 Ia. 246; *McAllister v. Ball*, 28 Ill. 210; *Ermentrout v. American Fire Ins. Co.*, 63 Minn. 194; *Kelly v. Bliss*, 54 Wis. 187.) The two cases relied upon by counsel for plaintiff are not in point here. In *Yates v. French*, 25 Wis. 661, after answer, the original complaint or petition was amended, by merely changing the *ad damnum* clause. Obviously nothing new was brought forward by the amendment which necessitated a new answer. In that case there had been no change in the matters in issue, and no different answer was required; while in the case at bar, after a reply was filed, an amended answer was brought in pleading a new and distinct defense to plaintiff's cause of action, so that the reply on file could not be considered as a plea thereto. In *Stevens v. Thompson*, 5 Kan. 305, the only amendment of the petition, after answer, consisted in adding a new party plaintiff, which did not change the grounds of the action, and the answer already on file in that case put in issue every fact pleaded in the original and amended petition.

It is insisted that the defendant waived a reply by trying the cause as if one had been filed to the amended answer; and *Western Horse & Cattle Ins. Co. v. Timm*, 23 Neb. 526, and other authorities* are cited to support the principle that if a case is tried as though a proper reply had been filed, no advantage can be taken in the appel-

**Meader v. Malcolm*, 78 Mo. 550; *Hensler v. Cannefax*, 49 Mo. 295; *Gray v. Worst*, 31 S. W. Rep. [Mo.] 585; *State v. Phillips*, 38 S. W. Rep. [Mo.] 931; *Hopkins v. Cothran*, 17 Kan. 173; *Wilson v. Fuller*, 9 Kan. 176; *Quimby v. Boyd*, 6 Pac. Rep. [Colo.] 462; *Jerome v. Bohn*, 40 Pac. Rep. [Colo.] 570; *McAlister v. Howell*, 42 Ind. 16; *Helton v. Wells*, 40 N. E. Rep. [Ind.] 930; *Comer v. Way*, 19 So. Rep. [Ala.] 966; *Minard v. McBee*, 44 Pac. Rep. [Ore.] 491; *Louisville & N. R. Co. v. Copas*, 26 S. W. Rep. [Ky.] 179; *Killman v. Gregory*, 65 N. W. Rep. [Wis.] 53.

late court of the fact that no reply to the answer was made. The doctrine invoked has no application here, since there is nothing in this record to show that the trial was conducted below on the theory that the averments of the amended answer were denied. There is no bill of exceptions in the record, so we are not advised what occurred during the trial. It does appear, however, that an exception was taken to each instruction, especially the portion of the charge relating to the surrender of collaterals by plaintiff; so that no inference can be properly drawn from this record that a reply was waived. The absence of a reply to the amended answer is not raised for the first time in this court. One of the grounds set forth in the motion for a new trial was that the verdict was contrary to law, which was sufficient to challenge the attention of the trial court to the fact that the verdict was not in accord with the issues tendered by the pleadings.

Section 440 of the Code of Civil Procedure controls in this case. It provides 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." Plaintiff by failing to reply to the amended answer admitted the bank voluntarily surrendered to the principal maker collaterals given to secure the note in suit, without the consent of the defendant surety, which, to the extent of the value of such collaterals, released him from liability. (*Bronson v. McCormick Harvesting Machine Co.*, 52 Neb. 342.) The verdict being for the face of the note in controversy with interest, for the reason stated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

FRED HERZKE V. JESSE H. BLAKE ET AL.

FILED APRIL 8, 1898. No. 7926.

1. **Conflicting Evidence:** REVIEW. A verdict based upon conflicting evidence will not be disturbed.
2. **Evidence:** LEASE. Rejection of the lease offered in evidence in this case *held* not prejudicial error.
3. **Review:** INSTRUCTIONS: BRIEF. Instructions not argued in the brief of plaintiff in error will not be reviewed.

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

*C. A. Baldwin*, for plaintiff in error.

*V. O. Strickler, contra.*

NORVAL, J.

This suit was instituted before a justice of the peace by Jesse H. Blake and Charles Secomb against Fred Herzke and Birdie Mann to recover a balance alleged to be due plaintiffs on an account for labor performed and materials furnished by them in the making of certain changes and repairs of the Elkhorn Valley House situated in the city of Omaha. Plaintiffs recovered judgment against both of the defendants, and the latter appealed to the district court, where, upon a trial to a jury, judgment was entered for the full amount claimed against Herzke alone, a verdict having been returned against the plaintiffs in favor of Mann.

Herzke was the owner of the building in question, and Birdie Mann, after the changes and repairs were made, occupied the premises as the tenant of Herzke. It is not disputed that the labor was performed and materials were furnished as alleged, nor is there any contention here over the amount due plaintiffs by reason of the premises. They insist the verdict and judgment against Herzke are right and should not be disturbed, while he

maintains that plaintiffs were employed by Mann alone and that she, and not himself, is liable. The evidence bearing upon this question is conflicting. That introduced by plaintiffs tended to show that in April, 1893, Herzke leased the Elkhorn Valley House to his co-defendant, Birdie Mann; that subsequently, on or about the 25th of said month, and before she had taken possession of the property, she saw Mr. Blake, one of the plaintiffs, and informed him that there was to be some work done on the building and suggested he meet Herzke, the owner, at the premises the next day; that Blake did so, when Herzke showed the latter through the building, pointed out the various changes and alterations he desired to be made, and told him to use any available material composing an old barn which stood on the same lot; that Herzke gave him the key to the premises, procured a permit from the building inspector, and during the progress of the work was frequently present giving directions and instructions to the workmen. There is in the record testimony conducing to show that while Herzke went through the building with Blake and pointed out the changes desired, he never employed plaintiffs, but the agreement was that they were to look to Birdie Mann for their pay. The testimony is ample to support a verdict in favor of plaintiffs. The jury have passed upon the conflicting testimony, and their finding we cannot disturb, although we would have been entirely satisfied had the verdict released Herzke from liability.

It is argued that the trial court erred in refusing to permit a written lease of the premises between Herzke and Mann to go in evidence. The ruling is justified on more than one ground. The lease was never recorded so as to give plaintiffs constructive notice of its contents, and no actual knowledge was brought home to plaintiffs, so they were not bound by any stipulations contained in the instrument. Again, an inspection of that document, which is incorporated in the bill of exceptions, discloses

that the relation of landlord and tenant did not exist between Herzke and Mann at the time plaintiffs began their work, since by the terms of the lease the tenancy was not to commence until May 1, 1893. This being the case, the rule could not be here invoked which was announced in *Turner v. Townsend*, 42 Neb. 376, to the effect that without an express contract a landlord is neither bound to repair leased premises, nor to pay for those made by the tenants. It follows defendant could not have been prejudiced by the exclusion of the lease from the jury. No reversible error is discovered in the other rulings on the exclusion and admission of testimony.

In the motion for a new trial and petition in error the decision of the court in refusing to give each of the six instructions tendered by Herzke is challenged by an appropriate assignment, but the requests to charge will not be considered, for the reason they are not argued in the briefs filed by his counsel. Assignments of error relating to the giving or refusing of instructions must be supported by arguments in the brief of plaintiff in error, pointing out the errors for consideration, else such assignments will be treated as waived. The judgment is

AFFIRMED.

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FIRST NATIONAL BANK OF NELIGH V. GUSTAVUS A. LANCASTER AND JAMES G. CRINKLAW, SHERIFF.

FILED APRIL 8, 1898. No. 7875.

1. **Mandamus:** RELATOR. When mandamus is the appropriate remedy the writ is issued on the relation of a private suitor.

2. **Attachment:** SEIZURE OF EXEMPT PROPERTY: APPRAISEMENT. It is the duty of an officer who has seized under an order of attachment property claimed to be exempt under section 521 of the Code of Civil Procedure to cause such property to be appraised when the attachment defendant, being a resident of the state, the head of a

family, and without any homestead exemption, files with such officer, or in the court from which the writ issued, the proper inventory and affidavit.

3. ———: ———: ———: MANDAMUS: PARTIES. Where, upon the filing of such inventory and affidavit, the officer refuses to call appraisers, a writ of mandamus will issue to compel him to perform that duty; and, pending the application for the writ, the attachment creditor may intervene and join with the officer in resisting the application.

4. ———: ———: ———: ———. To entitle an execution or attachment defendant to a peremptory writ of mandamus against an officer who has seized and refused to appraise property claimed to be exempt under section 521 aforesaid, he must allege, and prove, if not admitted, that after the seizure and before the sale he filed with the officer, or in the court from which the process issued, a schedule of his entire personal estate, together with a sworn statement that such schedule is complete and correct and that the claimant is a resident of the state, the head of a family, and not possessed of lands, town lots, nor houses exempt as a homestead under the laws of this state.

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

*N. D. Jackson*, for plaintiff in error.

*S. D. Thornton, contra.*

SULLIVAN, J.

The First National Bank of Neligh sued Lancaster and caused his property to be seized by Crinklaw, as sheriff of Antelope county, under an order of attachment issued in the action. Thereupon Lancaster, claiming the property to be exempt under section 521 of the Code of Civil Procedure, filed with the sheriff an inventory of the whole of the personal property owned by him and demanded an appraisement by three disinterested freeholders of the county to be called and sworn as required by law in such cases. The sheriff, at the instigation of the bank, ignored the demand and Lancaster commenced this suit against him to compel official action. The bank obtained leave to intervene and filed an answer. There was a trial in the district court, which resulted in a find-

ing and judgment for the relator. The bank alone complains.

The relator insists that the bank is a mere intruder in the case and should not be permitted to assail the judgment whether it is right or wrong. But we think there was no error in allowing the intervention. The writ of mandamus is no longer a prerogative writ; when it is the appropriate remedy it is issued as a matter of course on the relation of a private suitor. (*State v. Commissioners*, 11 Kan. 67; *Fisher v. Charleston*, 17 W. Va. 63; *State v. Cummings*, 17 Neb. 311.) Section 50*a* of the Code is as follows: "Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has joined in the action, and before the trial commences." This statute justifies the intervention, but it is quite clear from its language that the bank on being admitted into the case secured nothing more than the right of uniting with the respondent in resisting the relator's claim. The contention that it could put in issue the correctness of the inventory or the truth of the matters required to be stated in the affidavit attached thereto cannot be sustained. Being interested in the success of the officer, the bank could champion his defense, but could not widen its scope. The law providing for the appraisement of exempt chattels taken on execution or attachment is well designed to guard against oppression of indigent householders and to place in their hands a swift, inexpensive, and effective remedy; and it should not be bent from its appointed purpose and readjusted by the courts to suit the convenience of creditors. When the homeless

debtor, being a resident of the state and the head of a family, draws about his small possessions the sacred circle of the exemption law, they are within a sanctuary inviolable to the creditor as well as to the officer who is charged with the execution of his process. And we are entirely satisfied that the constitutional rights of the creditor are not infringed by limiting him, in actions of this character, to the defenses which may be rightfully interposed by the sheriff or constable acting under the execution or order of attachment.

We now proceed to consider whether the judgment is sustained by sufficient evidence. The petition alleges that the relator is a resident of Antelope county, the head of a family, that he has neither lands, town lots, nor houses subject to exemption, and that he filed in due season with the respondent, Crinklaw, an inventory of the whole of the personal property owned by him. The intervener's answer admits that the relator is the head of a family and a resident of the state, and, also, that he filed with the sheriff what purports to be an inventory of the whole of his personal property. The answer then charges that the inventory is false and fraudulent, and denies in general terms the facts not specifically admitted to be true. Thus it appears that the allegation of the petition that the relator possessed no real estate exempt as a homestead was one of the issues presented to the court for trial. The inventory was not offered in evidence and there is not in the record any proof whatever that Lancaster had neither lands, town lots, nor houses exempt as a homestead under the laws of this state. On this record can the judgment be sustained? Section 521 of the Code of Civil Procedure is as follows: "All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property." Here is contained a description of the persons who shall be entitled to exemptions of the character

claimed by the relator in this action. The next section provides what a person entitled to such exemption must do to secure it. He must, some time before the sale, "file an inventory under oath, in the court where the judgment is obtained, or with the officer holding the execution, of the whole of the personal property owned by him." Accompanying this inventory or attached to it must be a verified statement of the debtor showing his right to the exemption claimed. When such inventory and affidavit have been filed, it becomes the imperative duty of the officer to call freeholders and cause an appraisement of the property to be made; and he will be permitted to offer no excuse for failing to discharge this duty. But he is not required to act on the filing of an inventory unless it be accompanied by an affidavit showing that the debtor is within the class for whose benefit the law was enacted. The statute here under consideration has received very liberal construction in the interests of unfortunate debtors, but it has never been held that a person may have $500 worth of personal property set apart to him as exempt without even making an affidavit that he is entitled to it. In *Kilpatrick-Koch Dry Goods Co. v. Callender*, 34 Neb. 727, an affidavit reciting that the debtor was the head of a family, a resident of the state, and had neither lands, town lots, nor barns subject to exemption as a homestead was held not to meet the requirements of the law, because it failed to show that he did not possess any exempt houses. The second point of the syllabus states the rule thus: "A debtor who swears that he has neither lands, town lots, nor houses subject to exemption must negative the possession of any of these, and if he fails to do so the affidavit will be insufficient." It follows from what has been said that the plaintiff was entitled to the peremptory writ only upon due proof that he filed with the sheriff in connection with the inventory an affidavit setting forth that he was a resident of the state, the head of a family, and had neither lands, town lots, nor houses

exempt as a homestead. Having failed to furnish such proof, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

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## LOCKE, HULBERT & COMPANY V. GEORGE W. SHRECK ET AL.

FILED APRIL 8, 1898. No. 7995.

1. **Attachment:** SALE OF MORTGAGED CHATTELS. Where a subsequent mortgagee is without actual possession of the mortgaged property or the right of immediate possession, an officer, under writs of attachment, may lawfully seize the property and by a sale in gross dispose of the mortgagor's reversionary interest therein.
2. **Conversion:** POSSESSION. To maintain an action for conversion of chattels a party must have actual possession of the property or the right of immediate possession.
3. **Chattel Mortgages:** RIGHTS OF MORTGAGEE. A subsequent mortgagee has an interest in the mortgaged property which the law will protect in an appropriate action.
4. **Conversion:** LIABILITY OF SHERIFF. An officer who seizes mortgaged chattels on mesne or final process against the mortgagor is not liable in an action by the mortgagee if he does nothing to place the property beyond the reach of the mortgagee or to prevent him from taking possession of it when his right of possession accrues.
5. **Instructions:** HARMLESS ERROR. Where the verdict returned by the jury is the only one authorized by the pleadings and proof, the giving of an erroneous instruction is not prejudicial error.

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

*George B. France*, for plaintiffs in error.

*F. C. Power, contra.*

SULLIVAN, J.

On December 26, 1891, Morris Alexander, being the owner, and in possession, of a stock of general merchan-

dise in the city of York, mortgaged the same to J. Rosenbaum to secure an indebtedness of $1,347. The mortgagee took immediate possession. Three days later a second mortgage covering the same property was executed by Alexander to the plaintiffs, Locke, Huleatt & Co., to secure the sum of $416.81 due for merchandise previously purchased of them. Both mortgages were duly filed in the proper office and their validity appears on the record unquestioned. Afterwards, D. B. Fisk & Co., a corporation, commenced two actions against Alexander in the district court of York county and caused writs of attachment to be issued therein. These writs were placed in the hands of the defendant George W. Shreck, as sheriff, and acting under their authority he seized and took into his possession the whole of the mortgaged property. Thereupon a verified schedule of Alexander's entire personal estate was presented to Shreck and a demand made upon him to cause the same to be appraised in accordance with the provisions of section 522 of the Code of Civil Procedure. In obedience to this demand, freeholders were called, an appraisement made, and $500 worth of mortgaged merchandise turned over to Alexander as exempt, he being a resident of the state, the head of a family, and having neither lands, town lots, nor houses exempt as a homestead. Before this was done, however, the plaintiffs were notified by the sheriff that the exempt property was about to be surrendered, and that they might, if they wished to do so, take it from Alexander by virtue of their mortgage; but no action was taken by them and the property was removed out of the state. This suit was brought by the plaintiffs to recover damages for the conversion of the stock of goods. The verdict and judgment were in favor of the defendants and the plaintiffs prosecute error here.

Among other alleged errors they complain of the giving of the seventh instruction, which is as follows: "One who is not a general owner of personal property, but claims to own an especial interest therein, cannot main-

tain an action for the conversion of the property, unless he was in the actual possession of the property at the time of the conversion. Therefore in this action, although you should find that the plaintiff had a valid chattel mortgage on the property in question, still, unless you further find that the plaintiff, by himself or his agent, had the actual possession of the property at the time of the levy by the sheriff, you must find for the defendants." Considered as an abstract legal proposition the instruction is incorrect; but, in view of the conclusively established facts of this case, it did not prejudice plaintiffs' rights. Plaintiffs were subsequent mortgagees without actual possession or right of immediate possession when the writs of attachment were levied. No condition of their mortgage had been broken. The sheriff might, therefore, lawfully seize the property and by a sale in gross dispose of Alexander's reversionary interest therein. (*Burnham v. Doolittle*, 14 Neb. 214; *Chicago Lumber Co. v. Fisher*, 18 Neb. 334.) A sale of mortgaged chattels in bulk to a single purchaser and subject to existing mortgage liens is lawful whether made by the mortgagor himself or by the sheriff or other officer on execution against him. If nothing is done to place the property beyond reach of the mortgagee to prevent him from taking possession of it when his right of possession accrues, he is not injured and has no just cause of complaint. (*Burnham v. Doolittle*, 14 Neb. 214; *Chicago Lumber Co. v. Fisher*, 18 Neb. 334.)

There is another reason why the mere attachment of the goods did not give plaintiffs a cause of action for conversion. To maintain that action a party must have actual possession of the property or the right of present possession. A right to take possession at some future day is not sufficient. (*Holmes v. Bailey*, 16 Neb. 300; *Hill v. Campbell Commission Co.*, 54 Neb. 59; *Kennett v. Peters*, 54 Kan. 119; *Ring v. Neale*, 114 Mass., 111; *Clark v. Draper*, 19 N. H. 419; Cooley, Torts [1st ed.] 445; *Raymond v. Miller*, 50 Neb. 507.)

Plaintiffs had, however, an interest in the property, for the protection of which the law affords an adequate remedy. At common law injuries to reversionary and like interests were redressed by a special action on the case; but in this state, of course, the appropriate procedure is an ordinary action for damages grounded on the facts showing the wrong and the resulting injury. Plaintiffs have, in general terms, charged a conversion of the property and, assuming this allegation to be sufficient to entitle them to recover any damages proven, we proceed to consider the case on the evidence. The sheriff did not remove the attached property from the store where it was when the levy was made. Consequently it suffered no physical injury or diminution in value while in his possession. Neither was the surrender of the exempt property to Alexander an injury of which plaintiffs can complain. They had not asserted nor attempted to assert their right of possession as against Alexander. They were notified that the chattels claimed under the exemption law had been set apart in the store and were invited to take possession of them under their mortgage. This they declined to do; and the property was consequently lost to them by reason of their own inaction. After the removal of the exempt chattels, the value of the remainder was less than the amount due on the Rosenbaum mortgage, to which the plaintiffs' mortgage was subject. Therefore, plaintiffs' equity of redemption was valueless and the subsequent sale and dispersion of the property inflicted no actual injury upon them. So, notwithstanding errors committed at the trial, the verdict was the only one which could rightfully have been found by the jury. The court might properly have directed a verdict for the defendants, and, indeed, that was the legal effect of the instruction quoted. The judgment of the district court is

AFFIRMED.

## JOSEPH A. KIME V. ROSELL FENNER.

FILED APRIL 8, 1898. No. 7969.

1. **Judges:** POWERS AT CHAMBERS. A judge at chambers possesses no jurisdiction to vacate or modify orders or judgments of the district court.
2. **Vacating Judgments:** PLEADING. Where a defendant against whom a judgment has been irregularly entered moves for a vacation thereof under the provisions of sections 602-611 of the Code of Civil Procedure, he must show that he has a defense to the action. Such defense, however, need not be a complete and perfect defense to the plaintiff's entire claim. A defense to any substantial part of it will be sufficient to entitle defendant to the relief demanded.
3. ———: ———. Where a petition seeking the vacation of a judgment irregularly entered against a defendant has an answer attached thereto presenting several defenses to the plaintiff's cause of action, the court cannot strike out such answer on the ground that all the defenses pleaded are not available, and then dismiss the proceeding because the defendant's petition does not exhibit a defense to the action.

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

*R. C. Noleman*, for plaintiff in error.

*Thomas Darnall* and *W. G. Simonson, contra.*

SULLIVAN, J.

Fenner sued Kime in the county court of Box Butte county and recovered a judgment against him for $222.75 and costs expended, taxed at $18. Kime appealed and caused a transcript of the proceedings in the county court to be filed in the office of the clerk of the district court within thirty days from the rendition of the judgment. Through some misunderstanding the clerk did not docket the appeal, but instead entered the transcript on the judgment record. Thereupon the plaintiff, proceeding on the assumption that the district court had not acquired jurisdiction of the cause, at the next term filed a transcript of

the proceedings and moved for judgment thereon pursuant to the provisions of section 1011 of the Code of Civil Procedure. The trial docket does not show that any action was taken on the motion during the term, and the only evidence that any action was in fact taken is that contained in a letter of the presiding judge written after the adjournment of the term to the attorney for the plaintiff. This letter was filed with the clerk and is in part as follows:

"O'NEILL, NEBRASKA, 5-26-'90.

"DEAR SIMONSON: Replying to yours of the 18th, would say the motion in question was decided in your favor, which the minutes should show. * * *

"Yours, M. P. KINKAID."

Assuming that this communication referred to the motion of Fenner for judgment on the transcript of the county court, the clerk entered on the journal a judgment similar to the one from which the appeal had been prosecuted. Afterwards, at the suggestion of the court, the defendant filed a petition asking that this judgment be vacated on the ground that it had been irregularly obtained. At the October term, 1893, to-wit, on October 12, the cause came on to be heard on the petition, and the plaintiff Fenner being in default of an answer, the court found the facts stated in the petition to be true and made an order setting aside the judgment complained of. Subsequently, on November 14, 1893, at his chambers in Chadron, Judge Bartow made an order vacating the order of October 12 and directed that Fenner answer the petition of Kime within thirty days. Instead of answering, Fenner filed a general demurrer, which was overruled at the April, 1894, term of the court. He then moved to strike from the petition an answer setting up a defense and counter-claim to Fenner's cause of action and for judgment on the pleadings. This motion was sustained. Kime's petition was dismissed and costs to the amount of $100 taxed against him. To reverse this judgment he prosecutes error.

The judgment is erroneous and must be reversed. The answer attached to Kime's petition states a defense to the original cause of action, but it seems to have been stricken out on the theory that it presented different issues from those on which the case was originally tried. The answer attached to the petition for a vacation of the judgment contained a general denial and a counter-claim. It is asserted that the answer in the county court was only a general denial. Conceding this to be true, the motion of Fenner should, nevertheless, have been overruled. If the answer presented any defense, partial or complete, on which Kime could rely on a trial in the district court, it was sufficient. The court held that defendant's petition, with the answer attached thereto, did state facts sufficient to entitle him to have the judgment vacated. It then struck out the answer and condemned the pleading as insufficient. This method of procedure was irregular and unwarranted. The court could not emasculate the petition and then dismiss the proceeding because the petition in its emasculated form did not state a cause of action.

There is also another reason why the judgment is erroneous. The order of October 12, 1893, vacating the judgment in favor of Fenner has never been set aside. It is still in full force and effect. The order made by Judge Bartow at chambers on November 14, 1893, was a mere nullity. A judge at chambers possesses no jurisdiction to vacate orders or judgments of the district court. For the errors indicated the judgment complained of must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

# WILLIAM M. CLARK ET AL., APPELLEES, V. HARRY J. HALL ET AL., APPELLANTS.

FILED APRIL 8, 1898. No. 7919.

1. **Partnership:** DISSOLUTION AND ACCOUNTING. In an action brought to secure a dissolution of a copartnership and for an accounting, no demand being made by any of the partners for a reformation of the partnership contract, the court cannot, on its own motion, reform such contract nor disregard it as the basis of the rights of the litigants.
2. **Construction of Contract.** Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly.
3. ———: REVIEW: PRACTICE. Where on an appeal it is evident that the trial court disposed of a case on the theory that the contract did not express the mutual understanding of the parties and was, therefore, unenforceable, this court will eliminate from the findings of the trial court the errors resulting from its failure to construe and enforce the contract and order the judgment to be modified and entered accordingly.
4. **Partnership:** ACCOUNTING: JUDGMENT AGAINST INDIVIDUAL MEMBERS: INTERVENTION BY CREDITOR. A party obtained judgments against C. and M. on claims due from them individually, but which had been assumed by a partnership of which they were members. In an action to secure a dissolution of the copartnership and for an accounting the judgment creditor intervened and asked to have his judgments satisfied out of the partnership assets. *Held*, That the remedies were consistent and concurrent and might be prosecuted together or in succession, and a judgment in favor of such intervener will be upheld.

APPEAL from the district court of Lancaster county. Heard below before TIBBETS, J.

Action by William M. Clark and John H. Mockett against Harry J. Hall and Charles E. Hall for dissolution of a copartnership and for an accounting. Eugene Favre, a creditor, intervened and asked to have his claims satisfied out of the assets of the firm. From a decree for plaintiffs and for intervener, defendants appealed. *Affirmed as to intervener and reversed as to defendants.*

*Pound & Burr*, for appellants.

*Samuel J. Tuttle, Charles S. Allen*, and *Mockett & Polk*, *contra.*

SULLIVAN, J.

William M. Clark and John H. Mockett brought this action against Harry J. Hall and Charles E. Hall in the district court of Lancaster county to secure a dissolution of the copartnership of which they were all members, and for an accounting. The Halls had been engaged in business as partners in the city of Lincoln under the firm name of The Hall Stove & Range Company for more than a year prior to April 4, 1891, at which time they sold a half interest in their business to Clark and Mockett. The members of the new firm executed articles of copartnership which, being necessary to a correct understanding of the main question presented for decision, are here set out:

"This agreement, made and entered into this 4th day of April, 1891, between H. J. Hall, C. E. Hall, William M. Clark, and John H. Mockett, witnesseth: That whereas the Hall Stove & Range Company has this day sold a one-fourth interest in said copartnership to J. H. Mockett for three thousand three hundred and fifty-six dollars and ninety-seven cents ($3,356.97), and that it has also sold to Wm. M. Clark a one-fourth interest in said business for the same amount, and that the said parties have this day associated themselves together in business under the firm name and style of the Hall Stove & Range Company, this is to be the partnership name in which said firm is to transact its business. H. J. Hall is the owner of a one-fourth interest in said business, C. E. Hall is the owner of a one-fourth interest in said business, all of said parties having contributed an equal amount to said copartnership, which is to continue in force and effect for the period of five years, and are to engage in the manufacture and sale of ranges, iron castings, and

any other manufactured articles which they may deem profitable to said business. Said J. H. Mockett and Wm. M. Clark are each to pay into said copartnership the sum of three thousand three hundred and fifty-six dollars and ninety-seven cents ($3,356.97), to be paid as follows, to-wit: Each one of said parties, to-wit, Clark and Mockett, are to pay five hundred dollars ($500) each on or before May 10, 1891, each of said parties to pay the further sum of two thousand dollars ($2,000) each on June 10, 1891. Each of said parties are to give to said copartnership his note for eight hundred and fifty-six dollars and ninety-seven cents ($856.97), each to bear interest at the rate of ten per cent per annum until paid. It is further agreed that H. J. Hall and C. E. Hall are each to be paid a salary of fifteen hundred dollars ($1500) per annum. The net profits of said business are to be divided one-fourth to each party. If there are any losses, they are to be borne equally, one-fourth by each party. In consideration of the payment to H. J. Hall and C. E. Hall of a salary of fifteen hundred dollars per annum each they assume and agree to manage, conduct, and run and operate said business. The said J. H. Mockett and William M. Clark are under no obligation to give any of their time or attention to said business unless they prefer to do so. The said business books of account are at all times to be open to inspection to each and every one of said partners equally. It is further agreed that none of the profits arising from said business shall be drawn out by any of the parties until the expiration of at least one year; that all of said parties consent to withdrawing of said profits at the end of such time. In view of the fact that in the opinion of H. J. Hall and C. E. Hall there is needed a larger amount of capital for the purpose of successfully conducting said business, it is further stipulated and agreed that each one of the parties to this agreement shall contribute an additional amount of capital, to-wit, eleven hundred and forty-three dollars and three cents ($1143.03). Each one of said parties agrees

and hereby binds and obligates himself to put into and contribute to said copartnership that amount of additional capital on or before one month from April 4, 1891, and any failure on the part of any of the partners herein to pay his share of the amount herein mentioned to be made, said partner shall pay to the firm ten per cent interest on the amount of his deficit.

"H. J. HALL.
"C. E. HALL.
"WM. M. CLARK.
"J. H. MOCKETT."

The true construction of this contract is the principal point upon which the parties differ. The Halls contend that they, as members of the old firm, were entitled to receive the money which Clark and Mockett agreed to pay for an interest in the business, while Clark and Mockett insist that such money was to be paid to and for the use of the new firm. In relation to this controversy the trial court made the following finding: "That said contract is indefinite, uncertain, and ambiguous in its provisions concerning the payment of the money provided to be paid by each of the plaintiffs, whether the same should be paid to the defendants Harry J. Hall and Charles E. Hall, or should be paid into and become a part of the assets of the new partnership; and as to these provisions in the said contract the court finds that there was a misunderstanding between the parties to the said agreement as to the interpretation of the terms of said provisions, and the minds of the said parties did not agree thereon." The court then proceeded to adjust the rights of the parties as though no partnership contract had been made. Clark and Mockett were credited with all money contributed by them, including what was paid as the purchase price of a half interest in the business. The actual value of the tangible assets of the old Hall Stove & Range Company was ascertained to be $9,239.05, and the Halls were given credit for that amount. They were also given credit for various other

items contributed after the organization of the new firm. In thus disregarding the articles of copartnership we think the court was in error. There was no demand by either party for a reformation of the contract. The court could not reform it on its own motión nor disregard it as the basis of the rights of the litigants. It was the duty of the court to ascertain its meaning and enforce it accordingly. Casually read, the instrument seems to imply that the money to be paid by the appellees should go into the business of the new firm; and the fact that it was so used and that the appellants took no credit therefor upon the books of the partnership gives color to the claim that such was their interpretation of the contract. Nevertheless, after much reflection, we have concluded that the parties intended that the transaction in question should be governed by the rule applicable to ordinary sales, and that the purchasers should pay the purchase price to the sellers and not to the partnership of which the purchasers were themselves members. This, we think, is the only just interpretation which can be placed upon the contract when read in the light of surrounding circumstances. It appears from the petition that before the sale the Halls represented to Clark and Mockett that the assets of the old firm were of the value of $13,427.88, and that Clark and Mockett believed the representation to be true. The purchasers then made the contract in question, believing that they were securing a half interest in a firm the assets of which were worth $13,427.88. There is in the record before us not a syllable of evidence, not a circumstance of any kind, tending to show that the appellees thought they were buying an interest in the business of the Hall Stove & Range Company for one-half of its actual value. The Halls made an inventory before the sale to ascertain the value of their assets, and the fact that each of the appellees agreed to pay for a one-fourth interest in the business exactly one-fourth of its value, as shown by the inventory, is a persuasive argument in favor of the contention of appellants. The

contract recites that each of the parties has contributed an equal amount to the copartnership. The transaction having been consummated with a mutual understanding that the assets of the old firm were worth $13,427.88, it is difficult to comprehend how the conclusion was reached that each had contributed an equal amount, except on the theory that the Halls were to receive for themselves and to their individual use the money which Clark and Mockett had agreed to pay. If this was not intended, then the parties deliberately put into their contract a statement which they all, at the time, must have understood to be false.

But appellees contend that the court was justified in disregarding the contract on the ground that they were induced to execute it by false representations made to them by the Halls touching the value of the assets of the old firm. This contention is not based upon any of the numerous findings of the trial court, and we do not think the evidence would sustain such a finding had it been made. The case was evidently disposed of on the theory that the contract did not express the mutual understanding of the parties, and was, therefore, unenforceable. Eliminating from the findings of the trial court the errors resulting from its failure to construe and enforce the contract, we find the account between the parties to be as follows: Net amount paid in by the Halls after the formation of the partnership, $2,129.51; total amount paid in by Clark and Mockett, $1,419.38; paid by the Halls in excess of the amount paid by Clark and Mockett, $710.13.

Eugene Favre recovered a judgment in the county court of Lancaster county, January 4, 1894, against Clark, Mockett, and Harry J. Hall as members of the Weir Furnace Company, and on March 13, 1894, he recovered another judgment in the same court against Clark, Mockett, Harry J. Hall, and R. M. Weir. The items of indebtedness on which these judgments were based had been assumed by the new Hall Stove & Range

Company, and, seeking to have his claims satisfied out of the assets of the copartnership, Favre asked and was permitted to intervene in this action. On the final hearing he was given judgment according to the prayer of his petition. The Halls insist that this judgment is erroneous and ask that it be reversed. Their contention is that by prosecuting the cases in the county court he irrevocably elected to look to the defendants in those actions for satisfaction of his claims and lost his right of action against the members of the Hall Stove & Range Company. We do not think this position is sound or that it is supported by any of the authorities cited in appellants' brief.* It applies to cases where a party may, in vindication of his right, choose between modes of procedure bottomed on conflicting theories. The remedies pursued by Favre were not inconsistent. They were concurrent, and might be prosecuted together or in succession. They were grounded on separate contracts—distinct co-existent rights; and the attempt to enforce one of these contracts did not involve a renunciation of the other.

As to the intervener, the judgment of the district court is affirmed. The judgment in favor of Clark and Mockett is reversed and the cause remanded with direction to the district court to enter judgment in favor of appellants against Clark for $177.53 and against Mockett for a like amount.

JUDGMENT ACCORDINGLY.

*_Fowler v. Bowery Savings Bank_, 113 N. Y. 450; _Priestly v. Fernie_, 3 Hurl. & Colt. [Eng.] 977; _Scarf v. Jardine_, 7 App. Cas. [Eng.] 345; _Robb v. Vos_, 155 U. S. 13.

## FRANK E. MOORES ET AL. V. STATE OF NEBRASKA, EX REL. WILLIAM H. SHOOP ET AL.

FILED APRIL 8, 1898. No. 9724.

1. **Metropolitan Cities:** REMOVAL OF OFFICERS. By section 169 of chapter 12*a* of the Compiled Statutes of 1897 the power to appoint and remove officers and members of the fire and police departments in cities of the metropolitan class is vested in the fire and police commissioners of such cities.
2. ———: ———. No member of the fire or police department in any such city can be discharged for political reasons.
3. ———: ———. Removals deemed necessary for the proper management, discipline, or more effective service of either fire or police department must be made pursuant to such rules and regulations as may be adopted by the board of fire and police commissioners for that purpose.
4. ———: ———. Before an officer or member of either the police or fire department can be discharged for alleged misconduct, unfitness, dereliction of duty, or other cause affecting his character or standing as a public servant, charges must be filed against him and he must be afforded an opportunity to be heard in his defense.
5. ———: ———. But the right of an officer of the police force or member of the fire department to defend against formal charges, within the meaning of the law, is a right to vindicate himself from an unjust accusation; not a right to show that the public welfare requires his retention in the public service or that the revenues at the disposal of the board are adequate for the payment of his salary.
6. ———: ———. The membership of either the police or fire department may be reduced by the board on economic grounds, and in such case men may be dismissed from the service without a hearing and without an opportunity being given them to show cause against the order of dismissal.
7. **Transcript for Review.** The transcript brought to this court should contain only so much of the record of the district court as is essential to a correct understanding of the case.

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

*W. J. Connell,* for plaintiffs in error.

*McCoy & Olmsted, contra.*

SULLIVAN, J.

The relators were police officers of the city of Omaha, and being dismissed from service applied to the district court of Douglas county for a writ of mandamus to compel the respondents, as members of the board of fire and police commissioners, to reinstate them. An alternative writ was issued, an answer was filed, and a trial had, which resulted in the allowance of a peremptory writ as prayed. The respondents complain of the judgment and ask that it be reversed. The relators were dismissed from the police force under the authority of the following resolution adopted by the board: "Whereas, the fund provided by the mayor and the city council to maintain the police department is wholly insufficient to pay the salaries of the present police force, and the continuance of the force now in the employ of the city will create an overlap in an amount exceeding the sum of $3,400, which is wholly unauthorized under the laws controlling the action of the board, it therefore becomes the duty of this board to dismiss such a number of officers and patrolmen as will bring the expenditures within the limit of the funds placed at its disposal. Therefore, this board considers, finds, and declares that the proper management of said police force requires that the following officers and patrolmen be removed from their several offices, to-wit.: Sergeants, F. D. Mitchell and R. W. Chamberlain; detectives, E. H. Hemming and W. W. Cox; patrolmen, W. H. Shoop, R. A. Wilbur, James Kirk, and S. G. Hoff. It is therefore ordered that the foregoing officers and patrolmen be removed from their respective offices, to take effect upon and after September 30."

The contention of the relators is that the adoption of the foregoing resolution and the action taken in pursuance thereof were in violation of the provisions of section 169 of the city charter, which is in part as follows: "All powers and duties connected with and incident to the appointment, removal, government, and discipline of the

officers and members of the fire and police departments of the city, under such rules and regulations as may be adopted by the board of fire and police commissioners, shall be vested in and exercised by said board. * * * The chief of police and all other police officers, policemen and police matron, shall be subject to removal by the board of fire and police commissioners, under such rules and regulations as may be adopted by said board, whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service of the police department. No member or officer of the police or fire department shall be discharged for political reasons, nor shall a person be employed or taken into either of said departments for political reasons. Before a member of the police or fire department can be discharged, charges must be filed against him before the board of fire and police commissioners and a hearing had thereon, and an opportunity given such member to defend against such charges, but this provision shall not be construed to prevent peremptory suspension of such member by his superiors in case of misconduct or neglect of duty or disobedience of orders." This statute plainly vests the power to appoint, remove, and exercise a general supervision over police officers in the board of fire and police commissioners of the city. It provides that the members of the police department shall be subject to removal whenever, in the judgment of the board, such removal shall be necessary for the proper management, discipline, or more effective service of the department. It then declares that no officer shall be discharged for political reasons, nor without a formal accusation filed with the board, a hearing given, and an opportunity afforded such officer to make a defense.

The respondents having been dismissed from the service without a hearing or an opportunity to be heard, the question, and the only one presented by the record for decision, is whether the action of the board was forbid-

den by the above quoted provision of the charter. It is not claimed that the dismissal was for any reason other than the one stated in the resolution, and the respondents in their answer alleged, and at the trial offered to prove, that the motive there assigned was the true and only motive for the action taken. But relators insisted, and the trial court ruled, that they were entitled to a hearing regardless of the grounds upon which the board proceeded. We cannot accept this view of the law. These officers were not discharged within the meaning of the term as used in the statute. The places which they filled were abrogated. They were not dismissed to make room for others or because they were deemed unfit to be retained in the service. They lost their places because their places ceased to exist. The matters recited in the resolution as the basis for the action of the board can by no just interpretation be held to constitute a charge against these men. It imputes to them no official misconduct or dereliction of any kind; no unfitness or want of capacity. It touches in no way the private or official character of any of them. That the city authorities failed to make an appropriation adequate to the requirements of the police department is not a charge against officers whose services are dispensed with for want of sufficient funds with which to pay their salaries. The board may, undoubtedly, on economic grounds dismiss police officers without a hearing. The right given to an officer by the statute to a hearing and an opportunity to defend is manifestly a right to vindicate himself from an unjust accusation, and not a right to show that the revenues are sufficient to pay his salary or that the public weal requires that his place be not abolished. (*Phillips v. Mayor*, 88 N. Y. 245; *People v. Mayor of Brooklyn*, 149 N. Y. 215, 43 N. E. Rep. 554.) Speaking of the general policy of a statute like the one here considered and the cases to which it was applicable, the New York court of appeals, in the case of *Lethbridge v. Mayor*, 133 N. Y. 232, 30 N. E. Rep. 975, uses the following language: "The limitation contained in this statute

is in the interest of the public, which is best promoted by keeping in the service honest clerks who have attained experience in their employment; and besides, it is a matter of justice to the employé himself, whose summary displacement, and the appointment of another in his place, may give rise to an implication of infidelity or unskillfulness on his part, which an examination and explanation might have wholly dispelled. But no such reasons exist when a clerk is discharged from the public service because the moneys appropriated by the body charged with that subject are insufficient to keep up the clerical force to the standard which had obtained when larger appropriations were made, or when for such cause his services are no longer needed. The notice is indispensable, and an opportunity should be afforded to the clerk to make an explanation when such explanation might prevent the proposed removal. It is quite evident that the section applies only to cases where the removal is proposed to be made without just cause personal to the party, or when it is sought arbitrarily, and without adequate reason, to substitute another person in the place of the one proposed to be removed."

Counsel for relators contend that this court cannot review the judgment because the clerk of the district court failed to certify that the record contains a transcript of all the proceedings. A formidable array of cases from other jurisdictions has been marshaled in support of this contention; but the rule in this state has been settled the other way. This court has repeatedly held that the record brought here should contain only what is essential to a correct understanding of the case. (*Morgan v. Larsh*, 1 Neb. 361; *Smith v. Fife*, 2 Neb. 10; *Galley v. Galley*, 13 Neb. 200; *Hilton v. Bachman*, 24 Neb. 490.) Our conclusion is that the facts stated in the alternative writ do not show that the relators are entitled to any relief. The judgment of the district court is therefore reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

NORVAL, J., dissenting.

I dissent from the judgment just rendered herein, although heartily agreeing with the majority that a member or officer of the police department of a city of the metropolitan class cannot be discharged from the service upon political grounds; that removals essential to the proper management, discipline, or the more effective service of said department must be made pursuant to such rules and regulations as may be adopted for that purpose by the board of fire and police commissioners; and that no member of the police force of said city can properly be discharged for alleged misconduct, unfitness, dereliction of duty, or other cause affecting his character or standing as a public servant, except upon charges preferred against him, and after a notice and hearing. Conceding the soundness of the proposition enunciated by my associates that the services of a member of a police force of the city of the class to which Omaha belongs may be dispensed with, without formal charges having been made or an opportunity to be heard, where the ground of discharge is that the revenues of the city available for the support of the department are inadequate for the payment of his salary, nevertheless the action of the respondents in attempting to remove the relators from their offices, in my judgment, was unauthorized and illegal. If the discharge of these members of the police force was on economic grounds, as assumed in the majority opinion, the permanent relieving them of their positions by the board of fire and police commissioners was wholly unwarranted. Relators, at most, could have been suspended from their respective positions until such time as the funds at the disposal of the board were sufficient to meet the expenses of the department without a reduction of the force. (*Lethbridge v. Mayor*, 30 N. E. Rep. [N. Y.] 975.) The intention and purpose of the legislature were to place the police department of a city of the metropolitan class under civil service rules. This

is obvious from the mere reading of the provisions of the charter governing such a city. Section 169, chapter 12*a*, Compiled Statutes, declares that "all powers and duties connected with and incident to the appointment, removal, government and discipline of the officers and members of the fire and police departments of the city, under such rules and regulations as may be adopted by the board of fire and police commissioners, shall be vested in and exercised by said board. * * * The chief of police and all other police officers, policemen and police matron, shall be subject to removal by the board of fire and police commissioners, under such rules and regulations as may be adopted by said board, whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service of the police department. * * * It shall be the duty of said board of fire and police commissioners to adopt such rules and regulations for the guidance of the officers and men of said department, for the appointment, promotion, removal, trial, or discipline of said officers, men and matron, as said board shall consider proper and necessary." It is also enacted that appointments and removals shall not be made for political reasons. Section 187 provides for the creation of a police relief fund by assessing each member of the police force not exceeding a certain sum, to be deducted from the monthly pay of each member, to be paid into the city treasury and to be used exclusively to relieve members of the force when sick or permanently disabled, for funeral expenses, relief of their families in case of death, or for pensions for those honorably retired from the service. Other sections of the same act authorize the investment of the moneys thus raised, and section 191 provides for the pensioning of the officers and members of the police department who become bodily disabled while in the line of official duty, as well as those who have served faithfully for a specified number of years, and who have reached a certain age.

These several provisions, which are substantially like those contained in the prior act governing cities of the metropolitan class, show that merit and the effectiveness of the public service should alone control in the appointment of the officers and members of the police department, and that removal should not be effected except when essential to the proper management or discipline, or for the more effective workings or service of the department. If members or officers can be permanently discharged or removed from their positions without cause, then the provisions relating to pensions are a delusion and a snare. The court of appeals of New York, in discussing a similar question, in *People v. Hayden*, 133 N. Y. 198, used this apposite language: "The learned counsel for the defendant seems to concede in his argument that the provisions of section 42, title 11, of the charter, providing for pensions to members of the police force on account of injury, long service, or inability caused by long service or age, for the benefit of themselves or their families, constitute a privilege which attaches to the office of boiler inspector also, under the terms of the statute. If this is so, it furnishes a very strong reason why the relator should be exempt from an arbitrary dismissal without cause and at the mere will of the appointing power. The rights and privileges of receiving a pension from the government, based upon long service, carries with it the idea of permanency in the service for which the pension is ultimately granted. Such a right or privilege, whatever it may be called, cannot well exist with the power to defeat it at any time before the expiration of the necessary period of service by a discharge of the incumbent without cause and without notice or an opportunity to be heard." It is very evident that employment of the members of the regular police force can be terminated on economic grounds only by suspension from duty and the dropping of the names from the payroll until such time as the revenues are sufficient to meet the expenses of the department. The order in this

case discloses the absolute removal or discharge of relators and not merely their temporary suspension until their services should again be needed, which action was illegal and void. Doubtless, the board of fire and police commissioners may, by suitable rules and regulations, provide for the appointment of special policemen whenever an exigency therefor exists, and may also permanently dispense with their services when no longer required.

The statute, as will be observed, requires the board of fire and police commissioners to adopt suitable rules and regulations governing appointments and removals of members of the police department. All dismissals from the service, whether on the ground that the revenues at the disposal of the board with which to maintain the department are exhausted, or because of misconduct, unfitness, or dereliction of official duty, must be made in accordance with rules and regulations adopted by the board. There is no pretense in this case that any such rules or regulations have been promulgated by the board, or that the employment of relators was terminated in pursuance thereof. The board possesses limited powers, and it must affirmatively appear that it has acted within the scope of the authority conferred. Presumptions cannot be indulged in favor of the validity of its acts.

Again, it does not appear that relators were discharged from their positions on economic grounds. It is true the preamble to the order of dismissal recites that the funds at the command of the respondent were insufficient to maintain the police force then existing, but the finding upon which the order in question was based proceeds upon a different ground. It states "this board considers, finds and declares that the proper management of said police force requires that the following officers and patrolmen be removed from their several offices." This is equivalent to a declaration that relators were discharged or removed for some alleged misconduct, unfitness, or dereliction of duty; yet no charges were preferred against

them. Therefore they could not be lawfully dismissed without a notice and hearing.

It is said the relators were not discharged, but that the places which they filled were abrogated and ceased to exist. This court ought not to so declare, since the answer or return of the respondents to the alternative writ admits the removal of relators from their several offices, and the order of dismissal states "that the foregoing officers and patrolmen be removed from their respective offices." The word "removed," in the sense employed in this order, is equivalent to "discharged." There is no averment, nor evidence to establish, that the positions were abolished. For the reasons stated the judgment of the district court should not be disturbed.

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## HOME FIRE INSURANCE COMPANY v. JOHN N. PEYSON.

FILED APRIL 8, 1898. No. 7952.

1. Insurance: WAIVER OF CONDITION: FINDING OF JURY. Where, in an action on a policy of fire insurance, the jury find that certain facts are established by the evidence, it then becomes a question of law for the court to decide whether or not the facts so established warrant a conclusion that a condition of the policy was not violated.
2. ———: OCCUPANCY. The term "unoccupied," as used in a policy of fire insurance, should be given a fair and reasonable construction, such as was contemplated by the parties when the contract was made.
3. ———: ———. Evidence examined, and *held* sufficient to sustain the finding of the jury that the insured property, being a dwelling-house, was not vacant or unoccupied at the time it was destroyed by fire, and that the condition of the policy against unoccupancy had not been violated.

ERROR from the district court of Dakota county. Tried below before NORRIS, J. *Affirmed.*

*Jacob Fawcett, Byron G. Burbank,* and *William P. Warner,* for plaintiff in error.

*Daley & Jay* and *Jay & Welty, contra.*

SULLIVAN, J.

On February 26, 1892, the Home Fire Insurance Company issued to John M. Peyson a policy of fire insurance covering his dwelling-house and the household furniture therein contained. On the morning of June 27, 1894, the property was wholly destroyed by fire. The defendant refused to adjust the loss and Peyson commenced this action against it in the district court for Dakota county. A trial resulted in a verdict and judgment for the plaintiff, and the defendant brings the record to this court for review.

The company defended the action on the theory that the plaintiff had violated the following condition of the policy: "If the above mentioned buildings be or become vacant or unoccupied and so remain for more than ten days without consent indorsed hereon, then, in each and every one of the above cases, this entire policy shall be null and void." It is now strenuously insisted that the non-occupancy of the premises at the time of the fire and for six or eight months prior thereto was conclusively proven and that the trial court should have peremptorily directed a verdict in favor of the defendant. The evidence is voluminous and conflicting. We cannot present it here nor discuss it at length. It either establishes, or tends to prove the following facts: That the insured building was situated in Covington, in this state, just across the river from Sioux City, Iowa, and was the home of Peyson, who occupied it continuously with his wife from the time it was insured until October, 1893, when they both went temporarily to Sioux City to enable Mrs. Peyson to receive medical treatment from a physician of that place; that they did not again regularly occupy the insured premises, but that the plaintiff, who was engaged in business both in Sioux City and Covington, went there frequently and slept there about half the time; that he

was never away from the house more than three days at one time except when he went to Chicago or Waterloo on business; that after June 1, he slept in the house almost every day or every night; that between October, 1893, and June, 1894, plaintiff and his wife visited their home together on numerous occasions, cooked meals there, and on May 16 cleaned the house and spent the night there; that during a part of the time the Peysons were at Sioux City they had a rented room and did light housekeeping, removing for that purpose a small portion of their household furniture from Covington; that the plaintiff had no intention of abandoning the premises as his home; that it was always furnished and ready for use; that he held an office in Covington and received his mail there from two to four times a week; that Mrs. Peyson was sick and receiving medical treatment most of the time while in Sioux City; that on June 11 they gave up the room occupied by them at that place and Mrs. Peyson went to visit her folks; that during all the time in question Mr. Hall, a neighbor, had a key to the house and exercised some supervision over it. Now the jury were justified in finding, and we may assume they did find, that these facts were established by the evidence. Being so established, did they warrant the conclusion reached that the condition of the policy above quoted had not been violated? That is a question of law to be decided by the court. The term "unoccupied," as used in the policy, should be given a fair and reasonable construction. It should be given the meaning contemplated by the parties when the contract was made. While it was undoubtedly intended that the dwelling-house insured should be occupied as the customary and habitual place of abode for the plaintiff and his family, it was not expected that there would be continuous actual occupancy. A policy of fire insurance on a dwelling-house should not be construed as an instrument restraining in any manner the assured's ordinary freedom of action. In contracting for indemnity he does not consent to become

a captive in his own home. In the case of *Springfield Fire & Marine Ins. Co. v. McLimans*, 28 Neb. 846, it is said: "A party by effecting insurance upon his dwelling does not thereby impliedly agree that he will remain on guard to watch for the possible outbreak of a fire. He insures his property as a precaution against possible loss. If he is indebted, his duty to his creditors requires this; and if not in debt, his duty to his family may induce him to procure the insurance. He is not to become a prisoner on the property, however, nor to be charged with laches when, in the pursuit of his business, health, or pleasure, he temporarily leaves the property which still remains his home. The necessity of most persons for temporary absence on business or family convenience is known to every one and must have been in the contemplation of the insurer when the policy was issued. A policy of insurance is to be so construed, if possible, as to carry into effect the purpose for which the premium was paid and it was issued." In the case of *Hill v. Ohio Ins. Co.*, 99 Mich. 466, 58 N. W. Rep. 359, it was held that a dwelling-house was not unoccupied although the owner had been absent on business nearly two months at the time of the fire and had left home expecting to remain away about four months. In the case at bar there was very clearly no intention on the part of the Peysons to remove from Covington or to abandon the insured premises as their home. The absence of the family at Sioux City was temporary and not unreasonably extended; and we feel constrained to hold that the jury, on the evidence, were warranted in finding that the insured premises did not become unoccupied within the meaning of the policy. The judgment of the district court is

AFFIRMED.

## THOMAS COY V. CHRISTIAN MILLER.

FILED APRIL 8, 1898. No. 7985.

**Unauthenticated Bill of Exceptions.** A bill of exceptions cannot be considered in the supreme court unless authenticated by the clerk of the district court as part of the record.

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

*J. R. Patrick* and *B. F. Smith*, for plaintiff in error.

*Rhea Bros.*, *contra.*

SULLIVAN, J.

This action was commenced in the district court for Phelps county to recover the title and possession of certain real estate. The plaintiff had a verdict and judgment in his favor and the defendant presents the record to this court for review. The whole controversy between the parties pertains to the location of the divisional line between their adjoining lands; and the errors assigned and argued in the briefs of counsel relate to the sufficiency of the evidence to sustain the verdict. This question we cannot consider for want of a properly authenticated bill of exceptions. The certificate of the clerk of the district court attached to the record before us is as follows: "I, L. C. Huck, clerk of the district court in and for said county and state aforesaid, do hereby certify that the above and foregoing is a true copy of the petition, answer, mandate S. court, stipulation, motion, journal entry, motion and journal entry in the above entitled cause as the same is on file and on record in my office." Under repeated decisions of this court we are authorized to examine documents purporting to be bills of exceptions only when they are authenticated by the certificate of the clerk as part of the record. (*Union P. R. Co. v. Kinney*, 47 Neb. 393; *Wood Mowing & Reaping Machine Co.*

*v. Gerhold*, 47 Neb. 397; *Childerson v. Childerson*, 47 Neb. 162; *Spurck v. Dean*, 49 Neb. 66; *Merrill v. Equitable Farm & Stock Improvement Co.*, 49 Neb. 198; *Yankton, N. & S. W. R. Co. v. State*, 49 Neb. 272; *Wax v. State*, 43 Neb. 18; *Sieberling v. Fletcher*, 47 Neb. 847; *Scott v. Spencer*, 42 Neb. 632; *Romberg v. Fokken*, 47 Neb. 198.) In the case last cited it is said: "The statute requires both the transcript and the bill of exceptions to be authenticated by the certificate of the clerk of the district court, and we have no right to ignore or disregard its mandatory provisions." Without the assistance of the bill of exceptions we cannot determine whether the verdict rests on sufficient evidence, and consequently the judgment of the district court must be

AFFIRMED.

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S. B. STOUGH ET AL., APPELLANTS, V. PONCA MILL COMPANY, DEFENDANT, AND S. P. MIKESELL, INTERVENER AND APPELLEE.

FILED APRIL 8, 1898. No. 7962.

1. **Insolvent Corporations:** ASSETS. The assets of an insolvent corporation constitute a trust fund in the hands of its directors to be used by them in paying corporate debts.
2. ———: MORTGAGES. A mortgage executed by an insolvent corporation to secure a debt due from it to one of its officers or directors is illegal and void.
3. ———: ———. So also is a mortgage executed to a third person to secure a debt for the payment of which one of its officers or directors is personally bound.
4. **Corporations:** PURCHASER OF NOTE: NOTICE OF FRAUD: PRINCIPAL AND AGENT. One who buys a corporation note unlawfully issued is not an innocent purchaser where it appears on the face of the note that the payee therein named and the officer by whom it was executed is the same person.
5. ———: LOAN TO STOCKHOLDERS. Where money is borrowed by stockholders of a corporation for its benefit, and actually used in its business, the corporation is legally liable for the repayment of such money.

APPEAL from the district court of Dixon county. Heard below before ROBINSON, J. *Affirmed.*

*Gantt & Welty*, for appellants.

*A. E. Barnes* and *J. J. McCarthy, contra.*

SULLIVAN, J.

S. B. Stough, L. E. Baltzley, William Sheffel, and Peter Sheffel commenced this action in the district court of Dakota county to foreclose a mortgage executed to their assignor, S. K. Bittenbender, by the Ponca Mill Company on July 11, 1894. The mill company was a corporation engaged in the grain and milling business at Ponca from the latter part of 1886 until February 3, 1893, at which time, its mill and elevator being destroyed by fire, it ceased to do business. The mortgage in suit covered the entire property of the company and was given, pursuant to a resolution adopted by the board of directors, to secure the payment of four promissory notes for the aggregate sum of $3,400. Each of the plaintiffs is the assignee and owner of one of these notes and all joined in this action to foreclose the mortgage. The corporation was duly served with summons, but did not answer or otherwise appear in the case. On his application, and without objection on the part of the plaintiffs, S. P. Mikesell, a creditor and stockholder of the corporation, was permitted to intervene. In his answer to the petition Mikesell alleged that the mill company was insolvent on July 11, 1894, that there was no consideration for the mortgage, that it was executed by John Stough as president and S. K. Bittenbender as secretary of the corporation for the purpose of defrauding the creditors and stockholders, and that the plaintiffs were not *bona fide* purchasers of said notes. The trial in the district court resulted in favor of the intervener. There was a decree canceling the notes and mortgage and the plaintiffs have appealed the cause to this court.

Plaintiffs first insist that the insolvency of the corporation is not established by the evidence. The trial court found that the value of the assets of the mill company was $4,500 and its liabilities $8,500. This latter sum included an item of $6,000 borrowed from one W. L. Ogden by Mikesell and two other stockholders for the benefit of the company and which was actually used in its business. Plaintiffs argue that the company was not directly liable to Ogden for this sum and therefore it should not be counted as a liability. But we think it should. The company received the money and was under a legal obligation to repay it either to Mr. Ogden or to the stockholders on whose credit it was obtained. The finding of the district court that the corporation was insolvent when the mortgage to Bittenbender was executed is fully sustained by the evidence, and no other conclusion could be justified. The corporation being insolvent, the mortgage to Bittenbender cannot be upheld. He was secretary of the company and one of its directors. He and Stough, as directors, voted for the resolution authorizing the mortgage, and he and Stough, as officers of the corporation, executed the mortgage. According to Bittenbender's own evidence the mortgage was given to him in order to raise money to pay certain items of indebtedness, among which was a claim to himself of $1,600 for services, a claim of $445 to the Security Bank for which he was personally liable, and a claim of $330 to John Stough for services. The wisdom of the rule which forbids one from dealing with himself while acting as the agent of another is strikingly illustrated in this case. By the execution of the mortgage here in question the president and secretary of the mill company attempted to pay themselves nearly $2,000 for services alleged to have been rendered after the company had entirely ceased to transact business. The finding of the district court that the mortgage was authorized and executed for the purpose of defrauding creditors and stockholders of the corporation has ample evidence to

support it. Indeed, the transaction was so manifestly fraudulent that a different conclusion could not be approved. But if the corporation had been actually indebted to Bittenbender and Stough for services, they could not be permitted to give preference to their own claims. The corporation being insolvent and having ceased to prosecute the business for which it was created, its assets became a trust fund in the hands of its directors to be used by them in paying the corporate creditors. (Taylor, Private Corporations, sec. 668; *Beach v. Miller*, 130 Ill. 162; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; *Lyon-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 88 Tex. 468; *Hill v. Pioneer Lumber Co.*, 113 N. Car. 173.) That a mortgage executed by an insolvent corporation to one of its own directors is invalid was decided by this court in *Ingwersen v. Edgecombe*, 42 Neb. 740; and in *Tillson v. Downing*, 45 Neb. 549, it was held that a mortgage given by an insolvent corporation to secure a debt for which its directors are personally bound is likewise void. It follows, therefore, that Bittenbender could not enforce the mortgage. The plaintiffs, however, insist that they are in a better position, having, as they claim, purchased the notes in question before maturity for full value and without notice of antecedent equities. This contention cannot be sustained. They were not innocent purchasers because the notes on their face showed that they were executed by Bittenbender, as an officer of the corporation, to himself. This fact made it the duty of the plaintiffs to inquire and ascertain whether the paper was lawfully issued. (*Third Nat. Bank v. Marine Lumber Co.*, 44 Minn. 65, 46 N. W. Rep. 145.) Besides the district court found—and its finding is fully warranted by the evidence—that the plaintiffs had actual knowledge that the notes and mortgage were executed without consideration and for the purpose of cheating and defrauding the creditors and stockholders of the corporation. There is no error in the record. The judgment of the district court is right and is

AFFIRMED.

GAIL L. BARNES, APPELLEE, V. VICTORIA GEORGE, APPELLANT, ET AL.

FILED APRIL 8, 1898. No. 7931.

**Appeal:** PARTIES: EVIDENCE. There is presented no question on this appeal but the sufficiency of the evidence to sustain the judgment of the district court as to a single one of three defendants, and as the rights of the sole appellant are dependent upon those of the defendants who have not appealed, the judgment is affirmed.

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

*J. L. Caldwell*, for appellant.

*F. M. Hall, contra.*

RYAN, C.

In the petition filed in the district court of Lancaster county by Gail L. Barnes there were joined as defendants Victoria George, William Elwood, and May E. Elwood. There was a decree as prayed and a brief has been filed by Victoria George alone. The object of plaintiff's petition was to have subjected to the payment of a judgment in her favor, against Victoria George, certain land, which, before the rendition of said judgment, had been fraudulently conveyed by Victoria George to her co-defendants. Incidentally it was alleged that the grantees of Victoria George, when they received the conveyance just alluded to, had executed to her a mortgage on the property conveyed, and that both the conveyance and the mortgage were made for the purpose of defrauding the creditors of Victoria George, of whom plaintiff was one. There was a prayer that Victoria George might be enjoined from disposing of said mortgage and for general equitable relief. On the trial it was disclosed that William and May E. Elwood were the parents of Victoria George. One J. W. George, a brother-in-law of Victoria

George, was the only witness who testified on behalf of defendants, and his testimony went no further than the statement that the proceeds of the mortgage in question had been used by Victoria George in paying her debts. There was no testimony as to the history of the conveyance of the real property by her, neither was there any evidence as to the purpose for which such conveyance was made. There was no evidence explanatory of the giving of the mortgage to her by her parents. By failing to ask relief as appellants the grantees have relieved us of the necessity of inquiring into the *bona fides* of the conveyance by which they held title, and with regard to the regularity of the proceedings by which such title was decreed to be held subject to the rights of plaintiff. The relief decreed against Victoria George was confined to directing a sale of the real property which she had previously conveyed and was incidental to that decreed as against her parents. The district court, we must therefore assume, was justified in granting against Victoria George the relief which was granted, and its judgment in that regard is

AFFIRMED.

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LAURA S. FORBES, APPELLEE, V. EDWARD F. MOREARTY ET AL, APPELLANTS.

FILED APRIL 8, 1898. No. 8006.

1. **Review**: FAILURE TO FILE TRANSCRIPT. The filing of a transcript of a judgment in the supreme court later than one year after its rendition confers no jurisdiction to enter a judgment in said appellate court.
2. ——: TRANSCRIPT. The supreme court has no jurisdiction to review an order not embodied in a transcript certified by the clerk of the district court.

APPEAL from the district court of Douglas county. Heard below before WALTON, J. *Appeal dismissed.*

*Edward F. Morearty* and *Albert Swartzlander*, for appellants.

*Wright & Thomas, contra.*

RYAN, C.

In the record in this case we find the pleadings, a decree of foreclosure, and a supersedeas bond, but nothing else purporting to be a part of a transcript of the proceedings in the district court of Douglas county. There is likewise a bill of exceptions in which there are embodied a motion for an order for a writ of assistance, an affidavit in support of said motion, and certain orders made with respect to said motion. There is no certificate of the clerk of the district court identifying such motion and orders as a part of the record of the proceedings of said court. In appellant's brief complaint is made of the order granting a writ of assistance and of no other order or judgment.

It is required in effect, by the provisions of section 675, Code of Civil Procedure, that to perfect his appeal a party appealing from a final order shall, *inter alia*, procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the district court. In *Moore v. Waterman*, 40 Neb. 498, a compliance with the above requirement was held essential to confer jurisdiction upon this court. (See also *Hoagland v. Van Etten*, 23 Neb. 462; *Omaha Loan & Trust Co. v. Ayer*, 38 Neb. 891; *Record v. Butters*, 42 Neb. 786; *School District v. Cooper*, 44 Neb. 714; *Martin v. Fillmore County*, 44 Neb. 719; *McDonald v. Grabow*, 46 Neb. 406; *Otis v. Butters*, 46 Neb. 492; *Felber v. Gooding*, 47 Neb. 38; *Romberg v. Fokken*, 47 Neb. 198; *Union P. R. Co. v. Kinney*, 47 Neb. 393.) The decree in this case was entered in the district court November 28, 1893, and a transcript thereof was not filed in this court until September 21, 1895. This court is, therefore, without

jurisdiction to enter a judgment on this branch of the case, and this appeal is accordingly

DISMISSED.

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JOHN REGIER V. CRAVER, STEELE & AUSTIN AND SKANDIA PLOW COMPANY.

FILED APRIL 8, 1898. No. 7996.

1. **Factors and Brokers:** SALES. A sale, by a factor, of goods of his principal as his own and for his own sole benefit confers no title upon the vendee, as against the rights of the real owner.
2. **Conditional Sales:** RIGHTS OF SUBSEQUENT PURCHASER. A conditional vendor of goods, within the purview of section 26, chapter 32, Compiled Statutes, when there has been no compliance with the requirements of said section as to recording the conditional agreement, does not retain such an interest in the subject of said agreement that he can maintain replevin against one who, without knowledge of such conditions, has purchased the goods from the conditional vendee, as such, in possession thereof.

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

*George B. France*, for plaintiff in error.

*C. P. Halligan, contra.*

RYAN, C.

In the record of this case we find that the partnership firm of Craver, Steele & Austin filed a petition in the district court of York county whereby it claimed the possession, as against John Regier, of a certain spring wagon and an extension rubber top, the possession of which, as plaintiff alleged, the said defendant wrongfully detained from it. To this petition, by answer, there was a general denial. At some time not disclosed it seems that the Skandia Plow Company, a corporation, filed its petition in the same court claiming the right to

recover the possession of three plows and a lister drill, wrongfully withheld, as it alleged, by the said John Regier. These causes seem to have been consolidated, or, perhaps, they were tried as though the same questions were involved in both. There was a separate verdict in each instance in favor of plaintiff, and Regier presents for review by his petition in error the judgments based thereon.

The foundation of the claim made by Craver, Steele & Austin was a written contract entered into on August 27, 1891, between itself and Gerhard Regier for sales, on commission, of wagons and buggies to be consigned from the former to the latter. While Gerhard Regier, for the purposes above indicated, was in possession of the property afterwards replevied, he transferred it, as his own, to his brother, John Regier. The plows, the corn planter and drill, came into the possession of Gerhard Regier in compliance with his written order to the Skandia Plow Company of date January 9, 1891. This order was on a printed form, except as to certain dates and the rate of discount on goods other than those where net prices were named. In this order the prices were stated to be at list prices thereto annexed, less a discount of twenty-five per cent on repairs and extras and thirty-five per cent on all other goods where net prices were named. These prices were payable by notes due not later than October 1, 1891. All other goods sold for spring trade were payable by notes due July 1, 1891. Goods sold for fall trade were payable by notes due November 1, 1891. These notes were to be given on receipt of goods, payable to the order of the Skandia Plow Company, with exchange on Chicago or New York. There were other provisions embraced in the order which need not be specially noticed, for they tend only to show further that there was no bailment but rather a sale of the goods ordered. This order contained the following provision: "It is also expressly agreed that the right and ownership on all goods shipped under this contract, or their pro-

ceeds, shall be vested in the seller and subject to its order until full payment shall be made for said goods."

The plaintiff in each case predicated his right to maintain a replevin action on a written contract made with Gerhard Regier. In each instance Gerhard Regier had obtained possession in pursuance of the terms of a written contract, and while so in possession had attempted to transfer the title, and had transferred possession, to John Regier. There was no contradiction of the testimony of John Regier that he purchased and paid for the replevied goods without any knowledge of the contract between either plaintiff and Gerhard Regier. There were introduced in evidence five chattel mortgages made by John Regier, dated respectively between July 20, 1890, and November 16, 1891. Of these, three were shown by his undisputed testimony to have been paid though not satisfied of record at the time of the trial. There was shown to have been some disagreement as to what was due on the claim secured by another of these mortgages; and as to the fifth, given by Isaac and John Regier, the latter testified without contradiction that it was a matter to be paid by Isaac Regier. The consideration paid to Gerhard Regier by John Regier, according to the testimony of the latter, was $536 in cash and $1,000 by his own note. If these actions had been brought on by reason of a levy of process procured to be issued and levied on the property in dispute for the collection of the debt owing from Gerhard Regier to plaintiffs, the evidence as to the existence of chattel mortgages made by John Regier might have had a much more direct bearing than in these cases. Each of the present actions was brought by a plaintiff for the recovery of the possession of certain described property of which it claimed to be the owner. Of the contracts, that to which Craver, Steele & Austin was a party was, in so far as the facts of this case herein involved are concerned, a contract of employment. In it Gerhard Regier was described as an agent of Craver, Steele & Austin, and his duties as such agent were to

care for and sell the goods as those of Craver, Steele & Austin, and, for these services he was entitled to a specific commission on such sales as might be made by him. The contract between Gerhard Regier and the Skandia Plow Company we have already described, and it evidences a conditional sale within the provisions of section 26, chapter 32, Compiled Statutes. The provisions of the said section to which we specially refer are as follows: "That no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any purchaser * * * of the vendee * * * in actual possession, obtained in pursuance of such sale, * * * without notice, unless the same be in writing, signed by the vendee, * * * and a copy thereof filed in the office of the clerk of the county within which such vendee * * * resides; said copy shall have attached thereto an affidavit of such vendor * * * or his agent or attorney, which shall set forth the names of the vendor and vendee * * * or description of the property transferred and the full and true interest of the vendor * * * therein."

The tests to be applied in determining whether a contract is one of mere bailment or is a conditional sale within the purview of the above quoted language were very fully considered in *McClelland v. Scroggin*, 35 Neb. 536. The same subject was again under consideration in *National Cordage Co. v. Sims*, 44 Neb. 148, and, guided by the principles laid down in these two cases, we reach the conclusion that the contract with the Skandia Plow Company was a conditional sale, while that with Craver, Steele & Austin disclosed a mere bailment. In the latter case therefore the sale to John Regier failed to vest him with a title paramount to the rights of Craver, Steele & Austin. The judgment in favor of that firm could not have been other than it was, and accordingly it is affirmed. If the Skandia Plow Company's attitude as a litigant had been that of a creditor of Gerhard Regier,

seeking by appropriate process against his property to enforce collection of a debt due from him, we should feel disinclined to interfere with the verdict of a jury on a question of fraud, even though the evidence on which such jury acted might seem somewhat less than satisfactory to us. But in this case the Skandia Plow Company founded its rights upon an agreement of a class, with respect to which, to be valid, the statute required the performance of certain conditions. None of these conditions have ever been complied with, and the testimony of John Regier shows, without contradiction, that he purchased the property in dispute from his brother, who was in possession thereof by virtue of a conditional sale to him by the Skandia Plow Company, and that he then knew nothing of the said conditional contract. In such case the statute provided that such a contract as that between that company and Gerhard Regier should not be valid. The Skandia Plow Company could predicate no rights, as against John Regier, upon its written conditional contract with his brother, and the verdict of the jury in its favor was, therefore, unsupported by the evidence. It follows that the judgment in favor of the Skandia Plow Company must be reversed, while, as already indicated, the judgment in favor of Craver, Steele & Austin must be affirmed.

JUDGMENT ACCORDINGLY.

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## J. C. HAYES V. JOSEPH SLOBODNY.

FILED APRIL 8, 1898. No. 7938.

**Replevin:** AFFIDAVIT: VERDICT: VARIANCE. Where, by his affidavit in an action of replevin, plaintiff claimed merely the right of present possession of a chattel as the holder of a mortgage thereon, and by the verdict upon which judgment was rendered it was found that, at the commencement of the action, the right of property and right of possession were in plaintiff, *held*, that there exists such a material variance between plaintiff's claimed rights and those found in his favor by the jury that a judgment rendered on such finding cannot be sustained.

ERROR from the district court of Valley county. Tried below before KENDALL, J. *Reversed.*

*Clements Bros.* and *Herman Westover*, for plaintiff in error.

*A. Norman* and *T. L. Hall, contra.*

RYAN, C.

In the county court of Valley county plaintiff filed his replevin affidavit alleging that he had a special property in a dark bay mare; that said special ownership and property were by virtue of a chattel mortgage which had been executed September 7, 1892, by Alexander Osantowsky; that said property was wrongfully detained by the defendant Hayes, and that it had not been taken in execution or on any order or judgment against plaintiff, or for the payment of any tax, fine, or amercement assessed against plaintiff or by virtue of any order of delivery issued under chapter 11, of title 30 of the Revised Statutes of Nebraska, or on any mesne or final process issued against said plaintiff. After issues had been duly joined there was a trial, resulting in a verdict in the following form: "We, the jury, duly sworn and impaneled in the above entitled cause, do find that the right of property and right of possession of said property when this action was commenced was in the plaintiff and assess his damages in the premises at the sum of one cent." Following this there was a simple judgment in favor of plaintiff for the sum of one cent and costs. Error proceeding, for the reversal of this judgment, was prosecuted to the district court of said county, wherein the judgment of the county court was affirmed. By a petition in error in this court there is sought a reversal of the judgment of the district court. In his affidavit plaintiff in the county court asserted that he had merely a special interest in the subject-matter of the action and that this

special interest existed by virtue of a chattel mortgage. At the time of the trial the replevied property was in his possession, and with reference to that property there was no finding as to the value of his possession as in such cases required by the provisions of section 191*a*, Code of Civil Procedure, but the finding in his favor was of general ownership and an unlimited right of possession. In *Musser v. King*, 40 Neb. 892, it was held where one, by a replevin action, as the owner of certain property, had obtained possession thereof, that he could not sustain his claim of ownership by proof that he held a mortgage on the property. This doctrine was reaffirmed and enforced in *Randall v. Persons*, 42 Neb. 607, *Sharp v. Johnson*, 44 Neb. 165, *Camp v. Pollock*, 45 Neb. 771, *Strahle v. Bank*, 47 Neb. 319, and in *Garber v. Palmer*, 47 Neb. 704. In *Griffing v. Curtis*, 50 Neb. 334, it was held that in replevin, where plaintiff bases his right of possession of property upon a special ownership therein, he must in his petition plead the facts which create such special ownership, else the pleading will be fatally defective. These cases proceed upon the theory that a mortgagee has but a lien on the mortgaged property and that, by virtue of such lien, he cannot be permitted to assert the unqualified rights of a present owner. The case under consideration is within the reason of this rule. The statute requires the finding of the value of the possession for a substantial reason, and that is, that when the lien of the mortgage has been satisfied such mortgagee shall not be entitled to any further rights of control over the replevied property. The case of *Gould v. Armagost*, 46 Neb. 897, tends to illustrate the distinction between absolute ownership of chattels and the rights of a mortgagee with respect thereto, for in that case it was held that an unconditional tender by a purchaser of the mortgaged property at an execution sale, of the entire amount secured by such mortgage when such tender was duly made after the maturity of the debt secured, operated to divest the lien of the mortgage. In this case the verdict

was not responsive to the issues joined and, as we have seen, the variance was in a substantial respect. The judgment of the district court is, therefore,

REVERSED.

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JOSEPH S. SCHOTT, APPELLEE, V. THOMAS J. MACHAMER ET AL., APPELLANTS.

FILED APRIL 8, 1898. No. 7992.

1. **Fraudulent Conveyances:** RELATIVES: EVIDENCE. When the effect of a conveyance from one relative to another is to deprive the vendor's creditors of their just dues, the transaction will be closely scrutinized.
2. ———: HUSBAND AND WIFE: CREDITORS: BURDEN OF PROOF. In a suit between a wife and a creditor of her husband concerning property transferred to her by him after the contracting of indebtedness by him the burden of proof is on the wife to establish the *bona fides* of the transfer of the property to her.
3. **Creditors' Bill:** JUDICIAL SALE: TITLE OF PURCHASER. In an equitable action to subject certain real property claimed by the wife to the payment of certain judgments against her husband the decree found for plaintiff, ascertained and established the amounts due on the judgments, and directed the sheriff to sell the real property as upon execution. *Held*, That a sale under the decree, rather than upon the executions, vested title in the purchaser.

APPEAL from the district court of Hamilton county. Heard below before BATES, J. *Affirmed.*

*Jerome H. Smith* and *E. J. Hainer*, for appellants.

*Howard M. Kellogg, contra.*

RYAN, C.

Joseph S. Schott recovered two judgments against Thomas J. Machamer in the county court of Hamilton county. Transcripts of these judgments were filed in the office of the clerk of the district court of said county

and entered on the judgment record of said district court, wherein, subsequently, proceedings were commenced to subject to the payment of said judgments the southwest quarter of the southeast quarter of section 2, township 10 north, range 6 west, sixth principal meridian. When the equitable action was tried Mary E. Machamer, the wife of Thomas J. Machamer, held the title to said forty-acre tract, and by the judgment of the district court this land was subjected to the payment of the above judgments.

The indebtedness evidenced by the above two judgments was incurred by Thomas J. Machamer purchasing from Joseph S. Schott certain merchandise for the retail trade which Mr. Machamer was carrying on in Aurora. A portion of these goods, and such others as composed his stock in trade, were, by Thomas J. Machamer, exchanged for the forty-acre tract above described. The deed which vested the title to this land in Thomas J. Machamer was dated September 4, 1893. Thomas J. Machamer and his wife, Mary E. Machamer, by deed of date September 21, 1893, conveyed said land to Aaron E. Machamer, brother of Thomas, by whom and his wife there was executed a deed by which the title was vested in the aforesaid Mary E. Machamer, September 28, 1893. On the trial the efforts of Mrs. Machamer were directed to endeavoring to prove that the intention of herself and her husband was to have the deed in the first instance made directly to her and that when the failure to do so was realized she and her husband, as they both testified, conveyed to Aaron E. Machamer, for the purpose of having the title afterward vested in Mary E. Machamer. There was evidence of herself and her husband that while the marriage relation existed between them she had conducted a hotel and a restaurant business and so had acquired considerable means, which were invested in real property in the joint names of Thomas J. and Mary E. Machamer and that, when this was sold a part of the proceeds, in the form of cash, was received by Mr.

Machamer for her use and benefit. This money was the consideration for the conveyance of the property involved in this case to Mrs. Machamer, according to her own testimony and that of her husband.

In this state the question of fraudulent intent is always a question of fact and not of law. (Compiled Statutes, ch. 32, sec. 20; *Campbell v. Bank*, 49 Neb. 143; *Goldsmith v. Erickson*, 48 Neb. 48.) A married woman is entitled to receive payment in property, or otherwise, of a debt due her from her husband. While this is true, it is just as true that the burden is on the wife to establish the *bona fides* of a transfer of property from her husband to herself, when, in a suit with one of her husband's creditors, the matter litigated is the respective rights of the litigants with respect to such property. (*Melick v. Varney*, 41 Neb. 105; *Brownell v. Stoddard*, 42 Neb. 177.) In *Steinkraus v. Korth*, 44 Neb. 777, it was held that where property is conveyed from one relative to another as a payment of a past due indebtedness and thereby creditors of the party making the conveyance are deprived of their just dues and claims the transaction will be scrutinized very closely and its *bona fides* must be clearly established. This proposition was likewise enforced in *Plummer v. Rummel*, 26 Neb. 147. It would subserve no useful purpose to recapitulate the evidence in this case. The circumstances above recited were such that under the rules stated the burden of the proof was on the wife to establish the *bona fides* of the transfers under which she claimed title, and we cannot say that the district court erred in its conclusion that the proofs failed to meet this requirement.

The sale of the property was made by the sheriff under the decree which was herein entered. In this decree there were general findings in favor of plaintiff and that the deeds whereby the title to the property in controversy was vested in Mary E. Machamer were executed with intent to defraud, hinder, and delay the creditors of Thomas J. Machamer. There was also a finding of how much

was due plaintiff from Thomas J. Machamer on the two judgments above referred to as having been rendered against him in the county court. This was followed by the following language: "It is therefore considered by the court that said deeds hereinbefore referred to, and each of them, be, and the same are hereby, vacated, set aside, and annulled, and that said land be subjected to the payment of the judgments set out in the petition, and the sheriff of said Hamilton county is hereby directed to proceed as upon execution to sell said land and to bring the proceeds into court to await its further orders." It may be conceded that when the obstruction to the sale of the land on executions issued on the judgments rendered by the county court had been removed, a proper practice would have been to sell on these executions. In the case under consideration the district court had jurisdiction of the parties and of the subject-matter of the action, and, having such jurisdiction, ascertained and declared the amounts for the satisfaction of which the sale should be made and required the sheriff to conduct the sale as on execution. A sale conducted under this decree was effective to confer title on a purchaser thereat and the district court properly so ruled on the motion for confirmation. The judgment of the district court is

AFFIRMED.

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## H. A. MERRILL, APPELLANT, V. JOANNA C. WRIGHT ET AL., APPELLEES.

FILED APRIL 8, 1898. No. 7970.

**Foreclosure of Tax Liens**: PETITION: AMENDMENT: STATUTE OF LIMITATIONS. Where the original petition for the foreclosure of tax liens upon property purchased at sales for taxes was defective merely in the omission of averments of the levy and assessment of such taxes, the filing of an amended petition whereby such averments were supplied, *held*, not to be the commencement of the action in such sense as, meanwhile, to permit the running of the statute of limitations.

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

*Henry W. Pennock*, for appellant.

*Guy R. C. Read, William D. Beckett*, and *Andrew Bevins, contra.*

RYAN, C.

There has already been an opinion filed in this case in which the general nature of the action was fully described. There was a reversal of the judgment in favor of Merrill because in the petition there was neither averment nor proof of the existence of a levy or assessment of the taxes for the amount of which Merrill had obtained judgment. (*Merrill v. Wright*, 41 Neb. 351.) After the cause had been remanded to the district court of Douglas county for further proceedings leave was given to amend the petition, and on December 6, 1894, there was filed an amended petition in which were contained averments of a due levy and assessment of taxes. To this amended petition the defendants answered that the filing of this amended petition was the commencement of the action, and that as the sales, upon which plaintiff founded the right to a foreclosure of tax liens, had taken place more than four years before such alleged commencement of the action plaintiff's rights were barred by the statute of limitations. It seems that after issues had been joined subsequent to the filing of the amended petition the cause came on for trial and that an objection to the introduction of evidence, or to something else of the nature of which the record is silent, but by which was invoked the statute of limitations, was sustained and the action was dismissed by the court. The plaintiff alone has appealed, and we have so far, and hereinafter shall, confine ourselves strictly to a consideration of the complaints of that litigant.

It is insisted by appellees that this court, in *Merrill v.*

*Wright, supra,* held, in effect, that the petition was a nullity. We do not so understand the opinion. The only proof offered by plaintiff in the district court to sustain the right to foreclose the tax liens acquired by purchase at tax sales was the treasurer's certificate of purchase. The averments of the petition were consistent with this theory, and it was held that, in view of the failure to prove, and of the omission to plead, the levy and the assessment of the taxes of which the lien was sought to be foreclosed, the judgment could not be sustained. The action, however, was for the same relief prayed in the amended petition, but in the original petition sufficient facts to entitle plaintiff to that relief were not stated. The argument of the appellees is, however, that because of this failure the petition must be treated as though it was an absolute nullity; in other words, as though no petition had ever been filed. From this principle and its attempted application it would of necessity result that no amendment could be made upon a general demurrer being sustained to a petition. The rules of the Code of Civil Procedure are not thus inflexible. Section 144 of this Code provides that amendments may be made of any pleading, *inter alia,* by inserting other allegations material to the case, and by section 145 it is required that the court, in every stage of an action, shall disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party. We therefore conclude that the bar of the statute of limitations was not well pleaded, and the judgment of the district court dismissing the action of said appellant is accordingly

REVERSED.

## H. C. MCKIBBEN ET AL. V. A. S. HARRIS.

FILED APRIL 8, 1898. No. 7977.

1. **Justice of the Peace: BILL OF PARTICULARS: REVIEW.** In error proceedings it will not be assumed that no bill of particulars had been filed with a justice of the peace before he rendered the judgment assailed, when, before said judgment, no such question was raised.
2. ———: INDORSEMENT ON SUMMONS: REVIEW. In error proceedings prosecuted by a defendant to procure the reversal of a judgment rendered against him on default, by a justice of the peace, prejudicial error will not be presumed from the mere fact that the indorsement on the summons was that judgment in case of default would be for a certain sum with interest, when on the face of the summons there was a recitation that interest was claimed at ten per cent per annum, this rate with the principal justifying a judgment in excess of that actually rendered.

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

*E. A. Cook*, for plaintiffs in error.

*Warrington & Stewart, contra.*

RYAN, C.

This proceeding is for the review of alleged errors in the rendition of a judgment against plaintiffs in error by a justice of the peace of Dawson county. It is first urged that his transcript fails to show that the justice of the peace had before him any evidence when he rendered judgment. The recitations of the docket entry with reference to this branch of the case were as follows: "December 16, 1893. Defendants having failed to appear at 1 o'clock P. M., and, for one hour thereafter, having made default, and this cause coming up for hearing on plaintiff's evidence, I find for the plaintiff." We cannot assume that there was no evidence in the face of this recitation to the contrary. It is, however, insisted that this recitation does not disclose, and that by no other

means was it disclosed, that there was on file, or in the possession of the justice of the peace, a bill of particulars or anything that should be assumed to be a sufficient substitute therefor. If there was anything in this proposition it should have been urged before judgment. By the service of summons in a case duly docketed the justice of the peace acquired jurisdiction of the persons of the defendants, and any irregularity in the exercise of that jurisdiction, to be available in error proceedings, should, in the proper time, have been challenged.

It is insisted that the judgment was for a larger sum than the indorsement on the summons showed that judgment would be taken for, in case of a default. On the face of the summons there were recitations that the suit was for the recovery of judgment for $110.60, evidenced by a promissory note, duly described, with interest at ten per cent per annum from March 4, 1893. The indorsement on the summons was as follows: "If the defendant fail to appear, the plaintiff will take judgment for the sum of $110.60, together with interest thereon from the 3d day of March, 1893." The judgment was for $118.48, which is less than plaintiff was entitled to if the interest had been reckoned at ten per cent per annum. It was in excess of the principal and interest thereon reckoned at seven per cent. In this proceeding it should not be assumed that there was prejudicial error in resorting to the express recitations on the face of the summons, which defined the rate of interest demanded, where the indorsement did not assume to do more than state that interest should be included in the judgment if rendered by default. The judgment of the district court of Dawson county, which was in consonance with these views, is, therefore,

AFFIRMED.

## OMAHA FIRE INSURANCE COMPANY V. ANNA SINNOTT.

FILED APRIL 8, 1898. No. 7953.

**Insurance:** UNOCCUPIED HOUSE: EVIDENCE: REVIEW. Where a tenant had only removed a portion of his furniture from an insured tenement house at the time of its destruction by fire, the finding of a jury adverse to the contention of the insurance company that at the time of the loss the house was unoccupied, in violation of the terms of the policy, will not be disturbed as being without sufficient evidence to sustain it.

ERROR from the district court of Dakota county. Tried below before NORRIS, J. *Affirmed.*

*Jacob Fawcett* and *William P. Warner*, for plaintiff in error.

*J. J. McCarthy, contra.*

RYAN, C.

There was a judgment in the district court of Dakota county for the value of a house destroyed by fire, on which house the defendant in error held a policy of insurance, issued by the plaintiff in error. In the policy, as well as in the original petition, the lots on which the insured house stood were described as lots 1 and 2, block 12, in Jackson. The correct description was lots 1 and 2, block 12, Hedge's Addition to Jackson. After issues had been joined, the plaintiff in the district court obtained leave to file an amendment to her petition. In this amendment she recited that, in the policy, the house had been described as standing on lots 1 and 2, block 12, Jackson, by mistake and inadvertence, and that the true description, and the one intended, was lots 1 and 2, block 12, Hedge's Addition to the town of Jackson. There was in the amendment a prayer for the reformation of the policy so as to express the real intention of the parties thereto. To this amendment there was no an-

swer, and the district court properly treated the averments thereof as being uncontradicted.

The chief complaint of the insurance company is that there was a warranty by the insured that her house was, and should continue to be, occupied, and that this warranty was broken by reason of the house becoming unoccupied before, and continuing to be vacant until, the fire. The evidence most favorable to this contention was, in effect, that while the policy was in force, to-wit, about July 11, 1894, the owner of the insured property notified her tenant to vacate it; that immediately thereafter the tenant began to remove his furniture to another house, to which he went with his family. When the fire took place, however, he had not yet removed his cook-stove and some other personal property. Under these conditions we cannot say that the jury improperly concluded, from a consideration of the evidence, that the house was not unoccupied at the time of the fire. The testimony was that the loss was total, and the provisions of the valued policy law were, therefore, held properly applicable. The judgment of the district court is, therefore,

AFFIRMED.

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GEORGE WARREN SMITH v. FRANK B. KENNARD.

FILED APRIL 8, 1898. No. 7855.

1. **Rulings on Evidence:** ASSIGNMENTS OF ERROR. The action of a district court in admitting or excluding evidence on the trial cannot be reviewed by the supreme court unless such action is specifically assigned here in the petition in error.

2. **Instructions:** EXCEPTIONS. The action of a district court in giving or refusing instructions must be excepted to at the time or the exception will be unavailing.

3. ———: ———: TIME. Certain instructions were given and refused at the trial. Two days afterward exceptions were noted to the ruling of the court. *Held*, That the exceptions came too late.

4. **Party Wall:** COST OF CONSTRUCTION. The substance of the answer of the defendant in error set out in the opinion and *held* to state a defense.

5. **Payment.** Facts in reference to a payment made reviewed, and the payment *held* a voluntary one.

6. **Party Wall:** CONSTRUCTION OF CONTRACT. Provisions of a party-wall contract and a lease considered and the rights and liabilities of the parties thereunder determined.

7. ———. Evidence examined, and *held* to sustain the finding of the jury.

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

*Kennedy, Gilbert & Anderson,* for plaintiff in error.

*Kennedy & Learned, contra.*

RAGAN, C.

In 1885 William E. Clarke owned the east one-third of lot 6, in block 158, in the city of Omaha. Immediately east of this lot was lot 7, in said block, owned by George Warren Smith. On this date Clarke was about to erect a building upon his lot and a contract in writing was then made between Clarke and Smith and placed of record in the office of the register of deeds of Douglas county. This contract provided that Clarke, in constructing the east wall of his building, might place one-half of said wall on Smith's lot, and that such wall, when constructed, should be and remain a party wall for the use of said contracting parties, their heirs and assigns. The contract also provided that in case Smith, his heirs or assigns, should build upon said lot 7, he should be at liberty to use said wall as the west wall of the building constructed, and in case he did so, he should pay to Clarke a certain proportion of the value or cost of the part of the party wall used. After the execution of this contract Clarke constructed a building on his lot, one-half, if not more, of the east wall of which stood on

Smith's lot. In 1889 Smith leased his lot to Frank B. Kennard for a term of fifteen years. This lease was in writing and was made "subject to one or more party-wall contracts made, or which may be made, by the lessor at any time during the continuance of this indenture, the lessor's covenants and agreements in which party-wall contracts the lessee hereby assumes and agrees to perform." By the terms of his lease Kennard had the right to construct a building upon the leased lot, and at the lease's expiration the right to remove from the lot any building constructed thereon, unless the lessor should exercise his election to purchase the building at a value then fixed thereon by arbitration. Kennard took possession of this lot some time in May, 1889, and during that year erected thereon a brick building, and in so doing he used a part of this party wall. Subsequently Clarke demanded of Kennard pay for the portion of the party wall used by him. Kennard refused to make this payment, and Clarke demanded it of Smith, who paid the value of the party wall used by his tenant, and in the district court of Douglas county brought this action against Kennard to recover the amount paid to Clarke. The trial resulted in a verdict and judgment in favor of Kennard, and Smith has filed a petition in error in this court to review the judgment.

1. Complaint is made here of the action of the district court in the admission and exclusion of certain evidence on the trial. We cannot review these complaints, because they are not specifically assigned in the petition in error.

2. Other complaints relate to the action of the district court in giving and refusing to give certain instructions. We cannot review these complaints because plaintiff in error took no exceptions to the action of the court in giving and refusing to give the instructions complained of at the time. The case was submitted to the jury on June 27, and the record discloses that the plaintiff in error filed exceptions to the instructions com-

plained of on the 30th. This was too late. The action of a court in giving or refusing an instruction must be excepted to at the time the instruction is given or refused, or the action of the court cannot be reviewed.

3. The only defense of Kennard to this action which the district court submitted to the jury was the following: Kennard claimed that when he went into possession of the leased lot for the purpose of erecting a building thereon he discovered that more than one-half of the said party wall stood upon the lot which he had leased, thus depriving him of the use and occupancy of a part of the lot; that he thereupon notified Smith and Clarke that more than one-half of the party wall stood upon Smith's lot and that he, Kennard, would not connect his building with the party wall, but would erect an independent wall of his own, unless Clarke would give him an agreement in writing that at the expiration of the lease he, Clarke, would pay to him, Kennard, a specified sum of money,—being the amount it would cost, or a part of the amount it would cost, Kennard to connect his building with the party wall,—and that Clarke would also pay a certain portion of all taxes assessed against the leased lot during the existence of the lease; that Clarke then and there agreed that if Kennard would connect his building with the party wall he, Clarke, at the expiration of Kennard's lease, would pay to him the stated sum of money estimated as the cost of connecting Kennard's building with the party wall and would during the exstence of the lease pay a specified portion of all taxes assessed against the leased lot; that relying upon this agreement he erected his building and connected it with the party wall; that he reduced to writing the contract between himself and Clarke and presented it to Clarke for his signature; that he retained it for some time, and finally refused to sign it. It is now insisted that this answer of Kennard's did not state a defense. We think it did. Kennard, by accepting a lease of this property from Smith subject to the party-wall contract

and assuming the provisions of that contract, stood in precisely the same relation to Clarke as Smith himself did so far as the party-wall contract was concerned. But the party-wall contract did not compel Smith himself to use the party wall if he built upon his lot, but only obligated him to pay for a portion of the value of the party wall in case he used it. Kennard, as the lessee of Smith, was not obliged to connect his building with the party wall. If he did connect it with the party wall, without some special agreement with Clarke in reference thereto, then he would be bound to pay for the use of such wall. Nothing in the party-wall contract or lease forbade Kennard from making with Clarke the contract pleaded as a defense to this action. Clarke, had he seen fit, might by an agreement with Kennard have permitted him to connect with the party wall gratis, and, since Kennard did not connect with the party wall in pursuance of the provisions of the party wall contract, but by virtue of a separate and independent contract between him and Clarke, Smith was not liable to Clarke for the use made of the party wall by Kennard, and his payment to Clarke of the sum sued for here was a voluntary one on his part.

4. It is somewhat strenuously insisted that the finding of the jury sustaining this defense of Kennard is unsupported by sufficient evidence. We confess that had we been the triers of the issues of fact we should have found that the contract pleaded was never made; but, after as careful an examination of this record as we are capable of making, we are constrained to say that there is sufficient evidence in the record to sustain the jury's finding that it was made, and we may not substitute our opinion for that of the jury. It follows that the judgment of the district court must be, and is,

AFFIRMED.

## MCCORMICK HARVESTING MACHINE COMPANY V. CORNELIUS REGIER.

FILED APRIL 8, 1898. No. 7993.

1. **Guaranty.** Evidence examined, and *held* to sustain the finding of the district court.
2. ———. A guarantor is entitled to stand upon the letter of his contract. His guaranty is not to be extended by a strained construction or an unnecessary implication from the language used. His liability must be found in the very language of his agreement or it will not exist.

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

*George B. France,* for plaintiff in error.

*Gilbert Bros., contra.*

RAGAN, C.

The McCormick Harvesting Machine Company has filed here a petition in error to review a judgment of the district court of York county dismissing a suit brought by it in that court against Cornelius Regier.

On February 14, 1893, the machine company and one Isaac Regier entered into a contract in writing in and by which Isaac Regier was appointed agent of the machine company to sell its harvesting machines, twine, binder trucks, bundle carriers, flax dumps, and machinery repairs for a certain time in a certain territory. Isaac Regier was to make sales of the property furnished him by the machine company at prices to be fixed by the latter, and might sell the property either for cash or on credit, but if he sold on credit, he was to take the notes of responsible parties, and, in short, when called upon, was to pay the company for all property furnished him either in cash or by the notes of responsible persons to whom he had sold. On the date of the execution of this contract be-

tween the machine company and Isaac Regier, Cornelius Regier executed in writing and delivered to the machine company the following: "I hereby guaranty * * * the fulfillment of the within contract and the payment of all obligations arising under the same on the part of the said Isaac Regier." In September, 1893, an accounting took place between Isaac Regier and the machine company, in and by which it was found that the former was indebted to the latter in the sum of $759.09. Isaac Regier having failed to pay the machine company this sum of money, the latter brought this suit against Cornelius Regier to recover it on his guaranty. In the accounting had between Isaac Regier and the machine company the former was charged with $830 for twine, which the machine company had furnished Isaac, and which it alleges was furnished in pursuance of the contract entered into between them on February 14, 1893. The contention of Cornelius Regier was that no part of this twine was furnished Isaac Regier by the machine company in pursuance of the contract; that while the twine came into the possession of Isaac Regier, after he entered into the contract with the machine company, it was furnished him by the machine company in pursuance of a contract of sale entered into in December, 1892, prior to the date of the execution of the agency contract. If this twine was furnished by the machine company to Isaac Regier under the agency contract and not accounted for by Isaac, then it was an obligation for which Cornelius Regier bound himself by his guaranty. On the other hand, if the twine was not furnished by the machine company to Isaac Regier in pursuance of such agency contract with him, then Cornelius is not liable for the failure to account for it. That this twine was actually delivered to Isaac Regier after February 14, 1893, and that he has never paid the machine company for it, are undisputed facts. The inquiry is simply one of fact. Was the twine delivered to Isaac Regier by the machine company to be by him accounted for as its agent, or was this twine delivered to Isaac Regier by the

machine company in pursuance of an actual sale made thereof by it to him?

The district court found in effect, and the evidence sustains the finding, that this twine was actually sold by the machine company to Isaac Regier on December 29, 1892, and subsequently delivered to him in pursuance of that contract of bargain and sale; and that when it came into his possession it was his property, and that he did not hold it as the agent or bailee of the machine company; in other words, that no part of the twine was delivered to Isaac Regier in pursuance of the contract between him and the machine company. By the contract of purchase between the machine company and Isaac Regier, of December 29, 1892, Isaac Regier agreed on receipt of the twine to pay cash for the same or execute his note for the same, payable to the machine company and due November 1, 1893, with ten per cent interest from that date. It was in pursuance of this contract that the twine came into the possession of Isaac Regier. Another important circumstance which tends to support the conclusion of the district court is that in the contract of agency between Isaac Regier and the machine company the agent was to be paid a commission specified in the contract on machines sold by him, on repairs sold, on binder trucks, bundle carriers, and flax dumps, while the blank in the contract for commission for selling twine is not filled. Cornelius Regier guarantied that Isaac Regier would fulfill his contract with the machine company and pay all obligations he might incur to the machine company under that contract; but he did not guaranty that Isaac Regier would pay the machine company for the twine purchased by him in December, 1892, although it was not delivered until after he became the agent of the machine company.

A guarantor is entitled to stand upon the letter of his contract. His guaranty is not to be extended by a strained construction of, or an unnecessary implication from, the language used; but his liability must be found

in the very language of his agreement, or it will not exist. (*Crane v. Specht*, 39 Neb. 123.) In the case at bar Cornelius Regier guarantied that Isaac Regier would pay to the machine company all obligations which he might incur to it under his contract of agency; but this guaranty cannot be so extended as to render the guarantor liable to the machine company for anything it had sold and delivered to Isaac Regier, but only for such property as came into his hands as the machine company's bailee and which he had not accounted for according to his contract. The judgment of the district court is

AFFIRMED.

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PORTSMOUTH SAVINGS BANK, APPELLANT, V. BERNARD RILEY ET AL., APPELLEES.

FILED APRIL 8, 1898. No. 7972.

1. **Appeal:** COMPETENCY OF EVIDENCE. In reviewing a judgment on appeal this court will not presume that the district court considered incompetent evidence.

2. **Mechanic's Lien:** ACCOUNT: EVIDENCE. That one has furnished labor or material towards the erection of an improvement upon real estate, and is therefore entitled under the statute to a lien thereon, cannot be established solely by putting in evidence the verified account of items of labor or material which he has filed in the office of the register of deeds for the purpose of obtaining such lien.

3. ———: ———: ———. Such an account is not even *prima facie* evidence that the labor or material has been furnished, nor that the claimant has a lien upon the real estate.

4. ———: ———. The object of the statute in permitting such an account to be filed for record is to apprise persons dealing with the real estate of the existence of such claim for a lien.

5. ———: FORECLOSURE: NATURE OF ACTION. A suit to foreclose mechanic's lien is not an action *in rem*, in such sense that the disposition made by the court of the real estate involved therein is binding upon persons not parties to such suit, who have unrecorded liens against the same, acquired prior to the pending of the foreclosure suit.

6. ———: MORTGAGE: PRIORITY. Riley executed a mortgage on his real

estate to an investment company. The mortgage was recorded and soon afterwards assigned to a savings bank, but it did not record its assignment. Subsequently a material-man filed a verified account of items of material which he alleged he had furnished Riley for the erection of an improvement upon such real estate prior to the date of the execution of such mortgage. He subsequently brought suit to have established and foreclosed this mechanic's lien, making Riley and the original mortgagee, but not the savings bank, parties. The action resulted in a decree giving the material-man a lien upon the real estate prior to the mortgage. Subsequently the savings bank brought suit to foreclose its mortgage. *Held*, That the priority of the mechanic's lien to the mortgage could not be established solely by the introduction in evidence of the decree pronounced in the foreclosure case.

7. **Judgment.** A judgment is a binding adjudication upon all parties to the suit in which it was rendered, and upon all persons who claim an interest in the property involved therein through any party to that suit acquired after the action was pending.

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

*John W. Lytle*, for appellant.

*Ed P. Smith* and *James B. Sheean, contra.*

RAGAN, C.

On October 2, 1888, Bernard Riley was the owner of lot 3, in block 12, in Schull's Second Addition to the city of Omaha. On that date Riley, being indebted to the Kimball-Champ Investment Company, executed and delievered to said company his two notes, one for $3,000 and one for $150. These notes were payable to the order of the investment company and due five years after date. On October 2, Riley, to secure the payment of said notes, executed and delivered to the investment company two mortgages upon the above described real estate. The one securing the $3,000 note was made the first, and the one securing the $150 note was made the second, lien upon the premises. These mortgages were duly recorded about the date of their execution. On October 13, 1888, the investment company sold, assigned, and delivered the said $3,000 note and the mortgage securing the same to the

Portsmouth Savings Bank, a New Hampshire corporation. But the savings bank did not record its assignment until October, 1891. After the recording of the mortgages made by Riley to the investment company, and before the recording of the savings bank's assignment of the $3,000 mortgage, M. A. Disbrow & Co. brought a suit in the district court of Douglas county against Riley to have established and foreclosed a lien which they claimed for labor and material furnished Riley for the erection of improvements upon said premises. The investment company and a number of others, who claimed liens for labor and materials furnished Riley in erecting said improvements, were made parties to this action. In this suit the investment company filed an answer, in the nature of a cross-bill, in which it alleged its ownership of both the $3,000 and the $150 mortgages; claimed that said mortgages, by reason of defaults on the part of the mortgagor, had become due; claimed that they were first and second liens, respectively, upon the real estate, and prayed that they might be foreclosed. Disbrow and the other mechanics' lien claimants insisted that their liens were prior to the investment company's mortgages. The suit resulted in a decree giving Disbrow and the other mechanics' lien claimants first liens upon the property to the amount of about $1,800, and making the $3,000 mortgage the second and the $150 mortgage the third lien upon the property, and ordering it sold to satisfy the amount found due the mechanics' lien claimants and the two mortgages. The property was sold under this decree and purchased by the investment company for the amount found due the mechanics' lien claimants, with interest and costs, such sale confirmed, and a deed executed by the master for the real estate to the investment company. At the time this suit was brought the savings bank was the owner and in possession of the $3,000 note and the mortgage securing the same. It was not a party to that suit and it had no knowledge or notice of it. In October, 1891, after the investment company had ac-

quired the legal title to the real estate, as already stated, the savings bank filed in the office of the register of deeds of Douglas county the assignment of the $3,000 note and mortgage made to it by the investment company. Subsequent to that date, in May, 1893, one Hendee brought suit against the investment company and caused this real estate to be attached. This suit resulted in Hendee's obtaining a judgment against the investment company for something like $900, an order sustaining the attachment and ordering the property sold to satisfy the judgment. This was done. One Smith purchased this property at the execution sale and subsequently conveyed it to George Hendee, who now owns it. After all these occurrences, to-wit, in September, 1894, the savings bank brought this suit to foreclose the $3,000 mortgage assigned to it by the investment company, making Riley and Hendee and other parties, whose names it is not necessary to notice, defendants to the action. The suit resulted in the district court's finding that the mechanics' claims hereinbefore referred to were the first liens upon the real estate and superior to the $3,000 mortgage thereon; that the investment company, by purchasing said real estate at the mechanics' lien foreclosure sale and paying off the said mechanics' liens, because subrogated to the liens which the mechanics held against the real estate; that Hendee, by purchasing the real estate in the attachment suit against the investment company, acquired the latter's interest and lien upon the real estate, which lien was prior to the $3,000 mortgage; and that the amount due the savings bank on its mortgage was subordinate to Hendee's lien. The court decreed that the real estate be sold and the proceeds applied to the discharge (1) of the amount found due Hendee, and (2) to the amount found due the savings bank. From this decree the savings bank appeals.

1. It may be that the investment company, by purchasing this real estate at the mechanics' lien foreclosure sale, became subrogated to the lien against the real estate

which the mechanics had; and it may be true that the investment company could assert this lien or interest in the real estate, so acquired by subrogation, even as against the savings bank. Whether it could do so would, of course, depend upon the contract existing between the savings bank and the investment company. A paper was introduced in evidence on the trial which shows, or tends to show, that the investment company, at the time of assigning its mortgage to the savings bank, warranted the mortgage to be a first lien upon the real estate. If this was the contract relied upon by the savings bank when it purchased this mortgage, then, of course, the investment company could not be heard to assert a lien or title to this real estate as against the savings bank's mortgage. But the record contains no competent evidence of any agreement between the savings bank and the investment company that the latter guarantied the mortgage in controversy to be the first lien upon the property. No attempt was made on the trial to prove the execution of the paper referred to. It was, therefore, incompetent evidence, and we must presume that it was not considered by the district court. The record discloses nothing whatever which would prevent the investment company from asserting the mechanics' liens, which it had paid off on this property, as against the savings bank's mortgage.

2. If, then, the claims of the mechanics for labor and material furnished Riley were liens upon this real estate prior to the $3,000 mortgage, the record now here sustains the decree, and it must be affirmed. But is the finding of the district court that these mechanics' claims for labor and material were liens upon the real estate prior to the $3,000 mortgage sustained by the evidence? The only evidence offered on the trial, for the purpose of showing that these mechanics' claims were prior liens upon this real estate, consisted of the verified accounts of items of labor and material, alleged to have been furnished, filed in the office of the register of deeds by the mechanics' lien claimants, to procure their liens, and the

complete record of the mechanics' lien foreclosure suit already referred to. That one has furnished labor or material towards the erection of an improvement upon real estate, and is, therefore, entitled under the statute to a lien on such real estate, cannot be established solely by putting in evidence the verified account of items of labor or materials which he has filed in the office of the register of deeds for the purpose of obtaining such lien. The statute which permits the filing for record of a verified account of the items of labor and material furnished for an improvement upon real estate does not make such an account even *prima facie* evidence that the labor or material has been furnished, nor that the claimant has a lien upon the real estate. The object of the statute in permitting or requiring such an account to be filed for record is to appraise persons dealing or about to deal with the real estate of the existence of the claim. (*Wakefield v. Lutey*, 39 Neb. 285.) The introduction in evidence then in the case at bar of the so-called mechanics' liens which were filed against this property afforded no evidence whatever that the labor and material had been furnished by the lien claimants or that they had any liens upon this real estate.

3. The decree pronounced in the mechanics' lien foreclosure suit which determined that the claims of these mechanics were superior liens to the $3,000 mortgage was and is a binding adjudication upon all parties to that suit, and all persons who claim any right, title, or interest in the property involved therein through any party to that suit acquired after it pended. The lien of the savings bank upon this property was acquired from the investment company, a party to this suit, and had the savings bank obtained the assignment of the mortgage from the investment company after the foreclosure suit was pending, then, doubtless, the savings bank would have been bound by the decree rendered in that action. But the savings bank took its assignment of the mortgage in controversy from the investment company long before

this mechanics' lien foreclosure suit was instituted, and as it was not a party to that suit, it is not bound by the decree rendered therein; and that decree, in so far as it determined that the mechanics' liens were superior to its mortgage, was, as to it, a nullity; and that these mechanics' claims were, as a matter of fact and law, liens upon the real estate superior to the lien of the savings bank's mortgage could not be proved simply and solely by the introduction in evidence of the decree pronounced in the mechanics' lien foreclosure case. This mechanics' lien foreclosure case was not an action *in rem* in such sense that when the district court acquired jurisdiction over the property its disposition thereof bound all the world. It was a *quasi in rem* action, and the court had jurisdiction over the property involved therein; but the lien of the savings bank thereon by virtue of its mortgage was of such a nature that the court could not divest that claim without jurisdiction over the person of the savings bank. (*Freeman v. Alderson*, 119 U. S. 185; *Martin v. Darling*, 3 Atl. Rep. [Me.] 118; *Todd v. Crener*, 36 Neb. 430; *Connell v. Galligher*, 36 Neb. 749; *Monroe v. Hanson*, 47 Neb. 300; see the rule stated and the authorities collated in 2 Black, Judgments sec. 600; *Goodwin v. Cunningham*, 54 Neb. 11, and cases cited therein.) The precise question under consideration was presented to the supreme court of the state of Minnesota in *Corser v. Kindred*, 42 N. W. Rep. [Minn.] 297, and the court summed up its conclusion in the syllabus as follows: "A decree enforcing a mechanic's lien held incompetent to prove the existence of the lien prior to the date of the decree as against one holding a mortgage prior to that date who was not a party to the action." Because, therefore, the finding of the district court that the claims of the mechanics were liens upon the property in controversy prior to the lien of the mortgage of the savings bank is unsupported by any competent evidence, its decree must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

## BUCKSTAFF BROTHERS MANUFACTURING COMPANY V. JACOB SNYDER.

FILED APRIL 8, 1898. No. 7945.

1. **Fraudulent Conveyances:** CHATTEL MORTGAGES. A chattel mortgage which provides that the mortgagor may "remain in possession of said goods and chattels and sell and dispose of any of the stock in trade in the regular course of business," but contains no provision that the mortgagor shall pay the proceeds of sales made toward the satisfaction of the mortgage debt, is not merely presumptively fraudulent as to creditors of the mortgagor, but is conclusively so.
2. ———: ———. A debtor may make a valid oral pledge or mortgage of his property to his creditor; but to the validity of such mortgage it is essential that there be an immediate delivery of the mortgaged property to the creditor, and that such delivery be followed by an actual and continued change of possession of the property pledged or mortgaged.
3. **Replevin.** Evidence examined, and *held* to sustain the action of the district court in directing the jury to return a verdict for the defendant in error.

ERROR from the district court of Nance county. Tried below before SULLIVAN, J. *Affirmed.*

*Charles E. Magoon*, *M. I. Brower*, and *Albert & Reeder*, for plaintiff in error.

*W. F. Critchfield* and *M. V. Moudy, contra.*

RAGAN, C.

Buckstaff Bros. Manufacturing Company in the district court of Nance county brought an action of replevin against Jacob Snyder. The trial resulted in a verdict and judgment in favor of Snyder, and Buckstaff Bros. have filed a petition in error here to review this judgment.

1. Buckstaff Bros. claimed the right to the possession of the property by virtue of a chattel mortgage executed thereon to them by the owner, one Harris. Snyder

claimed possession of the property by virtue of an attachment levied thereon by him as sheriff in a suit brought against Harris by a creditor of his. The mortgage under which Buckstaff Bros. claimed was executed on April 13, 1894, and on the same date filed in the office of the county clerk of said county, and contained this provision: "And provided further, that until default by the parties of the first part in the payment of any debt hereby secured, or of any agreement herein, or until the happening of any event hereinafter provided, it shall be lawful for the parties of the first part to remain in possession of said goods and chattels and to sell and dispose of any of the stock in trade in the regular course of business,"—the party of the first part mentioned in said mortgage being the mortgagor, Harris. It will be observed that this mortgage provided that the mortgagor might remain in possession of the mortgaged property and sell and dispose of the mortgaged goods in the regular course of business. Such a mortgage is void upon its face as to the creditors of the mortgagor. It is not merely presumptively fraudulent as to creditors, but it is conclusively so. (*Hedman v. Anderson*, 6 Neb. 392; *Sherwin v. Gaghagen*, 39 Neb. 238; *Paxton v. Smith*, 41 Neb. 56.) The mortgage under consideration is unlike the ones considered in *Turner-Frazer Co. v. Killian*, 12 Neb. 580, and *Davis v. Scott*, 22 Neb. 154. The mortgages involved in those cases provided that the mortgagor might remain in possession of the mortgaged goods, sell the same in the usual course of business, and pay the proceeds of the sale to the mortgagee until his debt was discharged; and it was ruled in those cases that such mortgages, though presumptively fraudulent, were not conclusively so, and whether fraudulent, was a question of fact to be determined from the evidence. Buckstaff Bros. then acquired no lien upon the property of Harris by virtue of the above-mentioned mortgage as against other creditors of Harris.

2. Buckstaff Bros. also claimed the right to the pos-

session of the replevied property by virtue of an oral mortgage or pledge of the property made by Harris to them after the execution of the written mortgage above mentioned and before the attachment of the property by the sheriff, Snyder. Their claim is that after Harris had executed to them the written mortgage, they discovered that he was indebted to other parties, and thereupon entered into an agreement with him, which resulted in his turning over to them actual possession of the goods embraced in this controversy to secure what he owed them. It is not doubted that a debtor, in pursuance of an oral agreement, may place his property in the actual possession of his creditor to secure the payment of what he owes him, and that such a pledge will not only be good as between the parties, but good as against other creditors if it is made in good faith, if the pledgor makes an immediate delivery of the property to the creditor and such immediate delivery is followed by an actual and continued change of possession of the property pledged or mortgaged. (Compiled Statutes, ch. 32, sec. 14.) But the district court was of opinion, and we agree with it, that the evidence in this case did not show that Harris made an oral pledge of the property in controversy to Buckstaff Bros. to secure the payment of what he owed them; and if the evidence would sustain a finding that Harris did make an oral agreement with Buckstaff Bros. to deliver to them the possession of his property to secure the payment of what he owed them, then the evidence in the record will not sustain a finding that he made to Buckstaff Bros. an immediate delivery of the property orally pledged. The only evidence of an actual delivery of the property to Buckstaff Bros. by Harris is to the effect that Buckstaff Bros. and Harris orally agreed that the latter would remain in possession of the goods as the agent of Buckstaff Bros. There was no surrender of possession or control of the goods by Harris to Buckstaff Bros. There was no delivery, either actual or symbolical, of the goods by Harris to Buckstaff Bros.,

and while Harris remained in possession of the goods from April 14, the time it is alleged the oral mortgage was made, until the goods were attached in the following May, his possession, so far as the world could see, was precisely the same as it had been before; in other words, within the meaning of said section 14, chapter 32, Compiled Statutes, there never was a delivery of these goods by Harris to Buckstaff Bros.; but if it could be possibly inferred from the evidence that Harris did make a delivery of the goods to Buckstaff Bros. April 14, then that delivery was not followed by an actual and continued change of possession of the goods. We do not attempt to determine just what a debtor and creditor must do in order that the debtor may make a valid delivery of his property to his creditor to secure the payment of a debt; but he must do something more than say: "I deliver this property to you, and from this time forth I hold it as your agent, or such a delivery will not be good as against the mortgagor's other creditors." Since the written mortgage executed by Harris to Buckstaff Bros. was absolutely void upon its face, they acquired no lien on or rights to the property mortgaged as against Harris' other creditors; and since Harris did not make an immediate delivery to them of the property which he orally pledged to them to secure what he owed them, Buckstaff Bros. acquired no lien upon or interest in the property orally pledged. The judgment of the district court is

AFFIRMED.

SULLIVAN, J., not sitting.

## KEARNEY COUNTY V. FRANK TAYLOR.

FILED APRIL 8, 1898. No. 7978.

1. **Fees of County Treasurers:** STATUTE: EFFECT ON JUDGMENTS. Chapter 52, Session Laws 1893, is retroactive in its nature, in a sense special legislation, and will not be so construed as to embrace any subject not specifically named therein.
2. ———: ———: SETTLEMENT. The legislature by said act legalized settlements already made between county treasurers and county boards of counties under township organization, in and by which said treasurers had been allowed to retain fees, to which by law they were not entitled.
3. ———: ———: ACTIONS. Said act took from such a county its right to maintain an action against such a treasurer to recover the fees and compensation so allowed him.
4. ———: ———: EFFECT ON JUDGMENT. But it did not, in express terms nor by necessary implication, satisfy or attempt to vacate a judgment already obtained by such a county against such treasurer on such a cause of action.

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

*Ed L. Adams* and *J. L. McPheely*, for plaintiff in error.

*John M. Stewart* and *L. W. Hague, contra.*

RAGAN, C.

In the years 1884 to 1887, both inclusive, Kearney county was under township organization, and during said time Frank Taylor was the treasurer of said county. During the time Taylor was in office the township treasurers of the various townships of the county paid over to him large sums of money which they had collected as taxes from the property holders of their townships. Taylor, in making settlements with the county board, as required by the statute, credited himself with the same commission upon all moneys so paid to him by said township treasurers as if he had himself collected the moneys from the taxpayers, and the county board, in the settle-

ments so made, allowed him to retain the fees and commissions to which he claimed to be entitled by reason of these moneys having been paid to him. After Taylor had gone out of office the county brought two suits against him for the recovery of the money which he had retained as his commission on the moneys paid to him by such treasurers. These suits resulted in the county's obtaining two judgments against Taylor. He then brought one of those judgments to this court for review, and the judgment of the district court was affirmed. (See *Taylor v. Kearney County*, 35 Neb. 381.) No appellate proceeding seems to have been instituted for the review of the other judgment. The two judgments recovered by the county against Taylor amounted to something like $1,500, and after the affirmance of one of the judgments by this court, Taylor paid all of the two judgments and costs, except the sum of $790.

On April 6, 1893, the legislature passed an act entitled "An act legalizing the payment and allowance of fees to county treasurers in counties under township organization." (See Session Laws 1893, ch. 52.) The preamble of this act recited that, in accordance with an opinion of the attorney general, the treasurers of counties under township organization had been allowed and paid the same fees or commissions on taxes collected by township collectors and paid to said treasurers as the law allowed to treasurers of counties not under township organization for taxes collected by them. The act then proceeded to legalize and affirm all allowances and payments which had been made by the county boards of counties under township organization to the treasurers of such counties as their compensation for receiving the tax moneys paid to them by the township treasurers of such counties. After the taking effect of this act Taylor brought this suit in the district court of Kearney county against that county and the sheriff thereof, setting out the foregoing facts, and praying that the county might be perpetually enjoined from collecting the judgment which the county

had recovered against him. The district court rendered a decree as prayed, which the county has filed a petition in error here to review.

The theory upon which Taylor's action is based, and the theory upon which the decree of the district court is predicated, was and is that the legislature, by the act just referred to, forgave the debt which Taylor owed the county as evidenced by its judgment against him; in other words, by the act under consideration the legislature released and discharged the judgment in favor of the county. Addressing themselves to this construction of the act, counsel for the plaintiff in error vigorously assail its constitutionality. For the purposes of this case only we shall assume, without deciding, that this act of 1893 is not in violation of any provision of the constitution of this state. But the act is retroactive in its nature. It is in a sense special legislation, and it purports to legalize the retention and appropriation to their own use, by county treasurers of counties under township organization, public moneys to which by the laws of the state they were not entitled. This act then should be strictly construed, or at least it should not be held to embrace any subject not specifically named therein. The object of this act, as shown by its title and preamble, was to take away from counties under township organization any cause of action which they might have against persons who had been treasurers of their counties for moneys which they had been allowed by their county boards to retain as commissions on moneys paid to them by the township treasurers of such counties. Conceding, without deciding, that the taking away of such a cause of action from counties under township organization is a legislative function, it by no means follows that by the act under consideration the legislature intended to satisfy and discharge a judgment which such a county had obtained against one who had been its treasurer for the illegal fees so retained by him. The act does legalize and confirm settlements already made be-

tween county treasurers and county boards of counties under township organization, in and by which such treasurers had been allowed to retain fees to which by law they were not entitled. The act does take away from such counties the right to maintain an action against such treasurers to recover the fees and compensation so allowed them; but it does not, in express terms nor by necessary implication, satisfy and discharge or attempt to vacate judgments already obtained by such counties against such treasurers on such causes of action. Taylor's petition filed in the district court does not state a cause of action. The decree of the district court is reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

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## SVENNING HAGELUND V. HUGH MURPHY ET AL.

FILED APRIL 8, 1898. No. 7834.

1. **Malicious Prosecution**: EVIDENCE. To sustain a judgment for malicious prosecution the plaintiff must show by a preponderance of the evidence that the prosecution which the defendant caused to be brought against him has been determined; that the defendant had no reasonable or probable cause for believing the plaintiff guilty of the offense for which he caused him to be prosecuted; and that in instituting and carrying on the prosecution the defendant was actuated by malice.
2. ———: VERDICT FOR DEFENDANT. Evidence examined, and *held* to sustain the action of the district court in taking the case from the jury and in dismissing the plaintiff's action.

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

*Connell & Ives*, for plaintiff in error.

*Frank T. Ransom* and *William F. Gurley, contra.*

RAGAN, C.

Svenning Hagelund sued Hugh Murphy and Charles Fanning in the district court of Douglas county for dam-

ages for malicious prosecution. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict in favor of Murphy and Fanning, upon which the court entered a judgment dismissing Hagelund's action. To review this judgment he has filed here a petition in error.

The uncontradicted evidence on the trial showed that Murphy and Fanning filed a complaint against Hagelund before the police judge of the city of Omaha, in which they charged him and others with taking up and removing from a street in said city, in violation of the ordinances thereof, certain wooden blocks then and there forming and being a part of the pavement of such street; that Hagelund was arrested and tried on this charge and by the police court acquitted. To sustain a judgment for malicious prosecution the plaintiff must show by a preponderance of the evidence that the prosecution which the defendant caused to be brought against him has been determined; that the defendant had no reasonable or probable cause for believing the plaintiff guilty of the offense for which he caused him to be prosecuted, and that in instituting and carrying on the prosecution the defendant was actuated by malice. (*Dreyfus v. Aul*, 29 Neb. 191; *Peterson v. Reisdorph*, 49 Neb. 529; *Ross v. Langworthy*, 13 Neb. 492; *Rider v. Murphy*, 47 Neb. 857; *Fry v. Kaessner*, 48 Neb. 133, and cases there cited.) At the close of the evidence it appeared beyond dispute that the prosecution which Murphy and Fanning had instituted against Hagelund had been determined prior to the bringing of this suit; and the evidence not only shows, without contradiction, that when Fanning and Murphy instituted the prosecution against Hagelund, they had reasonable and probable cause to believe him guilty of the offense for which they caused him to be prosecuted, but that they had actual personal knowledge that he was guilty of the offense with which they charged him. One of the three essential things then necessary to sustain a verdict in this case was wanting; namely, that Murphy and Fan-

ning had no probable or reasonable grounds for believing Hagelund guilty of the offense for which they caused him to be prosecuted. There was nothing to submit to the jury. The judgment of the district court is right and is

AFFIRMED.

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## GRETNA STATE BANK V. JOHN GRABOW.

FILED APRIL 8, 1898. No. 8004.

**Action on Subscription for Stock: VERDICT FOR DEFENDANT.** The record presents no question of law. Evidence examined, and *held* to sustain the finding of the district court.

ERROR from the district court of Sarpy county. Tried below before BLAIR, J. *Affirmed.*

*Gregory, Day & Day*, for plaintiff in error.

*James Hassett, contra.*

RAGAN, C.

In the district court of Douglas county the Gretna State Bank sued John Grabow on a contract of subscription made by him for a certain amount of its capital stock. The trial resulted in a verdict and judgment in favor of Grabow, and the bank has filed here a petition in error to review that judgment.

Grabow admitted having subscribed for $500 of the capital stock of the bank, but interposed as a defense to the action that one A. U. Hancock was the promoter of the bank, a corporation, and procured the subscriptions to its stock and that to induce him, Grabow, to become a subscriber represented to him that one Hans Peters had also agreed to become a subscriber for the stock of the bank; that he, Grabow, believed said representation of Hancock to be true, and in reliance thereupon signed

the subscription; that the representation made by Hancock was false, and that within a day after signing said subscription he, Grabow, ascertained that it was false and notified Hancock that he would not be bound by the contract of subscription and requested him to erase his name from the list, which Hancock then and there agreed to do. Whether the signature of Grabow to this stock subscription was procured by the false representation of Hancock was the only question litigated on the trial. It was fairly submitted to the jury by the instructions of the court, and the jury found, in effect, that Grabow's signature to the stock subscription was procured by the false representation of Hancock. The evidence sustains this finding.

Complaints are made of the action of the district court in the admission of certain testimony and also in giving certain instructions. We have carefully examined all these complaints and have reached the conclusion that there is no error in the record which calls for a reversal. The judgment of the district court is

AFFIRMED.

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CHARLES JOHANSEN V. HOME FIRE INSURANCE COMPANY.

FILED APRIL 8, 1898. No. 7930.

1. **Insurance:** CLASSIFICATION OF PROPERTY: VALIDITY OF POLICY. A fire insurance policy which classifies the property insured and limits the amount of insurance on each class is divisible, and may be valid as to one class and void as to another.

2. ———: ———: INCUMBRANCES. A fire insurance policy covering real estate provided that the policy should become void if the property should be sold, transferred, or incumbered. When the policy was issued the land was incumbered by a mortgage to the amount of $2,500. Another tract belonging to the insured was incumbered to the amount of $1,300. Five hundred dollars of these debts was a common charge on both tracts. After the policy was written, and before the fire resulting in the suit, the insured took up all the mortgages and executed in their stead a mortgage on both tracts to secure $3,500, being the old debts with accrued interest. *Held*,

that the fact that the incumbrance on the insured property had been substantially changed and increased in amount rendered the policy void, and that the court could not speculate on the relative values of the two tracts or the probable manner of enforcement of the mortgages to ascertain if the risk had been increased.

3. ——: ——: PAYMENT OF LIEN. An insured who incumbers his personal property by chattel mortgage after it has been insured, and contrary to the provisions of the policy, may nevertheless recover therefor if the mortgage be discharged before the loss occurs.

4. ——: ——: INCUMBRANCES: INSTRUCTIONS. Evidence tended to show that there had been an agreement at the time a chattel mortgage was made, that, upon the making of a certain payment, the property afterwards burned should be released from the lien of the mortgage, and that such payment had been made, and a release of the property expressed by parol. *Held*, That it was error to direct the jury to find for the insurance company as to such property because of a provision in the policy rendering it void if the property became incumbered.

ERROR from the district court of Washington county. Tried below before HOPEWELL, BLAIR, and KEYSOR, JJ. *Reversed.*

*W. S. Cook* and *Frick & Dolezal*, for plaintiff in error.

*Byron G. Burbank* and *Jacob Fawcett, contra.*

IRVINE, C.

This was an action on a policy of fire insurance, naming a single premium, but classifying the property insured and limiting the insurance to a stated amount on each class. Among the items of insurance were $350 on a barn, $500 on horses, mules, and colts, $100 on harness, wagons, etc., and $150 on grain. The barn was totally destroyed by fire, and eight horses, a quantity of harness, and a quantity of grain were also destroyed. The defenses relied on relate to the existence of incumbrances on the insured property. At the close of the evidence the court, at the request of the defendant, instructed the jury to return a verdict for $100 and interest. The record does not distinctly disclose on what ground this instruction was based, but it is assumed in argument that the

court limited the recovery to the grain, holding that the making of incumbrances on the real estate, the horses and the harness precluded a recovery for their loss. As there was no pleading or evidence which assailed the insurance upon the grain we feel justified in reading into the record sufficient to warrant this assumption of counsel.

A policy such as the one here involved is divisible in its nature, and may give rise to a liability as to one class of property insured, although it be invalid as to another class. (*State Ins. Co. v. Schreck*, 27 Neb. 527; *German Ins. Co. v. Fairbank*, 32 Neb. 750; *Phenix Ins. Co. v. Grimes*, 33 Neb. 340.) Therefore the defenses set up with regard to the incumbrances upon the real estate and those upon the personalty must be considered separately.

When the policy was written the land was incumbered by two mortgages, one for $2,000, and the other for $500. The land upon which the insured property was situated consisted of 160 acres and was the homestead of the plaintiff. Half a mile away and in another county was a tract of 80 acres owned by the insured. On this there was a mortgage of $800, and the $500 mortgage referred to also extended to this tract. The application for insurance, signed by the insured, stated that the property was unincumbered, but there is evidence tending to show that the incumbrances were truly stated to the agent before the policy was written and that he filled out the application contrary to the facts stated to him. Were this the only question this issue of fact should have been submitted to the jury. But, after the policy was issued and before the fire, all these mortgages were released and a new mortgage made on both tracts for $3,500. The defendant did not consent to this incumbrance and knew nothing thereof until after the fire. The proof tends to show that the new mortgage was merely to take the place of the three old ones, and that the increase of $200 in the amount over the aggregate of the three former mortgages was to cover accrued interest. Many cases hold that a

condition that the insured premises shall not become incumbered is not broken by the making of a new mortgage solely in renewal of one existing at the time the policy was written; but this transaction was not simply a renewal. The tract on which the insured building stood was, at the time the policy was issued, incumbered for $2,500. By taking up the former mortgages and making a blanket mortgage on both tracts, the incumbrance on the one in question was increased to $3,500. But, argues the plaintiff, $2,000 of the old incumbrance was upon this tract alone and it is now distributed over both. Moreover the tract in question is a homestead and in the event of foreclosure the plaintiff could require the other tract to be first sold. Therefore, it is said, the real burden upon this land is not greater than before, and the risk was not increased. Some cases, notably *Russell v. Cedar Rapids Ins. Co.*, 71 Ia. 69; 32 N. W. Rep. 95, announce that a change made in incumbrances existing when the policy was issued does not violate the condition subsequent against incumbrances unless the risk be increased, and that whether there has been such an increase in the risk is a question of fact to be submitted to the jury. The case cited was where a portion of the land had been sold after the policy was issued and at the same time a portion of the mortgage debt had been paid and the remaining land subjected to a new mortgage for the unpaid portion of the debt. On the second hearing in the supreme court it was held that because the portion of the debt remaining unpaid was greater than that of the land retained the risk had been increased and that there could be no recovery. Other cases of a similar nature presented issues determinative of the extent of the risk on some equally exact basis as in the case cited. Nowhere have we found a case holding that, where there had been a substantial change in character of the incumbrance by which it had been increased, the case should go to the jury for that body to exercise its judgment as to the decree of moral hazard involved. To apply such a

rule here would introduce into the calculation questions as to the values and relative values of the different tracts at the time the policy was issued, at the time the incumbrances were changed, and perhaps at the time of the fire. It would involve a determination of the question whether the larger tract was of such a character that, if the court on a foreclosure should marshal it to protect the homestead it would be capable of sale in parcels. It would in a word substitute the opinion of a jury after the fire as to what was fair dealing between the parties for the contract they made for themselves. The fact remains incontestable that the incumbrance on the insured property was increased by $1,000, contrary to the terms of the policy. This is as far as the courts can go. They cannot, after finding that the policy has been so violated, speculate on the possibilities, or the probabilities, of an ultimate enforcement of the incumbrance. It was the existence of the incumbrance which was contracted against, not the probability of its enforcement against this land.

With regard to the personal property it appears without dispute that while the policy was in force, and before the fire, the plaintiff executed a chattel mortgage covering the horses and harness, together with other property, to secure notes of $1,000, $500, and $300. This was an apparent lien on the property at the time of the fire. There was, however, evidence tending to show that when this mortgage was made it was agreed between the parties thereto that upon payment of $500 the horses and harness should be released. The whole of the $1,000 note was paid before the fire, and plaintiff testifies that he thereupon reminded the mortgagee of the agreement and requested a release of the horses and harness and that the mortgagee then made a verbal release. It is contended that the testimony was not sufficient in this regard to warrant the submission of this issue to the jury, but plaintiff's testimony is positive and consistent in its different parts and is corroborated by the mortgagee. The record

of a chattel mortgage is for the protection of creditors and purchasers. Without a record and without a writing a mortgage of chattels may, in general, be valid between the parties. A parol release is equally valid, although not evidenced of record in any manner. The evidence referred to would, if believed, have led to a finding that, so far as the insured chattels were concerned, the mortgage had been satisfied before the fire. In such case the policy would regain its force notwithstanding the agreement not to incumber. (*State Ins. Co. v. Schreck*, 27 Neb. 527; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473.)

The instruction of the district court was right so far as recovery was sought for the loss on the real estate, but was erroneous with regard to the horses and harness. For that reason the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

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SOPHIA L. BENNETT, ADMINISTRATRIX, V. APSLEY RUBBER COMPANY.

FILED APRIL 8, 1898. No. 7783.

Sales: RESCISSION: FRAUD: EVIDENCE. In an action to rescind a sale of goods for fraud practiced by the purchaser, where reliance was placed on reports of a commercial agency, evidence reviewed and *held* insufficient to show any false representations or any fraud.

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

*Cowin & McHugh, W. W. Morsman,* and *Montgomery & Hall,* for plaintiff in error.

*Hall, McCulloch & Clarkson, contra.*

IRVINE, C.

This was an action in replevin, whereby the Apsley Rubber Company sought the recovery of certain goods

from George A. Bennett, sheriff of Douglas county, who had seized them under writs of execution against the Omaha Rubber Company. The Omaha Rubber Company had bought the goods from the plaintiff, and the ground of rescission was that the sale had been procured by fraud. The plaintiff had a verdict.

The verdict receives no support whatever in the evidence. While the goods were received by the Omaha company a very short time before its failure, they had been purchased several months before, and there is no evidence tending to show that the purchaser then knew itself to be insolvent, or that it was so, or that it contemplated insolvency. The only witnesses by whom it was sought to show any false representations by the purchaser communicated to the plaintiff were the salesman who made the sale and Mr. Apsley, the president of plaintiff. The salesman said that an officer of the Omaha company told him they had recently had a fire and had secured a good adjustment of the insurance. It was not shown that this statement was false, or that it was in any way relied on in making the sale. The salesman further testified that no further statement was made to him and that he made no inquiries; that, as usual, he left the matter of credit to be determined by others when the order reached his house. Mr. Apsley testified that he asked for a report from R. G. Dun & Co. and that in extending credit he relied entirely on that report. It is not shown what was contained in the report so by him received and relied upon. An effort was made to show that the Omaha company had made certain statements to Dun & Co. Only one of these was admitted in evidence, and there was no proof justifying the admission of any other. The statement admitted was in the form of a report made to the Omaha office of Dun & Co. by one of its reporters, and was as follows: "December 22, 1892. J. Hurd Thompson, secretary, says the year has been a prosperous one in both wholesale and retail departments. The volume of trade for the year will be larger than that of any

preceding winter months, and profits will be correspondingly satisfactory. A year ago they owed nothing at bank, for the reason that the adjustment of their fire loss and subsequent sales brought in cash to take up their indebtedness. They have a line of $15,000 and upwards at bank, and are within two or three thousand dollars of the limit. Their standing is not questioned, however, and it is expected that their annual statement will show a very positive growth in resources. Previous estimates of net worth are maintained." The reporter testified that this statement down to "they have a line of $15,000 and upwards at bank" was made by Thompson, that Thompson probably told him the extent of their bank credit, but that he verified it by inquiry at the bank. The rest of the statement was his own conclusion drawn from other sources. There is not a syllable tending to show that any of this statement was false,—certainly not that any statement of fact was false,—although it is perhaps inferable from the fact of the failure that some of the prognostications of the commercial agency, for which the Omaha company was not responsible, were not realized. Moreover, there is no evidence to show that this statement was communicated to the plaintiff.

It is said that for a long time before the failure the Omaha company had been owing the Goodyear India Rubber Glove Manufacturing Company, one of the execution creditors, a large amount, and that this fact was not made known to the plaintiff, nor was it stated in any report made to Dun & Co. But there is nothing to show that any inquiry was made either by plaintiff or by Dun & Co. with reference to any indebtedness. The report in evidence refers to the existing indebtedness to the bank alone, and that information did not come from the debtor.

The foregoing substantially covers the whole case as it went to the jury, and it will be seen that there was not a scintilla of evidence whereon to found a verdict for the plaintiff.

REVERSED AND REMANDED.

## WILLIAM BARR V. FRANK W. LITTLE.

FILED APRIL 8, 1898. No. 7968.

**Vendor and Vendee:** CONSTRUCTION OF CONTRACT: RESCISSION. A provision in a contract for the sale and exchange of lands, set out in full in the opinion, construed to be a personal covenant and not a condition, and so not entitling the vendee to rescind on account of its breach.

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

*G. M. Lambertson* and *F. M. Hall,* for plaintiff in error.

*William G. Clark, contra.*

IRVINE, C.

This action was brought by Little against Barr for the purpose of enforcing the rescission of a contract whereby Barr had agreed to convey to Little certain property in Lincoln, and to require the reconveyance by Barr to Little of land conveyed, and the repayment of money paid in part consideration. To Barr's answer Little interposed a general demurrer, which was sustained, and Barr electing to stand on his answer, a decree was entered in favor of Little. Barr brings the case here by petition in error.

By a familiar rule of pleading the demurrer to the answer searches the whole record, and judgment thereon should go against that party whose pleading was first defective in substance. (*Bennett v. Hargus,* 1 Neb. 419; *Hower v. Aultman,* 27 Neb. 251; *Oakley v. Valley County,* 40 Neb. 900; *City of Hastings v. Foxworthy,* 45 Neb. 676; *Hawthorne v. State,* 45 Neb. 871.) The sufficiency of the petition is the first question thus presented.

The petition alleges that Barr was the owner of lot 5, in block 58, in the city of Lincoln, said lot having a three-story brick building thereon. One Lamaster was the owner of an adjoining lot, having a similar building

thereon. There existed between Barr and Lamaster a contract whereby the two buildings were erected with a common central hallway for the use of occupants of both buildings, and whereby a single heating apparatus was made to do service for both. Such contract greatly enhanced the value of Barr's property. Its benefits ran with the land. February 18, 1893, the plaintiff and defendant entered into a contract in writing whereby Barr sold this property to Little at an agreed price of $20,700; $1,000 then paid, $19,700 to be paid on or before April 1, 1893, and, as the remainder of the price, Little agreed to convey to Barr a number of lots in Sabin Hill, in Lancaster county. The petition then alleges in detail, by averments in its body and by transcripts attached as exhibits, certain legal proceedings then in progress between Barr and Lamaster. These proceedings are evidently those reviewed by this court in the case of *Barr v. Lamaster*, 48 Neb. 114. The petition pleads the course of these proceedings as far as the decree in the district court. For the sake of brevity we refer to the opinion in the case cited for a detailed statement thereof. Suffice it here to say that the suit was brought by Barr to terminate the contract between him and Lamaster. Lamaster by cross-petition sought the same result, but by different means. Barr dismissed his petition and the case was tried June 20, 1893, on Lamaster's cross-petition. July 1, 1893 a decree was rendered in effect terminating the contract and ordering a sort of involuntary party wall to be erected under direction of the court. Little alleges that he was ignorant of these proceedings when he contracted to buy the Barr property, but having learned thereof, he procured his contract to be modified June 29, 1893, by the following instrument:

"*William Barr, Esq., City:* I will deed you the property in Sabin Hill Addition mentioned in our agreement, and will on September 1, 1893, pay you in cash $3,500, if you will at that time deed to me lot 5, block 58, Lincoln (with the three-story brick building thereon, which I under-

stand is located wholly on said lot 5), free and clear of incumbrance, taking back from me a first mortgage for $15,700, due in three years, at seven per cent interest, provided your suit against Lamaster is dismissed, the decree therein vacated, and Lamaster's cross-bill is dismissed.

"Yours truly, F. W. LITTLE.

"I accept above proposition and have received deed to Sabin Hill property thereunder, and I guaranty the dismissal, without decree, of Lamaster's cross-petition and of my suit against him. WM. BARR."

The plaintiff alleges that he paid $500 more on the purchase price, and at the date of the latter agreement, conveyed to Barr the Sabin Hill property. Barr did not procure the dismissal of the Lamaster case, but, on the contrary, it at once went to decree, and thereby the benefits of the hallway and heating contract were lost. Neither fraud nor mistake is alleged. If Little is entitled to a rescission, it is solely because Barr failed on his part to perform, and the failure, if there was one, was in not procuring the dismissal of the Lamaster suit. Taking the two agreements together, it appears that Barr was not obligated to convey except on Little's paying $3,500 and giving a mortgage for the remainder on September 1, 1893, or at such time and on such terms thereafter as a court of equity would regard proper. Little does not plead a tender or a willingness to perform, so he cannot rescind unless Barr's breach of the contract had rendered it unnecessary for him to proceed. It follows that the crucial question is whether the termination of the Lamaster litigation was a condition on which the performance of the contract depended, or whether, on the other hand, it was a collateral promise, affording a remedy in damages only. Two facts tend somewhat to characterize the stipulation in that behalf as a condition. The first of these is the use by Little in his proposition of June 29 of the word "provided" in introducing that subject; the other is the requirement that the Barr property should be

conveyed "free and clear of incumbrance." The force of the word "provided" is limited by the other terms of the proposition and by the form of Barr's acceptance. While the pending suit could hardly be called in itself an incumbrance, it threatened to charge the property with a party wall, which is, in a broad sense, an incumbrance. But this covenant against incumbrances could not have referred to such an incumbrance as the party wall. The very ground of plaintiff's case is that the Lamaster case threatened the continuance of the contract for reciprocal easements. Little did not expect or desire that the property should be conveyed free or clear of these easements, yet they were incumbrances of the same character as the party wall. All other circumstances point to a personal promise and not a condition. Any inference from the words used in Little's proposition is rebutted by the fact that Barr's acceptance was not in those terms. He, in accepting, merely "guarantied"—*i. e.*, warranted—the dismissal of the case. If the word "provided," in the sense of a condition, had been an essential of the proposal, then the proposal was not accepted, but met with a counter proposal substituting a warranty. But, going behind the strict meaning of the words employed, we reach the same conclusion from a construction of the whole contract in the light of the circumstances. The Lamaster case had been tried some days before the agreement of June 29 was made. It was then under advisement and a decree might be any day rendered. The time when there could be any great probability of an amicable adjustment was past. The parties actually contemplated that such an adjustment would not be reached, at least before a decision, because Little's proposal was that the decree should be vacated. This was something which must take place in the future. Little at once conveyed the Sabin Hill property to Barr. If the dismissal of the Lamaster case was a condition precedent to the exchange, he would not have done so. If it was a condition subsequent, it would have appeared in the contract or in

the deed. This contemporaneous practical construction placed upon the contract by the parties themselves is of the utmost significance. Barr had already dismissed his petition. Little knew that a decree would probably be rendered on the cross-petition. He knew that in that case the only way of procuring a vacation of such decree, except by Lamaster's consent, would be through appellate proceedings, and that such proceedings would require time extending long beyond that fixed for completing the transfers and making the final payment. We think it quite evident that the parties contemplated a consummation of the contract on the terms stated, regardless of the result of the Lamaster case, and that Little relied on Barr's promise, equivalent to one that he should do all things possible to dispose of the case without affirmative decree, and to answer in damages if he should fail.

REVERSED AND REMANDED.

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## JOHN DERN ET AL. V. WILLIAM H. KELLOGG ET AL.

FILED APRIL 8, 1898. No. 7948.

1. **Violation of Erroneous Instruction: REVIEW.** A verdict rendered in plain disregard of instructions is contrary to law; but the judgment will not for that reason be reversed when the instructions were erroneous and the verdict the only one which could properly be returned under the evidence.

2. **Liability of Bank for Failure to Collect Draft.** A merchant at H., in this state, being indebted to K. & Co., in Chicago, the latter made a draft upon him and sent it to a bank at H. without other instructions than to collect and remit. The bank received the draft February 19, presented it and obtained an oral acceptance and a promise that it would be paid in a few days. At maturity the merchant requested the bank to hold it and repeated his promise to pay in a few days. The same thing occurred later. The bank held the draft without communicating with the drawers until March 5, when at the merchant's request it wrote the drawers asking an extension of thirty days. March 7, and before an answer was received, it took a conveyance of all of the merchant's property in

satisfaction of a debt to itself and with an agreement to pay debts to strangers to a large amount, but not including that to K. & Co. It then returned the drafts, which could not be collected. *Held*, That it had not performed its duties in good faith and was liable to K. & Co.

3. ———: CUSTOM AND USAGE. A custom of banks at H., unknown to K. & Co., to so treat collections was no protection. A custom to be availed of must be lawful and reasonable.

4. ———: EVIDENCE. In such a case it is not necessary for the plaintiff to prove with certainty that but for the misconduct of the collecting agent payment would have been obtained. A *prima facie* case is established by showing that such, with reasonable probability, would have been the result.

5. ———: ———. The fact that all the time the bank held the draft the merchant continued to conduct his business and had property subject to execution to the value of many times the debt is sufficient to charge the bank, *prima facie*, with the amount of the draft.

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

*E. F. Gray* and *D. B. Carey*, for plaintiffs in error:

Under the evidence the bank is not liable. (*Freeman v. Citizens Nat. Bank*, 42 N. W. Rep. [Ia.] 632; 1 Daniel, Negotiable Instruments secs. 496, 497; 2 Randolph, Commercial Paper secs. 603, 604; *Farmers Bank & Trust Co. v. Newland*, 31 S. W. Rep. [Ky.] 38; *Sahlien v. Bank of Lonoke*, 16 S. W. Rep. [Tenn.] 373; *Crouse v. First Nat. Bank*, 33 N. E. Rep. [N. Y.] 301; *Bank of Washington v. Triplett*, 1 Pet. [U. S.] 25.)

*Rich & Sears, contra.*

IRVINE, C.

The defendants in error were partners doing business in Chicago under the name of Charles P. Kellogg & Co. The plaintiffs in error were partners doing business as bankers in Hooper, in this state, under the name of the State Bank of Hooper, and will hereafter be called the bank. H. H. Looschen was a merchant in Hooper, who

in February, 1891, was indebted to Kellogg & Co. in the sum of $704.50. February 17, 1891, Kellogg & Co. drew two drafts to their own order on Looschen, one for $352, payable three days after sight, the other for $352.50, payable ten days after sight, and after indorsing them to the bank, transmitted them to the bank with instructions to collect and remit. This action was brought by Kellogg & Co. against the bank to recover the amount of the drafts, and is based on the alleged negligence of the bank, preventing their collection. Plaintiffs recovered judgment for the amount of one of the drafts, and the bank brings the case here for review.

The drafts were received by the bank February 19, and were that day presented and by Looschen orally accepted, he promising to call and pay them in a few days. When the first draft matured Looschen called at the bank and asked that it be held, promising again to pay in a few days. When the second draft matured the same thing occurred. The bank held the drafts, without notifying plaintiffs, until March 5, when Looschen again called and requested the bank to write the plaintiffs asking an extension of thirty or sixty days. This was done. During this whole period Looschen was indebted to the bank about $12,000 on notes and about $3,000 on overdrafts. March 7 he conveyed all of his property to the bank in satisfaction of this debt, the bank also agreeing to pay certain other debts, not including that to plaintiffs, and amounting to about $5,500, according to a composition agreement Looschen had made with such other creditors, at the rate of 75 cents on the dollar. The same day the bank returned the drafts to plaintiffs, together with the letter with which they had been transmitted, indorsing across the letter, "Mr. Looschen has sold out his business." After the conveyance to the bank it was impossible for the plaintiffs to collect anything. In addition to the foregoing facts it should be stated that there was evidence tending to show that in this method of handling the drafts the bank followed a custom in vogue

by it and the only other bank at Hooper. There was nothing to show that the plaintiffs knew of this custom. Further, the evidence tends to show that prior to March 7 the bank considered Looschen solvent, and the conveyance seems to have been made at the suggestion of Looschen and not upon any pressure brought by the bank.

The court instructed the jury that the drafts being only a means resorted to by plaintiffs to collect the debt, and there being no other parties in interest, the bank was not required to observe the demands of the law merchant with regard to presentment and notice of dishonor of commercial paper, but that it was merely a collecting agent and bound only to reasonable diligence. So far the charge was undoubtedly correct. But the court also charged that if the bank pursued the custom prevailing at all the banks in Hooper, it was not liable, although the plaintiffs were ignorant of that custom. In other instructions the facts were rehearsed substantially as they have been stated here, and the jury was told that if the facts were so found there could be no recovery. Also the jury was charged that if it found for the plaintiffs it must find for the amount of both drafts. All these instructions were evidently disregarded by the jury. Those relating to the right to recover were palpably erroneous. A verdict rendered in plain disregard of the instructions is contrary to law, and will ordinarily be set aside, whether the instructions be good or bad. (*Aultman v. Reams*, 9 Neb. 487; *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229; *Standiford v. Green*, 54 Neb. 10.)

In this case, however, there should not be a reversal, because the error was in no sense prejudicial to the plaintiffs in error. The only verdict which could properly have been rendered under the evidence was one in favor of the plaintiffs below. It would be a disgrace to the law if the plaintiffs could not recover on the admitted facts of the case. True, the holding of the drafts for a reasonable time, at the request of the acceptor, might often not be negligent, and might even be the part of prudence; and

we by no means intend to hold that a bank holding paper for collection merely, may not, as a general rule, obtain a preference for a debt owing to itself. Neither the holding of the drafts nor the securing of a preference for its claim would necessarily charge the bank with liability. But the combination of the two facts, under the circumstances here proved, leaves but one inference to be drawn, and it is an act of charity to call that inference one of negligence. A harsher term might be more appropriate. Looschen was in the possession of property of great value, his own and subject to execution. He was conducting a mercantile business. He owed the bank more than $15,000. The bank held the drafts from February 19 until March 7, relying solely on an indefinite promise by Looschen to "come in and pay in a few days." The bank did not communicate with the plaintiffs in any way until March 5, and then only to ask a considerable extension. March 7, and before an answer was or could be received, it appropriated the whole of Looschen's property to itself, not only in satisfaction of its own debt, but assuming at the same time the payment of a large amount of other indebtedness, in favor of men to whom it owed no duty, and in disregard of the plaintiffs, to whom it was bound for the exercise of good faith and reasonable diligence in their protection. Having taken the property and so made it impossible to collect the drafts, it returned them, coolly stating that Looschen had sold out his business, but not even then disclosing its own interest or share in the transaction.

The cases cited by the defendants in support of the bank's conduct are not in point, and if they were we could not regard them as precedents worthy to be followed. Courts are not organized to lend their sanction to such transactions. The bank's conduct was not merely negligent. It was characterized by the utmost bad faith. *Freeman v. Citizens Nat. Bank*, 42 N. W. Rep. [Ia.] 632, was a case where drafts had been frequently drawn. It seems that some had been returned, and the drawers in-

structed the bank, "Do not return any more drafts. * * Wire us and await reply." The bank promptly wired the drawers of the dishonor of the drafts in question. The drawers answered by mail. In the meantime the bank had received information which led it to issue an attachment for a debt owing to itself. It at once wired that fact to the drawers, and on instructions to that effect handed the drafts to its attorney. Other attachments had been levied which absorbed the assets. Here the bank strictly followed special instructions, and informed the drawers promptly of the facts. It was of course held not liable. Most of the cases cited are adduced in support of the proposition that plaintiffs were bound by the custom of the Hooper banks in such matters, although not aware of such custom. This upon the theory that, the collection having been sent without special instructions, the customer is presumed to have intended that the bank should pursue its usual course. Such cases are *Farmers Bank & Trust Co. v. Newland*, 31 S. W. Rep. [Ky.] 38; *Sahlien v. Bank of Lonoke*, 16 S. W. Rep. [Tenn.] 373. But all such cases state or clearly imply that the custom must be both lawful and reasonable. In *Crouse v. First Nat. Bank*, 33 N. E. Rep. [N. Y.] 301, the customer had been promptly informed of the bank's acts and had ratified them. In sending the collection plaintiffs did not assent by implication to a custom that the bank should be negligent or that it should practice a fraud upon them. A case much like this, but where the conduct of the bank had been by no means so reprehensible, is *Mound City Paint & Color Co. v. Commercial Nat. Bank*, 9 Pac. Rep. [Utah] 709.

It is claimed that there was no proof of damages; that is, that it was not shown that had the bank been diligent the drafts could have been collected. In such cases it is usually impossible to show with certainty that if due care had been observed the collection would have been made. The law is not so rigid in its requirements for the protection of the negligent agent. It is only necessary to show a reasonable probability that with due care the col-

lection would have resulted. The burden then rests on the defendant to show that there was no damage. (*Fahy v. Fargo*, 17 N. Y. Supp. 344. See, too, *First Nat. Bank of Meadville v. Fourth Nat. Bank of City of N. Y.*, 77 N. Y. 320; 89 N. Y. 412; *Trinidad Nat. Bank v. Denver Nat. Bank*, 4 Dill. [U. S.] 290.) In this case it was shown that until March 7 Looschen continued to conduct his business and owned property subject to execution to the value of $15,000 at a conservative estimate. The bank saw fit to take it that day to satisfy a debt of over $15,000 and agreed at the same time to pay therefor several thousand dollars more. Looschen had been permitted to overdraw his account about $3,000, and the cashier testifies that any checks that he might have drawn before March 7 would have been paid. Certainly it would appear from these facts that had the bank been diligent in seeking payment of the drafts, or in returning them, or in notifying the plaintiffs of the facts, it is reasonably probable that payment would have been obtained. It is suggested that there was no ground of attachment and that the plaintiffs could not have otherwise proceeded with sufficient celerity to realize their debt. But if Looschen were honestly disposed it is clear that he could have paid. If he were otherwise disposed and had undertaken to evade plaintiffs, a cause of attachment would have arisen and the process would have been clearly effectual. The only vice in the verdict is that it was not for the amount of both drafts, and defendants cannot complain of that.

AFFIRMED.

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NATHAN MERRIAM V. ANDREW MILES, EXECUTOR, ET AL.

FILED APRIL 8, 1898. No. 7901.

1. **Principal and Surety:** ASSUMPTION OF MORTGAGE: CO-TENANTS. One of several co-tenants of land incumbered by mortgage, who buys the interest of his co-tenants and, as a part of the considera-

tion, assumes and agrees to pay the mortgage debt, becomes, as among the parties to that contract, the principal debtor, and the vendors become his sureties.

2. ———: ———: ———. While, by such a transaction, the rights or duties of the mortgagee cannot be changed without his consent, and he may enforce his original contract according to its terms, still, if he makes new contracts with the parties to the agreement, with knowledge thereof, he must do so with regard to the rights of those who are, among the mortgagors, sureties.

3. ———: ———: EXTENSION OF TIME FOR PAYMENT. Therefore, if, with knowledge of the changed relationship of the mortgagors, as among themselves, one purchases the notes secured by the mortgage, and at the same time enters into a contract, on valid consideration, to definitely extend the time of payment by him who has become the principal debtor, and this without the consent of the sureties, he thereby releases the sureties.

4. ———: ———: ———: NOTICE. Evidence examined, and *held* insufficient to show that the creditor in such a case had not notice of the relationship of the debtors to one another.

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

*Wharton & Baird*, for plaintiff in error.

*F. B. Tiffany* and *W. T. Nelson, contra.*

IRVINE, C.

Andrew Miles and James W. Vinton, executors of the will of John L. Miles, deceased, and James Thompson brought this action against Nathan Merriam, Charles T. Brown, Patrick Egan, and H. J. Cosgrove to recover on eight promissory notes for $1,000 each, executed by the defendants to William M. Clark and transferred to John L. Miles and James Thompson. Of the defendants, Merriam alone was served with process. As a defense he pleaded that the notes were made to Clark in part payment for a tract of land purchased jointly by the makers, and were secured by mortgage on the land purchased, which was afterwards platted into lots as an addition to Lincoln; that, before the notes were sold to Miles and Thompson, Merriam, Egan, and Cosgrove sold their re-

spective interests in the land to Brown, their co-tenant, and co-maker of the notes, who, in the deed of conveyance and as a part of the consideration assumed and agreed to pay these notes; that afterwards, for a valuable consideration, Miles and Thompson entered into a written agreement with Brown, whereby they extended the time of payment for four years, and agreed to accept partial payments on certain designated terms, and also agreed to and did release from the lien of said mortgage twenty-eight of the lots included therein; that Merriam was not a party to such agreement, and that, "as between said Brown and this defendant, this defendant was and remained only a surety upon said notes, which was well and fully understood by the said Miles and Thompson at the date of the execution and delivery of said agreement." The reply contains a peculiar negative pregnant in meeting the last averment quoted from the answer. It is as follows: "Plaintiffs deny that as to the payment of the notes set out in plaintiffs' petition Charles T. Brown became the principal and the defendant Merriam surety thereon, with the full understanding of the said John L. Miles and James Thompson at the date of the purchase of said notes." This is followed by averments that at the time of the purchase of the notes five of them were overdue and the time of payment had been extended by the then holder, and that the written agreement made by Miles and Thompson was merely in ratification of the agreement for an extension theretofore in force. The court, the case having been tried without a jury, found specially the facts almost as the defendant asserted them, but on the issue of notice to Miles and Thompson of the changed relationship between Brown and the other makers found that they had no notice thereof and did not consent thereto. On these findings it was held that Merriam was not discharged, but that he was entitled to a deduction from the amount of the notes of the value of the twenty-eight lots released by Miles and Thompson from the lien of the mortgage. Judgment was entered against

Merriam for the amount thus ascertained, and Merriam has brought the case here for review. There can be no doubt of the correctness of the findings of fact, except with regard to notice. Indeed defendant in error concedes that the facts are not open to dispute except as to the change in relationship between Brown and his comakers, and with regard to notice; and on the former issue the ultimate facts are not open to controversy. It is shown beyond peradventure that Brown bought the property and as a part of the consideration agreed to pay the debt. It is not shown that the holder of the note was a party to that contract. The only question here is as to the legal effect of those facts on the duties of the holder.

It is asserted on behalf of the plaintiffs that, unless the holder was a party to the agreement, or afterwards ratified it and accepted the new liabilities thereby created, he was not bound in any respect thereby, and could for all purposes continue to treat all the parties to the instruments as principals and deal with them on that basis. We do not think that so broad a statement of the law is warranted by reason or the authorities, although some cases are found which go to that extent. The doctrine has been frequently recognized by this court that, where one buys land incumbered by a mortgage, and covenants to pay the mortgage debt, or as part of the consideration assumes the payment thereof, his promise creates a principal obligation which the mortgagee may enforce against him. (*Cooper v. Foss*, 15 Neb. 515; *Keedle v. Flack*, 27 Neb. 836; *Rockwell v. Blair Savings Bank*, 31 Neb. 128; *Reynolds v. Dietz*, 39 Neb. 180; *Grand Island Savings & Loan Ass'n. v. Moore*, 40 Neb. 686; *Meehan v. First Nat. Bank of Fairfield*, 44 Neb. 213; *Green v. Hall*, 45 Neb. 89.) It follows, as a logical consequence, that thereupon the vendor becomes in effect a surety, and the vendee the principal debtor, that is between themselves. (*Paine v. Jones*, 76 N. Y. 274; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Flagg v. Geltmacher*, 98 Ill. 293.) Of course there can be no change without the knowledge and consent of the mortgagee which can affect

his rights. He need not look at all to the vendee unless he so elects. He need surrender no rights against the vendor unless he so elects; but it by no means follows that because he is not contractually bound by the contract between them, he may, after learning thereof, enter into new relations with one of the parties, in disregard of the rights of the other. He may enforce his rights as they before existed, but if he undertakes, after notice of the changed relationship between the other parties, to deal with one of them by changing his own contractual obligations with him, he must regard the rights which he knows the third person has acquired. The rule which releases a surety, when the creditor, without the surety's consent, enters into a valid contract extending the time of payment, is founded on equitable considerations, and does not arise from an implied provision of the original contract. Where the relationship is, or has become, that of principal and surety, the duty to regard the surety's rights exists, although the creditor may himself sustain such a relationship that in enforcing his own rights he may treat both as principals. In practically all the cases on this subject the duty of the creditor in this behalf is made to arise from his knowledge of the relationship existing between the debtors as between themselves, not upon the existence of the relationship of principal and surety as between them and the creditor. In *Paine v. Jones, supra*, a mortgagee, with knowledge that the land had been sold and that the vendee had assumed the debt, agreed with the vendee to abrogate a clause in the mortgage whereby the mortgagor, on partial payment, might require partial releases of the land mortgaged. It was held that the mortgagee "was under an equitable obligation to do nothing to affect or alter the rights of the surety," and that the vendor was therefore discharged. So in many cases similar in principle, the discharge of the surety is made to depend on the knowledge by the creditor of the existence of the relationship between principal and surety, and not on the form or nature of the contract

as between the creditor and the debtors. (*Bank of British Columbia v. Jeffs*, 15 Wash. 230; *Behrns v. Rogers*, 40 S. W. Rep. [Tex.] 419; *Wilson v. Foot*, 11 Met. [Mass.] 285; *Morgan v. Thompson*, 60 Ia. 280; *Lamson v. First Nat. Bank*, 82 Ind. 21.) It is not necessary, for reasons which will presently appear, to determine whether this knowledge must exist at the time one becomes a creditor, or whether it binds the creditor if possessed at the time the extension is given. We conclude on this branch of the case that while the holders of the note were not parties to the contract changing the mutual relationship of the makers, still Brown had, as between him and Merriam, become the principal debtor and Merriam the surety, and that the plaintiffs were bound to do nothing to injure Merriam, by way of extension or otherwise, if they knew of that relationship at the time they bought the notes—perhaps at the time they made the extension.

The case therefore turns on the fact of notice, and we shall treat the averment quoted from the reply as putting that fact in issue, and examine the evidence to ascertain whether the special finding thereon is sustained by the evidence. It appears that the notes sued on had passed from Clark, the payee, to the Clark & Leonard Investment Company, and that five of them were some months overdue. Brown desired an extension thereof and himself arranged with Miles and Thompson to buy them and grant the extension. He paid Miles and Thompson about $1,000 as a bonus to induce them to purchase the notes and grant the desired extension. After this was negotiated a representative of the investment company took the notes to Omaha and there the transfer was completed, the written agreement for an extension being made the same day and evidently as a part of the same transaction. Brown negotiated both the sale and the extension, and it was his desire for the extension that led him to bring about the sale. This contract for the extension recites the purchase by Miles and Thompson, "this day," of the notes in suit and one other, and that "Charles T. Brown is the present

owner of said addition and agrees to pay the said notes as hereinafter agreed upon." Then follow the terms of the extension and the agreement pleaded to release twenty-eight lots from the mortgage lien. This was certainly evidence tending very strongly to show that Miles and Thompson had knowledge of Brown's and consequently of Merriam's position. It expressly recites the transfer of the property to Brown, or at least the present ownership in Brown, and it is not contended that the nature of the paper and the former condition of the title were unknown. Indeed Brown testifies that Miles visited the land with him and examined it to ascertain whether it afforded sufficient security, showing that Miles and Thompson were buying with reference to the mortgage and must have been on inquiry as to title. It does not appear that they had actual notice of the deed to Brown, which discloses his obligations to the former owners, and we need not decide whether they were charged with notice, because, in addition to the very strong evidence afforded from the recitals in the contract, and the circumstances leading to the sale of the notes, Brown testifies that John L. Miles actually knew of his purchase of the property. Against this we have only the testimony of Andrew Miles that he did not know of these facts. Andrew Miles was a book-keeper for Miles and Thompson, and seems to have taken an active part in the final transfer of the paper, but he does not say that he knew all that the purchasers themselves knew. He indeed says that he does not know what knowledge his brother, John L. Miles, possessed, and Brown testifies, without contradiction, that it was with John L. Miles that the negotiations took place, and he did know. Andrew's testimony as to his own ignorance is clearly insufficient, in view of the contract itself and the other evidence, to sustain the finding that Miles and Thompson had not notice.

It is asserted that the extension had been granted before the notes were sold; that the written contract was merely evidence of a ratification thereof by the purchas-

ers. This assertion is founded upon a memorandum appearing on the back of each note, "payment of within note extended to March 17, 1893." Andrew Miles testifies that this was on the notes when they came into his charge on the day of purchase. There is no evidence as to who made the memorandum or why it was made or when, except that when Andrew Miles got the notes it was there. Brown, however, testifies that there had been no extension by the former holders so far as he knew, and the irresistible inference from all the proof is that the very purpose of the sale was to procure the extension. The indorsement may have been made, and probably was made, contemporaneously with the sale to plaintiffs. Certainly the unexplained memorandum cannot be taken to prove an extension for a valid consideration by the former holders. We are compelled to hold that the finding that plaintiffs were without notice of the rights of Merriam is not sustained by the evidence in the case.

REVERSED AND REMANDED.

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## HORACE A. GREENWOOD V. ERIE W. FENTON ET AL.

FILED APRIL 8, 1898. No. 7991.

**Statute of Limitations: INTEREST ON JUDGMENT: EXTENSION OF TIME.** A agreed with B that if B would purchase a judgment against A the latter would pay B ten per cent interest on that judgment and another in favor of B, instead of seven, the rate each bore. The object was to obtain an extension of the time of payment. About five years thereafter A paid both judgments with interest at seven per cent, according to their terms. B then sued for the additional interest. *Held*, That the promise, while in a sense collateral, was to pay interest as such, and that the interest was not payable until the principal should be paid, that therefore the statute of limitations had not run.

ERROR from the district court of Gage county. Tried below before BUSH, J. *Reversed.*

*E. N. Kauffman*, for plaintiff in error.

*A. Hardy, contra.*

IRVINE, C.

In 1888 a decree was rendered against Erie W. Fenton and Addie C. Fenton, his wife, foreclosing two mechanics' liens, one in favor of the National Lumber Company and one in favor of Horace A. Greenwood. Soon thereafter the claim of the lumber company was purchased by Greenwood. The decree then stood without action until five years, less a few days, from its rendition, when, an order of sale having been issued, Fenton paid it in full. Greenwood then brought this action against the Fentons, alleging that the Fentons had agreed that if he would purchase the judgment of the lumber company, they would pay him ten per cent interest on both judgments, they theretofore bearing only seven per cent. The prayer was for the additional three per cent on the amount of the judgments. The answer was a general denial of the contract, a special denial by Mrs. Fenton of her husband's authority to so contract on her behalf, and a plea of the statute of limitations. There was a verdict and judgment for the defendants.

The plaintiff assigns as error the giving of two instructions with reference to the statute of limitations, and the refusal to give one on that subject requested by the plaintiff. The instructions given were to the effect that if four years had elapsed from the expiration of what would be a reasonable time for the payment of the judgment, before the commencement of the suit, the verdict must be for the defendants. The court evidently took the view that, there being no time fixed during which plaintiff should not enforce his judgment, and it being evident that Fenton had induced him to purchase the lumber company's judgment in order to obtain an extension of some kind, the contract, in effect, was that plaintiff was to forbear a reasonable time, and that the statute of limitations began running against the demand

for the additional interest from the expiration of such reasonable time. Certainly these instructions were wrong. They could only be right if the contract were to be construed as wholly collateral to the original debt, and then as contemplating the payment of additional interest independent of the payment of principal and at and only for a reasonable time after the judgment was bought. Collateral to the principal debt the agreement certainly was to a certain extent, but the evidence in no way supports any such theory of the duration of the agreement. As testified to by plaintiff's witnesses, the agreement was generally to pay ten per cent interest on the judgments—a rate which would endure until the debt should be paid. Even if periods for paying the interest had been agreed upon, and if the contract were so far independent of the debt that the statute would run from the time an installment of interest became due, it is plain that several years' additional interest had accrued within the statutory period and recovery could be had for this in any event. But as the case must be retried it is proper to give our views with more certainty as a guide for the court in the next trial. The agreement, if it existed, while it perhaps did not merge into the judgments and become, strictly speaking, a term injected therein, still was an agreement to pay interest as interest. No time of payment was fixed; and in such case the interest, always an incident to the principal debt, is deemed payable therewith, and the statute does not run against the interest until the debt is barred. (*French v. Kennedy*, 7 Barb. [N. Y.] 452; *Bander v. Bander*, 7 Barb. [N. Y.] 560; *De Cordova v. City of Galveston*, 4 Tex. 470; *Grafton Bank v. Doe*, 19 Vt. 463.) Under the plaintiff's theory of the facts the plea of the statute of limitations was not available; the defendant did not set up a different contract which might make it available, but denied the contract altogether. As the verdict may have been based entirely on this defense, the error was prejudicial.

REVERSED AND REMANDED.

FRANZ WERNER ET AL., APPELLANTS, V. PETER E. ILER ET AL., APPELLEES.

FILED APRIL 8, 1898. No. 7965.

1. **Partnership:** JUDGMENTS: EXECUTIONS: DISTRIBUTION OF PROCEEDS. A partner, without authority from his copartner, signed the firm name to notes as security for a stranger and not given with any reference to the firm business. The firm was not then in debt or contemplating becoming so. Thereafter firm debts were incurred. Judgment was regularly recovered against the firm on the notes. There was no charge of fraud or collusion. Execution was levied on the partnership property, and the firm creditors having recovered judgments, they, too, caused executions to be levied on the same property, and then brought suit to have the proceeds of the property first applied to the satisfaction of their demands. *Held*, That they were not entitled to such relief.

2. ———: ———: ESTOPPEL. Under such circumstances the partner who did not sign the notes was precluded from asserting, after suffering judgment thereon, that he or the firm was not bound, and creditors, in the absence of fraud, had no greater right.

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

*B. N. Robertson*, for appellants.

*Lake, Hamilton, & Maxwell, contra.*

IRVINE, C.

Henry Voss and William Voss were partners as Voss Bros., in the wall-papering business. May 29, 1893, Henry Voss signed the firm name to two notes drawn in favor of Peter E. Iler, and signed also by G. A. Ackerman and B. C. Voss. The consideration of these notes did not move to the firm, but, on the other hand, they were given in payment of rent of a building occupied by B. C. Voss and Ackerman and used in another business. Judgment was rendered against the firm on one of the notes August 12, 1893, and on the other October 24. Subsequently judgments against the firm were recovered by Werner

and Henry Lehman, both on debts incurred by the firm of Voss Bros. in the prosecution of its business. Executions on the Iler judgments were levied on the firm property, and later executions on the Werner and Lehman judgments were levied on the same property, subject to the prior levies. Then Werner and Lehman brought this suit to require the proceeds of the sale of the firm property so levied upon to be first applied to the satisfaction of their judgments. Their theory was that the debts represented by their judgments being strictly partnership debts, were entitled to satisfaction out of the partnership property before the debt of Iler, which did not originate out of the partnership business, and which was, it is claimed, created by Henry Voss without authority. The property levied upon was, by order of the district court, sold and the proceeds paid into court to await the event of this suit. On final hearing the court found for Iler and ordered the fund in court to be applied on the Iler judgments. The plaintiffs appeal.

The plaintiffs assert that Henry Voss, being without authority to bind the firm on matters outside the scope of its business, the debt must be treated as his individual debt, notwithstanding the judgment against the firm, and they then invoke the doctrine of equity, that partnership assets are to be first applied to the payment of partnership debts. The facts do not call for an application of that doctrine. It has been held that such doctrine is not based on the theory that a partnership creditor has a lien on the partnership assets, for, merely as a general creditor, he has no such lien. It is based on the presumption that credits have been extended to the individuals on the faith of their individual assets, and to the partnership on the faith of the partnership assets. (*Richards v. Le Veille*, 44 Neb. 38.) The right to require such application is, indeed, not a primary right of the creditor, but a derivative right, traced through the primary right of the partner not liable for the debt as a partner, to have such application made. It is not averred or proved that when the

Iler debts were incurred the partnership was insolvent. It does not appear then that the firm owed a dollar. Even when the Iler judgments were recovered none of the debts to plaintiffs had been incurred except about $40 to Lehman. While there is evidence that Wiliam Voss did not authorize Henry to sign the Iler notes and did not then know of them, he might ratify the act, at least unless such ratification would operate as a fraud on partnership creditors. There is no pretense that the Iler judgments were not obtained on due service of process and with perfect regularity, and there is no charge of collusion or fraud. If William Voss desired to repudiate his brother's acts he should have done so in the suit brought on the notes. Suffering judgment then to go against the firm precluded him from thereafter questioning the debt. Without setting aside those judgments for irregularity, fraud, or some equally potent cause, he could not thereafter assail them. As the plaintiffs were not existing creditors, and there is no charge that the debts to Iler were incurred or the judgments suffered in contemplation of creating debts, the plaintiffs can assert no rights which William Voss did not possess. It follows that the debts to Iler, if they were not in the first instance firm debts, became so on the rendition of the judgments against the firm. They are now as much so as the debts to the plaintiffs, and all must be satisfied in the legal order of priority of liens. The consideration for the creation of the debts, or the application of that consideration to partnership business, does not, under the facts of the case before us, become material.

AFFIRMED.

NELSON MORRIS, APPELLEE, V. ANDREW HAAS, APPELLANT.

FILED APRIL 8, 1898. No. 7684.

1. **Consent to Reference:** ESTOPPEL: APPEAL. A defendant to an action in which an accounting is prayed, who consents to an order of reference and proceeds according to the analogies of a suit in equity, cannot on appeal be heard to say that the action was essentially of a legal character, and should have been so treated.
2. **Accounting:** COUNTER-CLAIM: PLEADING: ESTOPPEL. One who, by his answer to a petition for an accounting, joins issue on the facts, pleads a counter-claim, and himself prays an accounting of all the transactions cannot be afterwards heard to allege that the petition did not contain averments sufficient to entitle the plaintiff to demand an accounting.
3. **Consent to Reference:** PARTICIPATION IN TRIAL: ESTOPPEL. One who consents to an order of reference directing the referee to report his "conclusions" and then proceeds before the referee, after the expiration of the time limited in the order, participating in the production of evidence and asking the referee to pass upon questions of law and fact, and who, after the evidence has been taken, stipulates for an extension of time for the referee to file his "decision," cannot, after the filing of an adverse report, be heard to say that the referee did not proceed within the time first fixed, or that he was not authorized to find the facts.
4. **Partnership:** ACCOUNTING: EVIDENCE. Books of account, kept by one partner and showing his transactions with the other, to which accounts the other had access and which he from time to time examined, and which, after the business ceased, he admitted to be correct, are admissible in evidence on an accounting between them.
5. **Accounting:** EVIDENCE. The evidence on certain issues of fact examined, and certain findings set aside because not sustained thereby.

APPEAL from the district court of Douglas county. Heard below before FERGUSON, J. *Modified.*

*Bartlett, Baldrige, & De Bord,* for appellant.

*Wharton & Baird, contra.*

IRVINE, C.

The petition in this case alleges two partnership contracts between the plaintiff and the defendant, the one made in 1883 having for its object the purchase and operation of a cattle ranch in Colorado and Utah, usually called by witnesses the "Two-Bar Ranch," the other made in 1887 for the operation of a feeding ranch at Herman, in this state. The petition charges that in each instance the money for the purchase and operation of the ranch was furnished by plaintiff under an agreement that he was to receive interest thereon; that defendant was to devote his time, skill, and attention to the conduct of the business; and that profits or losses were to be shared or borne equally. It then charges that large losses were incurred; and further, that Haas had failed to account for a portion of certain large advances that Morris had made to him for use in the joint undertakings. Amounts are in all cases alleged with certainty, and the prayer is for an accounting of the various transactions, and for judgment for $85,485.15, with interest. April 4, 1892, an answer was filed admitting the partnerships essentially as charged, but traversing some details of the contracts alleged, and pleading that profits had accrued for which plaintiff refused to account. The answer closed with a prayer for an accounting. April 15, 1892, an order was made by consent of parties, referring the case to Edgar H. Scott, Esq., "to take the testimony in this case, and said referee is hereby authorized and directed to take the testimony in this cause and report the same to the court, together with his conclusions, * * * within 90 days from the date hereof." It would seem that nothing was done under this order until October, when the referee took the oath. It does not appear that any orders were made extending the time for the referee to act, but from time to time stipulations were entered into for the further taking of testimony and the extension of time to report. The taking of testimony was begun October 4, 1892, and

continued at intervals until March, 1894. Pending the taking of testimony, and January 15, 1894, an amended answer was filed substantially changing the issues. This amended answer admitted that there had been an agreement for a partnership in the Two-Bar Ranch, but alleged facts amounting to an exclusion of the defendant therefrom on June 10, 1884. With regard to the Herman ranch, it denied the partnership and alleged that defendant purchased that ranch for the plaintiff and was to have a one-third interest therein for his services. By way of counter-claim four other transactions or business ventures were alleged, which will later be noticed. The amended answer also prayed for an accounting.

The referee reported June 13, 1894, finding nearly all the issues in favor of the plaintiff, and finding due him $63,212.09. Numerous exceptions were taken and a motion was made to set aside the report. This motion was overruled and judgment entered on the referee's findings.

The defendant asserts that the proceedings, from the facts alleged, should be in the nature of an action at law, and not in equity. If this were true, so far as the district court was concerned it would only go to the method of trial, and the defendant, by consenting to the reference, waived the objection. (*Sherwin v. Gaghagen*, 39 Neb. 238.) So far as the question could be raised here it would only affect the defendant's right to have the case reviewed in the manner he has brought it here, by appeal.

It is urged that the petition does not contain the necessary allegations to entitle the plaintiff, as a partner, to an accounting, in that it neither pleads a past dissolution nor prays for a present one. But it appears—if not by the petition, certainly by the answer—that whatever business connections had existed between the parties were severed before suit brought. Moreover, in both answers the defendant himself prayed for an accounting. He went on before the referee for about two years taking the account, and by counter-claim he injected into the accounting matters not embraced within the original pe-

tition. He cannot now be heard to say that the court should not have allowed the accounting both parties asked.

The report of the referee is assailed on the ground that he acted after his authority had expired by limitation of time, and beyond his original powers. On the latter point the argument is that he had power only to take and report testimony, and not to find the facts. The order of reference, directing the referee to take the testimony and report the same with his "conclusions," lacks certainty. Under our practice it is customary to speak of findings of fact and conclusions of law; but necessarily such conclusions can only be reached after the facts have been found. It would seem, therefore, that "conclusions" in the order was not used in its narrower and more technical sense, but included the finding of the facts as well as the ascertainment of the law applicable thereto. Both parties evidently so understood the order. During the taking of testimony the defendant asked of the referee leave to file an amended answer. Probably the referee would not in any case have power to so reform the pleadings, but the application shows that the defendant construed the order of reference as conferring wide judicial authority and not as merely constituting the referee an examiner to take the proofs. At the close of the plaintiff's case the defendant asked the referee to dismiss the case because the proof was insufficient. This certainly showed that he considered the referee authorized to pass upon the evidence. May 11, 1894, counsel for defendant signed a stipulation to extend the time for the referee "to make up and file his report and decision." It is very clear that until the defendant was confronted with an adverse report he never sought to question the referee's authority, and now, after submitting to the proceeding and taking part therein for about two years, and after the taking of thousands of pages of proof, he cannot be heard to question it. (*Moline, Milburn & Stoddard Co. v. Wood Mowing & Reaping Machine Co.*, 49 Neb. 869.)

The findings of the referee are vigorously assailed as not sustained by the evidence. The argument is largely directed to the credibility of the plaintiff and his witnesses—a question for the trier of fact in the district court, and by him determined. So far as the issues concern the nature of the contracts with reference to the ranches, there can be no doubt that the findings receive substantial support in the evidence. Much argument is addressed to the proposition that the contracts, in any view of the evidence, lacked certain essentials of a partnership, especially mutual agency and authority. There is no question involved of the improper exercise of such powers, the critical issue is merely whether there was an agreement that Haas was to share the liability for losses. That point established, and the evidence certainly tends to establish it, it makes no difference whether or not we are to designate the arrangement by the name of partnership.

The sufficiency of the evidence to establish the amounts found by the referee depends largely on the admissibility of certain accounts in evidence. These were from the private books of Morris, kept by his book-keepers in Chicago, and were not, in any proper sense, partnership accounts. They were rather the personal accounts of Morris with his partner. Moreover, we are inclined to concur with the defendant in the conclusion that they were not shown to be admissible under the statute as private entries on behalf of the person making them. We have, however, the testimony of several witnesses that these accounts were made up in part from statements sent by Haas to Morris, and that statements in the form of transcripts from these books were from time to time sent by Morris to Haas. Further, that during the whole period to which the proof relates, Haas was several times each year in Chicago and had access to these accounts, and did from time to time examine them and at times suggested corrections, which were made after investigation of the facts. Finally, after the joint transactions had been terminated.

Haas examined the books and pronounced them correct. They were thus admissible in much the same way as a statement of account, received and retained without objection, and also as an affirmative admission of one of the parties.

We must be excused from a detailed review of the enormous volume of evidence before us. It has been examined, and, except in the particulars now to be noticed, has been found to sustain the findings.

When we reach the referee's treatment of the counterclaims we encounter more difficulty. The defendant alleged that under instructions from Morris he superintended the construction and operation of an establishment at South Omaha known as the Union Rendering Works; that a corporation was formed, to which the works were transferred, and that Morris, who controlled the stock, agreed that Haas should have one-fourth of the stock for his services. It was also averred that this stock had been in fact delivered, but that by fraudulent means Morris had repossessed himself thereof and had refused to surrender it. The finding on this subject in favor of plaintiff is sustained by proof that the stock in question was issued to Haas only to enable him "to attend the meetings" of the corporation, and that when the certificate was sent him it was with express instructions to indorse it to Morris and send it back to him, which was done. No interest was shown in Haas. The defendant also bought for Morris certain cattle and fed them at the Willow Springs Distillery at Omaha. He claims that he was to have one-third the profit for this service. The finding adverse to him on this subject is sustained, because there is no proof of any profit. Haas testified that he did not know whether there was a profit, but that there was a profit of $10 to $12 a head on other cattle similarly handled that season. Such evidence was incompetent to prove a profit on these cattle.

During a large portion of the time occupied by the amicable business relations of the parties, defendant was

engaged in purchasing cattle on the South Omaha market and shipping them to Morris in Chicago. He claims he did so under a contract whereby he was to receive $5 per car load for his services in that behalf. The referee found that he was entitled to no compensation. This finding must have been based on certain testimony by Morris and his son that Morris owned Haas' time, and that they could call on him for any service they chose. When this proof is examined it will be found that it consists merely of statements of the conclusions or inferences of the witnesses as to the nature of the contracts, and that such inferences are wholly unwarranted. Mr. Morris may have thought that when he entered into the partnership contracts with Haas he was acquiring a slave, but he had no right to think so. Such an inference is repugnant to the theory of either party—to that of Haas because according to him each venture stood on its own footing, there being no interdependence; to that of Morris because according to him the ranch partnerships were joint business ventures, each party assuming his share of the risk, and Haas not in any manner becoming Morris' servant. They were partnerships towards which Morris advanced the money, and Haas gave the skill and attention necessary for their conduct. Morris was no more entitled to Haas' time outside the partnership, to assist Morris in his private business, than Haas was entitled to the whole of Morris' fortune, not embarked in the ranches, to assist Haas in his own private ventures. Against this arrogant assertion of human ownership made by Morris we have the undisputed fact that the services were rendered, and that at Morris' request, and the strong antecedent improbability that either party contemplated that such services should be gratuitously performed. We also have uncontradicted proof that the compensation which Haas says he was to receive was a reasonable compensation, and we have Haas' detailed account of the conversation leading to and expressing the contract. As to the amount of this item the proof is not very definite. Haas says he bought

and shipped for Morris more than 6,000 car loads of cattle. Morris seems to have kept his books in other particulars very carefully, and undoubtedly might have shown the exact figures, and would have done so if Haas had overstated them. We must allow this item according to such proof as we have, that is to the amount of $30,000. Precisely in the same situation stands a claim for $250 for services in purchasing cattle in Kentucky. In this instance there is no dispute as to the value of the services. This item must also be allowed.

The referee calculated interest on all items from September 1, 1890. The judgment is modified by deducting therefrom the sum of $30,250, with interest at seven per cent from the date last mentioned.

JUDGMENT ACCORDINGLY.

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BROWNELL & COMPANY V. JOHN A. FULLER ET AL.

FILED APRIL 21, 1898. NO. 9876.

**Bill of Exceptions: ALLOWANCE BY DEPUTY CLERK.** In cases where the clerk of the district court is authorized to settle bills of exceptions, the act may be performed by a deputy, it not being shown that the principal is absent.

MOTION to quash bill of exceptions. *Overruled.*

*B. N. Robertson*, for the motion.

*Lane & Murdock* and *Congdon & Parish*, *contra.*

PER CURIAM.

This case is presented on a motion to quash the bill of exceptions. The order of allowance is signed "Albyn L. Frank, Clerk Dist. Court, by J. D. Harris, Deputy." The principal grounds of the motion are that there is no showing that the judge was prevented by sickness or absence

from his district from allowing the bill, and that the deputy clerk is in no instance authorized to perform such an act. The former ground seemed to be well taken when the motion was filed, but plaintiff in error has since tendered an additional transcript containing the affidavit on which the clerk was authorized to act by section 311 of the Code of Civil Procedure. This affidavit is combated because not embodied in a bill of exceptions, because it is not the best evidence, because no leave to file it has been given, and because it was executed before a notary public who was one of the attorneys for plaintiff in error. It has never been held that the proofs on which authority to settle a bill of exceptions depend must themselves be embodied in a bill of exceptions. On the contrary, it has always been the practice to receive, on a motion to quash, independent evidence in this court. The transcript of the affidavit is the best evidence. (Code of Civil Procedure, sec. 408.) Leave is now given to file it in accordance with a motion made for that purpose and the established practice of the court. While it is shown to have been executed before an officer who was not permitted to take it, the officer was generally empowered to take affidavits, and did not act wholly without power. In such case the affidavit is not a nullity. It was irregular merely. An act based thereon was not void. (*Horkey v. Kendall*, 53 Neb. 522.)

We are thus brought to a consideration of the powers of a deputy clerk in such matters. The discussion on this subject turns upon section 2, chapter 24, Compiled Statutes, and section 893 of the Code of Civil Procedure. By the former section it is enacted: "In the absence or disability of the principal, the deputy shall perform the duties of his principal pertaining to his own office, but when an officer is required to act in conjunction with or in place of another officer, his deputy cannot supply his place." By the latter section it is provided that "Any duty enjoined by this Code upon a ministerial officer, and any act permitted to be done by him, may be performed

by his lawful deputy." The joint effect and the proper construction of these two sections was the subject of investigation in *Nebraska Loan & Building Ass'n v. Marshall*, 51 Neb. 534, where it was held that the provision in chapter 24 of the Compiled Statutes relates to the power of a deputy to supply the place of the principal in the case of the latter's absence or disability, and that the provision from the Code of Civil Procedure governs as to the general power of deputies in matters enjoined upon or permitted to officers under that Code. So construed, it was held that a deputy sheriff might act for his principal in appraising property preliminary to a judicial sale. The case is not distinguishable in principle from the one before us.

A final objection to the bill is that no notice was served on the defendant in error of the time of presenting the bill for allowance. Amendments had been suggested, but were all allowed by plaintiff in error and are now incorporated in the bill. In such case, as well as when no amendments have been proposed, no notice need be given. (Code of Civil Procedure, sec. 311.)

MOTION OVERRULED.

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SUPREME TENT OF THE KNIGHTS OF THE MACCABEES OF THE WORLD V. ELIZABETH E. KREIG, ADMINISTRATRIX.

FILED APRIL 21, 1898. No. 9934.

1. **Bill of Exceptions: TIME FOR ALLOWANCE.** Assuming, but not deciding, that the absence from the county of both trial judge and clerk during the period within which a proposed bill of exceptions should have been presented for settlement excused a failure to have it settled within that time, still the statutory time began to run, under that assumption, from the time of the judge's return, and he was not authorized to allow the bill when it was not presented for more than ten days after his return.

2. ———: ———. The fact that the defendant in error held the pro-

posed bill longer than the law permitted did not excuse a subsequent default by the plaintiff in error.

3. ———: MOTION TO QUASH: WAIVER. The defendant in error did not waive his right to move to quash the bill by appearing before the trial judge merely to object to its allowance, nor by failing to file the motion until after the time had expired within which the plaintiff in error was required to file his briefs to the merits, such briefs not having been filed.

MOTION to quash bill of exceptions. *Motion sustained.*

*Burr & Burr*, for the motion.

*Kelley & Browne* and *A. R. Talbot*, *contra.*

PER CURIAM.

In this case there has been submitted a motion to quash the bill of exceptions. The ground of the motion is that the proposed bill was not submitted to the judge for allowance within the ten days allowed by statute for that purpose after it had been returned to plaintiff in error by defendant in error. Objection was made to the trial judge on the same ground. He allowed the bill, as is proper in doubtful cases, making, however, special findings of the facts relating to the question presented. From these findings it appears that the term of court at which the case was tried was adjourned *sine die* April 5, 1897. The full period of eighty days from the time of such adjournment seems to have been allowed for presenting the proposed bill to the defendant in error. Within that time and June 21 it was so presented. Defendant in error retained the bill until July 7, returning it then and suggesting certain amendments. The trial judge left the county and state July 8, returned July 27, remaining until July 31, when he again left and was absent until August 13, when he returned. The bill was not presented to him for settlement until August 31, when the defendant in error objected to its allowance at that time, and also objected to the judge's then considering the amendments which had been proposed.

Section 311 of the Code of Civil Procedure, after providing that the party excepting shall within a time designated present the proposed bill to the adverse party for examination, and that the adverse party shall return it within ten days after such submission, provides further that "the bill and proposed amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who heard or tried the case upon five days' notice to the adverse party, or his attorney of record, at which time the judge shall settle the bill of exceptions." It is asserted that the defendant in error is estopped to set up that the bill was presented out of time, because counsel for defendant in error held the bill sixteen days instead of ten, and that plaintiff in error was thereby prevented from giving notice of settlement and presenting it within the statutory time before the judge left the district. What effect the neglect of defendant in error in this respect would have if the fact stood alone we need not determine. It would not excuse subsequent negligence on the part of the plaintiff in error. Defendant in error contends that there was such subsequent negligence in failing to present the bill, with an affidavit of the judge's absence, to the clerk of the court for allowance as the statute authorizes. To this it is answered that the clerk of the court was also absent. His deputy was here and a question discussed relates to the power of the deputy to act for his principal in such a case. We do not pass upon that question, and state the facts merely in order to meet the thought which would naturally occur to the practitioner in regard to the clerk's power, and to avoid any apparent adjudication thereon by silence. It appears that the judge returned to the county August 13, and if the plaintiff in error was excused by his previous absence from presenting the bill before that time it cannot be claimed that it was entitled to more time after the judge's return than it would have had if the judge had been present from the beginning. In other words, assuming, but not deciding, that the absence

of the judge under the facts of the case prevented the plaintiff in error from obtaining a settlement of the bill during his absence, the statutory time certainly began to run from the time of his return, and the bill should have been presented within ten days thereafter. It was not presented until the eighteenth day. It is true that after the judge found the specific facts he added that the bill was presented at the earliest opportunity for presenting the same in person to the judge who tried the case. This is not, however, a finding of any fact justifying a further delay. No such fact is shown to exist.

It is contended that the defendant in error cannot now be heard to urge this motion because it was not filed before the time had expired for filing briefs by plaintiff in error. It has been held that a motion to quash on such a ground as this must be interposed before briefs to the merits have been filed. (*Nash v. Costello*, 50 Neb. 325.) But here the plaintiff in error has not filed briefs. Its failure to do so within the time fixed by rule is its own laches, and not that of defendant in error. If it had itself complied with the rule, it would be in position to invoke the doctrine of the case cited. It is further said that defendant in error has waived the objection by suggesting amendments and by appearing when the judge allowed the bill; but when the amendments were suggested there had been no default. A suggestion of amendments made before the right to a bill has been lost does not operate prospectively to waive future and unanticipated defaults. The appearance of defendant in error was solely to insist on the objection to the allowanee, and one does not ordinarily waive a right by insisting on it.

MOTION SUSTAINED.

BEATRICE SAVINGS BANK OF BEATRICE V. BEATRICE CHAUTAUQUA ASSEMBLY, IMPLEADED WITH J. S. GRABLE ET AL., APPELLANTS, AND E. R. FOGG, RECEIVER, APPELLEE.

FILED APRIL 21, 1898. No. 8044.

1. **Unauthenticated Bill of Exceptions.** A bill of exceptions which lacks authentication by the clerk of the trial district court will not be considered in the supreme court.

2. **Review Without Bill of Exceptions.** In an appeal to this court, in the absence of a bill of exceptions, if the petition or pleading on which the decree is predicated contains sufficient statements of a cause and proper prayer for the relief thereby afforded, questions which for decision necessitate a reference to the bill of exceptions will not be considered, and an affirmance of the decree is proper.

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

*G. M. Johnston,* for appellants.

*J. N. Rickards, E. R. Fogg,* and *Griggs, Rinaker & Bibb, contra.*

HARRISON, C. J.

Action to foreclose a real estate mortgage in which the appellee by cross-petition sought the foreclosure of a mortgage on the property involved, and from a decree favorable to his prayer certain of the parties have perfected this appeal. What is filed with the record here as the bill of exceptions lacks the requisite authentication by the clerk of the trial district court and will not be examined. (See *Romberg v. Fokken,* 47 Neb. 198; *Spurk v. Dean,* 49 Neb. 66; *Childerson v. Childerson,* 47 Neb. 162.)

The cross-petition was sufficient in its statements of facts and prayer to warrant the relief, for which as to it there was a decree, and in the absence of a proper bill of exceptions we cannot examine the questions presented

by the brief of counsel. (*Stuart v. Burcham*, 50 Neb. 823.) The decree must be

AFFIRMED.

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GERMAN NATIONAL BANK OF LINCOLN, APPELLEE, V. FARMERS & MERCHANTS BANK OF HOLSTEIN, NEBRASKA, ET AL., APPELLANTS.

FILED APRIL 21, 1898. No. 7986.

1. **Review Without Bill of Exceptions.** If there is no bill of exceptions in the record, or the same has been quashed, questions which for their examination require reference to a bill of exceptions cannot be considered.
2. **Corporations:** CONSTITUTIONAL LAW. "The word 'ascertained,' in section 4, article 11, of the constitution, means judicially 'ascertained,' and to 'judicially ascertain' the amount due from a corporation to a creditor thereof means to have the finding and judgment or decree of a court as to such amount." (*Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175.)
3. ———: ———. The foregoing is also applicable to the liability of a stockholder in a banking corporation as fixed by section 7 of the same article of the constitution. (*Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353.)
4. ———: ———: PLEADING. The portion of the petition in relation to the ascertainment of the amount due a creditor from the corporation and exhausting the assets of the latter *held* sufficient against attacks of the time and manner made.
5. **Action Against Stockholders.** An action such as this should be for the benefit of all the creditors of the corporation against whose stockholders it is commenced.
6. **Insolvent Bank:** ACTION AGAINST STOCKHOLDERS: PARTIES. The bank, the liability of whose stockholders was sought to be enforced herein, *held* not a necessary party to the action, but not an improper one.
7. ———: ———: This and similar actions are within the equity jurisdiction of the courts and call for the exercise of their equity powers.
8. ———: ———. The general nature of the relief to be afforded in its main and ordinary elements outlined herein.

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

*Capps & Stevens* and *Boehmer & Rummons*, for appellants.

*Abbott, Selleck & Lane, contra.*

HARRISON, C. J.

Action was instituted by the appellee, for itself and for the benefit of all other creditors of the Farmers & Merchants Bank of Holstein, to recover of the stockholders of the latter the amount for which each, as a stockholder of the corporation, was liable to the creditors of the corporation. It was of the allegations of the petition: "Plaintiff further says that since the execution, delivery, and transfer of said notes the said defendant the Farmers & Merchants Bank had ceased to do business and had been dissolved, and is now wholly and completely insolvent and unable to pay its obligations hereinbefore set forth; that all the assets ever held by said bank, including the amount of the notes above described, have been appropriated and used by the said bank, or its officers, for the purpose of paying its debts or dividing among its several stockholders, and that there are no assets or property of any kind or description belonging or owing to said bank with which the notes hereinbefore mentioned and described could be paid, and that said bank has no assets with which to pay these obligations, except as hereinafter described; that the exact amount justly due has heretofore been ascertained, and the corporate property has been wholly and completely exhausted." It was of the defenses set forth in answer for all defendants except the corporation that no judgment had been obtained against the appellant bank for the amount of the notes, the indebtedness evidenced by which furnished a basis for the present action. In a trial of the issues joined the appellee was successful, and the other parties have perfected this appeal.

The bill of exceptions herein has, on motion, been

quashed and all questions which for their due consideration would require a reference to that document must be passed without examination.

It is of the points of argument for appellants that the petition was insufficient, in that it contained no statement of the facts relative to the due ascertainment of any sum due from the Farmers & Merchants Bank of Holstein, and the exhaustion of the assets thereof. We have hereinbefore quoted the averments of the petition on this subject, and it remains to determine whether they were sufficient or insufficient. In section 4 of the article of the constitution entitled "Miscellaneous Corporations" it is provided: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." It has been held by this court that "ascertained," as used in the portion of the constitution quoted, means judicially ascertained; and it has also been determined what is the import of the language in regard to the assets of the corporation being exhausted. (See *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175; *Commercial Nat. Bank v. Gibson*, 37 Neb. 750; *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *State v. German Savings Bank*, 50 Neb. 734; *Van Pelt v. Gardner*, 54 Neb. 701.) And it has also been announced that the provisions of section 4, in relation to the ascertainment of the liability of the stockholders and the exhaustion of the assets of the corporation, are applicable to the liability of stockholders in banking corporations under the terms of section 7 of the same article of the constitution. (See *Farmers Loan & Trust Co. v. Funk, supra.*) It will be noted that the allegations in the petition are that the "exact amount justly due has hereinbefore been ascertained, and the corporate property has been wholly and completely exhausted," and the wording of

the section of the constitution is "The exact amount justly due shall be first ascertained and after the corporate property shall have been exhausted." The framer of the pleading did not employ the precise words of the constitution, but followed them very closely, and conveyed the same meaning.

Before answer for appellants there was filed for them a motion that the sentence to which we have just referred be stricken from the petition because indefinite and uncertain and a statement of conclusions and not of facts, which was overruled; but there was no proper attack made against such portion of the petition, and we are satisfied that it was a sufficient statement to warrant the reception of evidence under it of the necessary facts, and inasmuch as by the answer and reply the issue was raised of whether a judgment had been rendered, in the absence of a bill of exceptions it must be presumed there was sufficient of evidence to warrant the court's decree, based, as it must have been, partially on a finding that there had been the necessary ascertainment of the amount due from the corporation and its assets exhausted.

It is urged that the action was evidently brought for the benefit of appellee alone, and should have been for all creditors; hence was not sustainable. Such an action should be for all creditors, and all creditors within the jurisdiction of the court should be made parties. (*Van Pelt v. Gardner, supra.*) In the case at bar the action was, in form and substance, for the benefit of all creditors, and there was in the petition an allegation in effect that the appellee was the sole and only remaining creditor, and as the record does not disclose to the contrary, it must be concluded that the action was not defective in this particular.

It is contended that there was a misjoinder, in that the bank, the corporation, and its stockholders were sued in the one action; that this was a misjoinder of parties and of cause. The bank was not a necessary party to an action to establish and enforce the stockholders' liability, and in

such action no specific relief is sought, or can be granted, against the corporation. (*Van Pelt v. Gardner, supra.*) But that the bank was made a party, or relief afforded herein against it, if erroneous, was not error of a character which can affect in any manner the adjudication of the rights of the stockholders. While probably not a necessary party, the bank was not an improper one. This is an action which addresses itself to the equity side of the court; calls for the exercise of equity jurisdiction of the court, rather than what are termed its strictly and distinctively law or legal powers. In *Harris v. Dorchester*, 23 Pick. 112, the supreme court of Massachusetts, in the consideration of a similar question under a like provision of statute, stated: "If actions at law will lie under the 30th section, suits may be multiplied to an indefinite extent. Each bill-holder or other creditor must have its separate suit, and each stockholder must be sued separately. Again, suits between stockholders to adjust their contributions would be interminable. If a creditor's demand be larger than the amount of stock owned by any one, he must have several suits against several individuals on the same cause of action, or lose a part of his just demands. If any one stockholder owned more stock than was needed to meet any one claim made upon him, he would be liable to several suits. It may happen, and probably has happened in this instance, that a bank owes more than the amount of its whole capital. In such case, there must either be a *pro rata* division among the creditors of what may be recovered, which would be impracticable in suits at law, or those who sue first must recover the whole of their debts, leaving others totally remediless, which would be palpably unjust. The evils and inconveniences of attempting to enforce this section by suits at common law would be incalculable; and such remedy would be inadequate, vexatious, and mischievous. The only proper means of giving effect to this provision is by a process in equity, and this, of all cases which can arise, seems to call most loudly for chancery jurisdiction. To a bill in

equity all persons, however numerous, might be made parties, and all the relative and conflicting claims of the many creditors and stockholders settled and their proportionate rights to recover, and liabilities to contribute, adjusted in a single suit. We are all, therefore, of opinion that this case comes within the equity jurisdiction of the court and that an action at law will not lie." (See also *Coleman v. White*, 14 Wis. 762 (700*); *Harper v. Carroll*, 69 N. W. Rep. [Minn.] 610, 1069; *Harpold v. Stobart*, 46 O. St. 397; *Glenn v. Williams*, 1 Am. & Eng. Corp. Cas. 58; *Terry v. Tubman*, 92 U. S. 156; *Pollard v. Bailey*, 87 U. S. 520; *Wright v. McCormick*, 17 O. St. 87; *Richmond v. Irons*, 121 U. S. 27; *Schroder v. Manufacturers Nat. Bank*, 133 U. S. 67; *Ligett v. Glenn*, 51 Fed. Rep. 381.)

There was judgment herein in favor of the appellee and against each of the stockholders of the appellant bank for the full sum for which each was liable under the terms of the constitutional provision, and that execution be awarded the appellee against each. This, we think, as to the awarding of the execution in favor of appellee, was improper. To make collections and disburse the moneys to the creditors there should be some person always amenable to the order of the court and from whom at all times the true state of account may be ascertained. This points directly to a receiver. There should in each case of the nature of this one be an application for and the appointment of a receiver. The court should adjudge the amount due the creditor, or each of the creditors, if more than one, and also the total amount due from each stockholder, and determine the amount of the *pro rata* share required in the first instance necessary to be paid by each stockholder to satisfy the indebtedness proved in the suit, and the costs thereof, such amounts to be collected under the court's order by execution or other proper writ or process or by suit, if necessary, all moneys to pass into and through the hands of the receiver. Of course, when the total of the indebtedness exceeds the aggregate of the sums due from stockholders an assess-

ment will not be requisite. The cause should be retained that in proper application such further orders, assessments, and decrees may be made as the facts and circumstances and the doing of equity may require. This cause is remanded to the district court for modification of the decree and such further proceedings as we have hereinbefore indicated and as may be necessary to insure the proper relief herein.

JUDGMENT ACCORDINGLY.

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## UNION LIFE INSURANCE COMPANY OF OMAHA V. WILHELM HAMAN, GUARDIAN.

FILED APRIL 21, 1898. No. 7832.

1. **Conflicting Evidence:** REVIEW. A verdict on conflicting evidence will not be disturbed unless manifestly wrong.
2. **Action Against Insurance Company:** VERDICT FOR PLAINTIFF. The evidence examined, and *held* that there was sufficient thereof in support of the verdict returned.
3. **Rulings on Evidence:** REVIEW. Actions of the trial court in the admission of alleged objectionable evidence considered and determined not erroneous.
4. **Insurance:** PAYMENT OF PREMIUM: CREDIT: QUESTION FOR JURY. To constitute a life insurance policy operative and of force it was necessary that the first premium should be paid, and in an action on the policy there was evidence sufficient to sustain a finding that the general manager of the company had extended credit to the party named in the policy for the payment of the first premium. *Held*, That the question of whether such credit had been given was a proper one to submit to the jury; and further, that such question was within the issues presented by the pleadings in the case at bar.
5. ———: ———. If, for the payment of such first premium, a credit was extended, the policy became of effect and binding.
6. ———: STATEMENTS OF AGENT: EVIDENCE. The statements of an agent while acting in a matter in which he has authority, and of matters within the scope of his authority, and of and concerning the business in hand, made at the immediate time of its transaction, or a part thereof, are admissible in evidence against his principal.

7. ———: ———: ———. Such statements made subsequent to the close of the transaction, not connected therewith and not specially authorized by the principal, cannot be received in evidence against the latter.

8. ———: INSTRUCTIONS: REVIEW. Actions of a trial court in giving portions of the charge to the jury approved or *held* not prejudicially erroneous.

9. Harmless Error. Errors which it is clear from an inspection of the whole record did not prejudice the rights of the complaining party furnish no sufficient cause for reversal of a judgment.

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

*W. W. Morsman*, for plaintiff in error.

*Brome, Burnett & Jones, contra.*

HARRISON, C. J.

Of date December 16, 1891, there was executed an instrument, in form a policy of insurance on the life of John W. Drewlow, in the sum of $2,000, the beneficiaries therein named being Helen and Richard Drewlow, the children of John W. Drewlow, and of date August 8, 1893, this action was instituted in the district court of Douglas county by the defendant in error as guardian of Helen and Richard Drewlow, it being alleged in the petition that the policy of insurance was, of the date we have before stated, issued and delivered to the assured; that he "kept and performed all the conditions and agreements on his part to be kept and performed, and paid the consideration in said agreement mentioned at the time the same was due and payable, excepting the sum of $62.80 falling due on the 16th day of December, 1892, and said sum was on said date duly tendered and offered to defendant by said Drewlow." The death of John W. Drewlow of date March 24, 1893, the furnishing to the company of proof thereof, demand of payment of the amount of the insurance, and failure and refusal by the company were pleaded. In the answer there

was a denial that the company ever delivered or authorized the delivery of the agreement or policy in suit, and it was stated that the policy was signed pursuant to an application by John W. Drewlow to the company for the issuance with the express understanding that it was not to take effect until the amount of the first premium should be paid in full, and that the first premium had never been paid and the policy had never been of force or effect. The further portions of the answer were as follows: "That the agreement or policy of insurance sued on, copy of which is set out in the petition, was obtained by the said John W. Drewlow, during his lifetime, by fraud; that prior to, and on the 16th day of December, A. D. 1891, Frank H. Chapman was a soliciting agent in the employ of this defendant; that said Frank H. Chapman employed the said John W. Drewlow to assist him in securing applications for insurance to be taken by this defendant, and in order to enable the said John W. Drewlow to show and represent to persons whom he might solicit to make applications for insurance that he (said Drewlow) had himself taken a policy on his own life, the said Chapman and Drewlow made out an application in writing in the name of said Drewlow, as applicant, for the policy of insurance sued on, and procured a medical examination of said Drewlow, and forwarded the said application to this defendant; that this defendant accepted said application and issued the policy of insurance sued on, and, together with a receipt duly signed, for the first premium, to-wit, the sum of $62.80, forwarded the same to said Chapman, to be delivered to the said Drewlow upon the payment of said $62.80, and not otherwise; that in fact the said Drewlow did not make said application in good faith and did not intend to accept the said policy of insurance and pay the premium aforesaid, or any premium thereon, of all of which this defendant was wholly ignorant and issued the said policy and forwarded the receipt aforesaid in good faith believing the said application to have been made *bona fide*,

and would not have issued the same if it had known the facts aforesaid; that afterwards the said Chapman, the said John W. Drewlow then being present and consenting, at the office of this defendant, in Omaha, Nebraska, surrendered to this defendant the aforesaid receipt for the first premium, stating that the said Drewlow did not intend to accept the said policy of insurance or pay the said premium or any premium thereon, which receipt this defendant then accepted and destroyed and demanded the return of said policy of insurance, which the said Chapman and said Drewlow then promised, but afterward failed to do; that afterwards the said John W. Drewlow, being about to undergo a painful surgical operation, represented to the said Chapman that he (Drewlow) would be compelled to submit himself to the influence of chloroform, and that he feared he might not survive the same, and desired to obtain the benefit of said policy of insurance for his children in the event of his death during such operation; and thereupon it was agreed by and between the said Chapman and said Drewlow that the said Drewlow should execute in favor of said Chapman his (Drewlow's) promissory note for the amount of the first premium aforesaid, and date the same back to a period within sixty days from the date of said policy of insurance, and that said Chapman should execute a receipt for the amount of said first premium and place the same in the hands of one Underberg during the surgical operation, and that if the said Drewlow should survive the said operation such note and receipt be destroyed, but in the event of his death during the same the note would be paid by a relative of said Drewlow and the receipt delivered showing the payment of said premium, all of which the said Chapman and Drewlow then did and performed, but wholly without the knowledge or consent of this defendant and in fraud of this defendant's rights; that said Drewlow in fact survived said operation, but whether said note and receipt were destroyed or not this defendant has no knowledge or

information; but this defendant says the said Drewlow did not pay or intend to pay the said note or said premium, or any part of the same; that the said Chapman had no authority to accept a note in payment of said first premium, nor any authority to execute a receipt for the same or to receive payment of said premium, except upon the production of a receipt therefor signed by the president, or the vice-president, or the secretary of this defendant, all of which the said Drewlow then well knew." The reply was a general denial. The guardian was successful in the district court and the company presents the cause here for review.

We deem it best to first discuss and determine the question of the sufficiency of the evidence to sustain the verdict. It is urged that the verdict has no support in, and is contrary to, the evidence, and in this connection, also, that the trial court erred in refusing a request to direct a verdict for the company.

One F. H. Chapman was called as a witness and testified that during the winter season of 1891 he was agent or solicitor for the company at Stanton, this state, where Drewlow then lived, and that he, Chapman, employed Drewlow to assist in soliciting parties to take insurance, and further testified substantially as follows: "I took an application from him for a policy of insurance, and forwarded it to the company. I had solicited him for life insurance, and he claimed he could not afford to carry it, so I told him that I would get him a policy any way, and I did so. It was not the understanding that he was to pay for the policy. I told him it would not be necessary; I would get him a policy without, and I did so. Drewlow spoke the German language, and I was among Germans and he was assisting me, and the question arose often why he did not carry a policy, and I thought I would fix that by getting him a policy, and I did so. The policy was not to be delivered at all. He was not to pay anything for it. He did not pay anything for it. I received the policy within a day or two after its date,

together with a receipt for the first premium, somewhere along about $60. I afterward returned this receipt to Mr. Harrison on Christmas day, 1891. Mr. Drewlow and myself were present together in the office of the defendant at Omaha. Mr. Hunter was also present, and, I think, all of them. I told them that he [Drewlow] was not going to take the policy; that he had got the policy for soliciting purposes, and I returned the receipt so it would not be charged against me. This was in the presence of Drewlow, and he made no protest or objection. Then I went out with Mr. Wigton to the bank to get a check cashed, and when I returned Mr. Hunter and Mr. Drewlow had had some talk, and Mr. Hunter didn't like the plan, and he told me that Mr. Drewlow had concluded to take the policy. Mr. Hunter said the policy should be returned if it was not taken. Drewlow did not take it, or pay any premium on it. Afterwards, Drewlow submitted to a surgical operation. This was in the spring after the policy was issued. When he was ready for the operation he came to me and wanted me to arrange to make the policy good. I didn't like to do it, but I did. I gave him a receipt for the first premium. He gave me a note for the amount. We dated the receipt and the note back. He told me that his brother-in-law would pay the note in case he died during the operation. These papers were given to Dr. Underburg, and after the operation they were to be returned to him, if he didn't die. He survived the operation. I do not know what became of the papers. I never saw them afterwards, and never thought he would claim the policy was in force and I neglected to call for the receipt. He never paid the note to me. The receipt and note were dated back, so as to make it appear that the transaction occurred within sixty days from the date of the policy, and avoid the rule of the company, which would have required a re-examination. This letter now shown, to be marked 'Exhibit 2,' is in the handwriting of Mr. Drewlow. I received it by mail, along in the summer after the surgical operation.

I first informed the company of the fact that this policy was applied for without any expectation on the part of Drewlow of paying the premium, and for the purpose of using it merely to aid in soliciting insurance, on Christmas day, 1891. I did not inform the company of the arrangement entered into between Drewlow and myself at the time of the surgical operation, until after the money was offered for the second premium. My arrangement with Drewlow was, that I gave him a percentage on the business done, to be paid out of my own commission. The paper marked 'Exhibit 3' is signed by me. It is the same paper that I gave at the time that Drewlow was about to submit to the surgical operation. I said nothing to the defendant about the matter until the time when Mr. Wigton came to Hastings to see me about it, some time in the following summer, I think. It was at the same time that Mr. Wigton came to see me, and Mr. Hunter went to Stanton to look the matter up."

On cross-examination his testimony was in part as follows:

Q. At the time you got this policy, what date was it with respect to the date of the policy?

A. Probably one day after, or the same day perhaps. Probably one day later though.

Q. After you got this policy up there did you deliver it to Mr. Drewlow?

A. We officed together.

Q. It is a fact that the policy was turned over to him?

A. Well, yes.

Q. Now, on Christmas day you and Mr. Drewlow came down here to Omaha?

A. Yes, sir.

Q. And at the time this policy came to you, there was a receipt for the first premium that came with it?

A. Yes, sir.

Q. And when you came back down here to Omaha you brought that receipt back?

A. Yes, sir.

Q. And you went in with Mr. Drewlow and had a talk with Mr. Hunter and Mr. Wigton?

A. Yes, sir.

Q. And in which you told them that Mr. Drewlow had concluded not to take this policy?

A. No, I told them that he was not to take the policy; that he said he could not pay for it and he didn't want to take the policy. They urged him at that time to take the policy.

Q. Didn't they say to him—didn't Mr. Hunter say to him at that time that he could take the policy and pay for it out of the premiums he would make from business you and he could obtain?

A. Yes, sir.

Q. And subsequently you went out?

A. Yes, sir.

Q. And when you came back Mr. Hunter told you that Mr. Drewlow had concluded to take the policy?

A. Yes, sir; he said that Drewlow had concluded to take the policy, but the facts of the case were——

Q. Now, did you mean that Hunter said the facts were?

A. No, that was mine.

Q. What else did Mr. Hunter say about that at that time?

A. There was nothing in particular.

Q. Who was Mr. Hunter?

A. Mr. Hunter was the general manager.

Q. How?

A. General manager.

Q. He was general manager of the company?

A. Yes, sir.

Q. And this conversation took place at its home office here in Omaha?

A. Yes, sir.

Q. In Christmas, 1891?

A. Yes, sir.

Q. Mr. Hunter was the man under whose supervision you were acting as agent?

A. Yes, sir.

Q. Now, isn't it a fact that after you went back to Stanton this policy was delivered to Mr. Drewlow?

A. He had possession of it all the time. He had possession of it in this way: we had our office together. Yes, sir; I gave him the policy, and when we solicited insurance he pulled his policy and showed them.

Q. He took the policy along with him when he went with you to solicit insurance?

A. Yes, sir.

Q. And had possession and control of it?

A. Yes, sir.

Q. And Mr. Drewlow assisted you in soliciting insurance during the months of February and March?

A. Well, Drewlow didn't do very much. He worked with me for a while, and saw a good number of people, and then, when I would insure a man, he would come in for his part of the commission; and if I was allowed to say what I started to say a while ago I could explain that a little.

Q. Well, go ahead and let us have the explanation.

A. Mr. Hunter told me at the time that Mr. Drewlow and Hunter and I were talking, and when Mr. Hunter made the remark that he would take the policy, of course he knew nothing of our private matters. Drewlow was not good pay, and I did not want to deliver him the policy. I had no intention of delivering him the policy without he paid for it. He never paid for it.

Q. You simply delivered him the policy and he never paid for it?

A. It had been delivered prior to that.

Q. And after that he assisted you in soliciting insurance?

A. Yes, sir.

Mr. A. L. Wigton, secretary of the company, was present in the office at Omaha when Chapman and Drewlow were there and gave up the receipt, and testified to its being given to the cashier and destroyed, and a record

made in the books that the policy was not taken, and that the two then stated the policy had not been obtained as insurance on the life of Drewlow but as a "decoy policy" to use in soliciting other parties to insure; that the company did not learn or know that Chapman had given Drewlow a receipt showing payment of the first premium or that Drewlow was asserting the policy of force, until November, 1892.

The cashier testified in the main the same as the secretary, and further as follows: "The company first learned in November, 1892, that Drewlow, or some person for him, was claiming that the policy was in force. Mr. O'Halleron came in and asked when a second premium would be due. The first premium was never paid. I keep the books of the company. When this policy was sent out with the receipt for the first premium, the amount of the receipt was charged to the account of Chapman; that was the usual and ordinary way of keeping an agent's account; but it is an agent's account—sort of a memorandum account. Whenever a policy was sent to an agent, it is charged to his account, and he is held responsible for it until the receipt is returned or the money paid."

The witness Chapman was called for the defendant in error on rebuttal and stated as follows:

Q. Mr. Chapman you may state whether or not during the time you have been transacting business for the Union Life Insurance Company it has been customary and usual for you to settle for and collect premiums upon policies solicited by you and issued through you, as agent, in such manner and upon such terms as you saw fit.

A. The company require a certain amount of money from me on each policy. They hold me for that. The settlement I make with the—. The settlement with the parties I make myself.

Q. Has it been customary and usual for you to extend credit to parties for the first premium, if you saw fit?

A. Yes, sir; that is, on the payment of the first premium. I have arranged the payment of it.

Q. You may state whether or not you did that with respect to policies issued while you and Drewlow were acting together at Stanton.

A. Yes, sir.

One Walter Lucas was interrogated on rebuttal in regard to a conversation between Chapman and Drewlow relative to the policy, and whether he had heard it. He stated that he did, and was further asked and answered:

Q. I will ask you whether or not upon that occasion Mr. Drewlow gave a revolver to Chapman and said that makes us square on the premium on my life insurance, and Mr. Chapman answered, Yes, that straightens it up?

A. He did.

Q. Did you hear that conversation?

A. I did, sir.

He also said that he had been in possession of and carrying the revolver for some time prior to the conversation and Drewlow asked him, the witness, for it, saying that it was to be delivered to Chapman to finish the payment for the policy.

George E. Bryson testified that at three or four different dates during the month of January, 1892, Chapman told him, the witness, that Drewlow had paid the first premium on the life insurance policy. These were all at times when Chapman was soliciting the witness to make application for insurance.

From an inspection of all the evidence it is clear that the policy did not become operative and of effect by its delivery to Drewlow to use as a "decoy policy," as some of the witnesses expressed it, or in the soliciting of insurance to induce persons asked to insure to believe that Drewlow was a policy-holder. Neither, if believed in all its statements, could it be drawn from the testimony relative to the delivery of the policy, and a receipt for the first premium to Drewlow by Chapman immediately

prior to the time at which the former subjected himself to the surgical operation, that the policy became of force; and the jury would have been fully warranted in finding that the policy never did become of force as a contract of insurance, and of such decision it could not have been said that it was without sufficient of evidence to support it; but on the other hand the inference was but fair that when Chapman and Drewlow were at the office of the company in Omaha, and the company, through its officers, the manager, secretary, and cashier, were informed of the facts, circumstances, and motives attendant upon the obtaining of the issuance of the policy, and acting on such information the regular formal receipt for the first premium was destroyed and the policy was ordered returned to the company, but subsequently, during the interview, after being urged by the manager, Drewlow concluded to take the policy, and the information that this conclusion had been reached was conveyed to Chapman by the manager, coupled with the statement that Drewlow could pay for "it out of the premiums" he would make from business done in soliciting insurance for the company by the two, Chapman and Drewlow, that there then arose a contract by which Drewlow became entitled to pay to Chapman the first premium from commissions made in soliciting insurance; and, when considered in connection with the further testimony that Chapman was authorized or with the knowledge of the company gave credit to parties for the payment of the amount of premiums or settled them in his own way, he paying the company, how the settlement was made between the two men ceased to be important to the company. There was also evidence that the payment was made by Drewlow to Chapman. A receipt was introduced, signed by Chapman, by which such payment was evidenced, and there was the statement of Chapman to Drewlow in the presence of the witness Lucas which tended to prove the fact of payment. Of the testimony of Lucas, also that of the witness Bryson, of admission by Chapman of payment of

the premium by Drewlow, it is insisted that it could not be received to show the fact of such payment, as the statements of Chapman in this relation could not bind the company. The statement in the presence of Lucas was a part of and at the immediate time of the transaction and hence was receivable. (1 Am. & Eng. Ency. Law [2d ed.] 691-694; *McCormick v. Demary*, 10 Neb. 515.) The statements to Bryson were not of the time of the transaction and not competent as evidence of the fact in issue. (1 Am. & Eng. Ency. Law [2d ed.] 695; *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103; *Commercial Nat. Bank v. Brill*, 37 Neb. 626.) If the latter was receivable for any purpose, it could but be to affect the credibility of the witness to show statements of the witness at variance with his testimony. That the statements of Chapman disclosed by the former, the testimony of Lucas, could not be received to bind the company could only be true if the further contention was correct, that Chapman was not authorized to receive payment of the first premium; but whether he was so empowered was a question of fact, and we must presume that the jury believed he was, as such a finding was of necessity elemental of the verdict it returned. That Chapman stated the policy to be in force, and the premium paid, was explainable, as is insisted by counsel, on the theory that such statements were made as a part of the scheme to use the policy as a "decoy" to represent it of force, when in reality it was not so; but this and all these matters were of fact for the jury to determine, and its settlement of them, as evidenced by the verdict, had sufficient favorable evidence to sustain it. One of the strongest circumstances lending support to the view of the affair taken by the jury is that, after the officers of the company knew all the facts in regard to the obtaining this policy, and had taken steps to recall it, after the close of the visit of Chapman and Drewlow to Omaha, nothing further was done relative to getting possession of the policy, but it was left with the two men, presumably pursuant to the

talk with the manager of the company. It follows that the argument of the lack of evidence to warrant the verdict and that the decision of the jury was contrary to the evidence is unavailing.

It is argued that the trial court erred in admitting in evidence the insurance policy, on which the suit was predicated, when offered. The ground of the objection and basis of the argument is that at the time it had not been shown that the premium had been paid, or that there was no evidence that it had ever become operative as a contract. That the policy, in the form in which it was offered, had been signed and sent to its agent for delivery was of the facts admitted by the pleadings. This being true as to the policy in suit, it was admissible without further proof; that the first or any premium had not been paid was of the matters placed in issue by the pleadings, and the burden of its proof was on the company.

It was assigned for error that the court overruled the objection on the part of the company to the introduction of the receipt by Chapman to Drewlow for the amount of the first premium. With the view we have taken of the authority of Chapman to settle with Drewlow for this amount, this piece of evidence was entirely competent and receivable, and the same may be said of the third assignment of error, which was in relation to a portion of the testimony of the witness Lucas in which he was allowed to detail the receipt of certain property by Chapman from Drewlow as payment of the balance of the first premium.

During the argument of the cause to the jury the following was made of record: "And both parties having rested, the case was argued to the jury by counsel for each party, whereupon, during the closing argument made by H. C. Brome, Esq., in behalf of the plaintiff, the said H. C. Brome commented upon the testimony on the trial by the witnesses Walter Lucas and George E. Bryson, and argued to the jury that the testimony of said witnesses showed that the first premium on the policy had been

paid in February or January, A. D. 1892; whereupon counsel for the defendant interrupted the argument and objected to the same, on the ground that the evidence of said witnesses had been admitted solely for the purpose of impeaching the credibility of the witness Frank Chapman, and was not admissible for any other purpose, and that counsel for plaintiff had no right to use the same, or comment upon the same, as tending to prove the fact that said premium had been paid; and thereupon the court ruled and stated in the presence of the jury, that while the testimony of said witnesses had been introduced for impeaching purposes only, their evidence tended to contradict the testimony of the said Frank Chapman, to the effect that the first premium on said policy had not been paid, and that it was for the jury to determine from this conflicting evidence, and such other evidence as there might be, whether or not the first premium on said policy had, in fact, been paid; to which ruling and statement of the court so made in the presence of the jury counsel for the defendant then and there excepted, and thereupon the said H. C. Brome, counsel for the plaintiff, proceeded with the argument to the jury, and continued to argue from the evidence of the said witnesses Walter Lucas and George E. Bryson that the testimony of the said witness Frank Chapman, to the effect that the said first premium had not been paid, had been overcome, and that the same was false, and that the said first premium had been thereby shown to have been paid." In the charge to the jury the court made the following statement: "You are instructed that the testimony of the alleged admissions of the witness Chapman, that said policy had been paid for, were not admitted for the purpose of binding the defendant company, and were not competent for that purpose, but were admitted solely as impeaching testimony, and the jury should consider it only so far as it bears on the truthfulness of said witness' testimony that said policy was not paid for." It is contended that the trial court erred in its statement

relative to the testimony made at the time of objection to counsel's argument to the jury by giving to the testimony substantive force as applied to one of the facts in issue; also that it was error to instruct the jury that in considering the effect of this testimony on the credibility of the witness, its application must be narrowed to the truthfulness of one statement, viz., "that the premium had not been paid;" that instead of this the jury should have been informed that the testimony of the conflicting statements should be considered as affecting the credibility of the witness generally and not in regard to any particular fact. The record discloses that the testimony here drawn in question was ostensibly received for but one purpose—that of affecting the credibility of the witness Chapman. The court, during the argument to the jury, evidently concluded it possessed greater significance, and so stated. In the instruction the court gave expression to a contrary view to that it had voiced during the argument. As we have hereinbefore stated, the testimony of Lucas was competent as tending to prove the fact of payment of the premium, and there was other competent evidence of the same import amply sufficient, all taken in connection, to sustain a finding that such payment was made; furthermore, it was not entirely essential that there be such finding as a basis for the verdict returned. The verdict may have been predicated on a determination that an extension of credit had been given for the payment of the premium; and if so, it rested on a supporting foundation in both the evidence and the rule of law applicable and governing. There were errors in these portions of the proceedings, but after a thorough review of the whole we cannot conclude or believe any prejudice to the rights of plaintiff in error resulted therefrom.

It is of the errors assigned and argued that the third paragraph of the charge to the jury was improper, in that it submitted to that body the query of whether Drewlow, during life and good health, paid the first premium to Chapman, the company's agent. This question

was directly of the issues presented and on which the evidence was conflicting, and was for the consideration and determination of the jury; hence it was not error to give the portion of the charge, the subject of this objection.

It is argued that the court erred in giving in its charge to the jury the paragraphs numbered "4" and "5." These are in the following terms:

"4. The defendant has alleged that said policy was obtained from it by fraud. Fraud is never presumed, but must be proved by a preponderance of all the evidence by the party claiming the existence thereof. If you believe from the evidence that said policy was obtained in the first instance under an agreement entered into by said Drewlow and Chapman that said policy should not be paid for and should be used by Drewlow solely for the purpose of showing it and soliciting risks for said company, and that defendant was ignorant of said facts, then you are instructed that such conduct on the part of said Drewlow constituted a fraud sufficient to render the policy void; and said policy could thereafter be made valid only by a new delivery with the intent of defendant and deceased that it should be binding on both.

"5. You are further instructed, if you find from the evidence that said policy was delivered without requiring payment of the first premium and without any intention on the part of said Drewlow of taking and retaining said policy and paying the premiums accruing thereon, but that subsequently it was agreed between said Drewlow and the general manager of said defendant company that Drewlow should retain said policy and should pay to said defendant the amount of the first premium thereon at a later date, then you are instructed that such transaction amounted to a valid delivery of the policy and a giving of credit for the first premium, and said policy took effect and became a binding contract at and from the time such arrangement was made, and for all the purposes of this case it would be immaterial whether such first premium

was ever paid or not; and if you find such arrangement was made and such credit was given, plaintiff will be entitled to recover in this case."

In the brief it was stated: "It will be observed that by these two instructions the court submitted it to the jury to determine whether or not there had been a subsequent delivery of the policy, or whether or not there had been an agreement to waive the payment of the first premium. There was not, in my judgment, a particle of evidence justifying the submission of these questions to the jury." An examination of the evidence has convinced us that there was sufficient in the narration of what occurred between the general manager of the company and Drewlow and Chapman to warrant and to require the submission to the jury of the question of it being then agreed that Drewlow was to keep the policy and pay the premium from commissions earned in soliciting insurance, and that there was not submitted whether there was a "waiver of the payment of the first premium," but whether, as stated by the court, "credit" or time had been given within which it should be paid. It was further argued in this connection that these two paragraphs of the instructions embodied a proposition of fact to be settled by the jury which was not of the issues presented in the pleadings. Of the allegations of the petition was the following:

"3. That on the 16th day of December, 1891, one John W. Drewlow, a resident of Stanton, Stanton county, Nebraska, entered into a certain written agreement with the defendant Union Life Insurance Company of Omaha, Nebraska, by virtue of which agreement said defendant was, for a consideration to be paid by the said John W. Drewlow to this defendant and in accordance with certain conditions and reservations in said agreement set forth, to pay Helen and Richard Drewlow, his children, or their executors, administrators, or assigns, upon satisfactory proof of the death of the said John W. Drewlow, after deducting therefrom all indebtedness due to

the company, the Union Life Insurance Company of Omaha, Nebraska, from said John W. Drewlow the sum of two thousand dollars ($2,000)."

Of this there was a denial in the answer, and, as we have hereinbefore set forth, there were also certain affirmative statements on the subject of the delivery of the policy which were denied in the reply. Under the allegation that the agreement "was for a consideration to be paid by Drewlow," and its denial, the matter of the contract between the manager and Drewlow was fairly within the issues, and where a credit is extended for the payment of a premium, of which payment is required to constitute the policy of force, the policy becomes operative and binding. (*Miller v. Brooklyn Life Ins. Co.*, 12 Wall. [U. S.] 285; *Bochen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131; *McAllister v. New England Mutual Life Ins. Co.*, 101 Mass. 558.)

At request of defendant in error the following instructions were given:

"1. You are instructed that what purports to be a copy of the application printed and written on the back of the policy is not in evidence and should not be considered by you.

"2. You are further instructed that the printed indorsement on the back of the policy, entitled 'notice to the policy holder,' is no part of the policy, is not in evidence and should not be considered by you."

It is asserted that this action was of prejudice to the right of the company, in that there was thereby withdrawn from the consideration of the jury the fact that in the application and on the back of the policy there appeared notice to the party to be insured or a stipulation to the effect that the policy could not and did not become of force until the first premium had been paid during the life and good health of such party, and that there appeared further on the back of the policy, that no agent had authority to collect the first premium unless there was in his possession a receipt for the premium signed by

the president, vice-president, or secretary of the company. Under the issues joined and the evidence adduced, whether the matters to which we have referred entered into the consideration of the jury could not affect their findings or verdict; hence that they were withdrawn by the instructions could not prejudice the rights of plaintiff in error.

No errors were assigned and presented which call for a reversal of the judgment and there must be an affirmance.

AFFIRMED.

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## E. H. ANDREWS ET AL. V. WILLIAM KERR.

FILED APRIL 21, 1898. No. 8021.

1. **Review Without Bill of Exceptions.** If there is no proper bill of exceptions in the record, no question can be determined which for its consideration necessitates a reference to matters which must be made of the record by or through such a document.
2. **Review: REVERSAL.** To warrant a reversal, that errors have been committed and the rights of the complaining party were prejudicially affected thereby must affirmatively appear of the record.

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

*Greene & Hostetler*, for plaintiffs in error.

*Capps & Stevens, contra.*

HARRISON, C. J.

Action on a promissory note, in which, by answer filed, the defendant admitted the due execution and delivery of the instrument in suit, but alleged that it was given to evidence in part an indebtedness arising in a contract of sale of a horse, of the terms of which there was a warranty that the animal was "sound and all right," relied on by defendant, but which was untrue, in that the horse

was a "cribber" or "crib-biter;" that by the breach of the warranty the defendant had been damaged in a stated sum. As the result of a trial of the issues joined the plaintiff was accorded a recovery of the full amount of his claim as asserted. Defendant seeks a review in this court. The bill of exceptions, on the hearing of a motion having such purpose, was quashed, and cannot be considered.

One of the assignments of error relative to the instructions given is that the court informed the jury "that the defendant had admitted the plaintiff's cause of action, and the allegations of the petition were to be considered as true." The complaint here is that by the petition it was asserted that the defendant was indebted to the plaintiff in the sum stated in the note in suit, and interest thereon, and that this was true was not admitted. In this there was no error. The defendant did admit that he had become indebted to the plaintiff in the amount of the note and interest, but pleaded that by reason of the breach of the warranty of the horse, of the consideration for the sale of which, to the defendant, the note in suit evidenced a part, the defendant had been damaged, and for such damages asked an allowance.

There are other assignments in relation to the instructions, which are urged in argument in the brief, but to determine whether the errors, if any were committed, were prejudicial to the rights of the complainant would necessitate a reference to, and consideration in this connection of, the evidential matters in the bill of exceptions, and these are not before us. There may have existed conditions of the evidence with which any of this branch of the errors assigned could not have been prejudicially erroneous, and to establish that errors may have been or were committed is not sufficient to secure a reversal of a judgment in an action. It must further affirmatively appear from the record that the errors were prejudicial to the rights of the complaining party. (*Tracey v. State*, 46 Neb. 361.)

There being no bill of exceptions, we cannot consider the assignment that the verdict lacked evidence to sustain it. (*Appelget v. McWhinney*, 41 Neb. 253; *Becker v. Simonds*, 33 Neb. 680.)

The petition contained statements sufficient to constitute a cause of action, and a proper prayer for relief. The material allegations were admitted, and no prejudicial errors appear of record; hence the judgment must be

AFFIRMED.

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## HOME FIRE INSURANCE COMPANY OF OMAHA V. LOUIS S. DEETS.

FILED APRIL 21, 1898. NO. 8029.

1. **Appeal to District Court:** ISSUES: EFFECT OF DISMISSAL. An appeal from the judgment of a justice of the peace in an ordinary civil action presents the case in the district court, to be proceeded with in all respects in the same manner as though the action had been originally instituted in the appellate court, and if the plaintiff suffer or invite a judgment of dismissal before a hearing on the merits, the judgment constitutes no bar to another action on the same cause.

2. **Insurance:** ADDITIONAL INSURANCE: EVIDENCE. In a suit on a policy of insurance the defendant company interposed the defense that the insured party had procured additional insurance on the property in violation of the terms and conditions of the policy in suit, and that by such action the contract had been avoided. The evidence examined, and *held* not to support the contention of the company, but to sustain a finding that no additional insurance had been placed on the property.

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

*Greene & Breckenridge*, for plaintiff in error.

*John E. Deeker, contra.*

HARRISON, C. J.

Action on a policy of insurance against loss by fire, by the party insured, for the amount of the value of certain corn included in the property described in the contract of insurance, and alleged to have been destroyed by fire subsequent to the contract which was of date April 16, 1890. In its answer the company admitted the contract of the date and terms alleged by the plaintiff and pleaded that of the conditions of the policy there was the following: "If the assured shall now have or hereafter procure or accept any other contract of insurance on the above mentioned property, whether valid or not, without consent indorsed thereon, this policy shall be null and void;" that subsequent to the issuance of the policy and prior to the time of the fire by which the loss was occasioned, without the knowledge or consent of the company and in violation of the contract, the assured obtained of another company, the "Farmers Mutual Insurance Company of Buffalo County, Nebraska," other and further insurance on the corn, by which act the policy on which this suit was predicated was annulled. For the company it was further pleaded that prior to the institution of this action the plaintiff had commenced a suit against the company before a justice of the peace of Buffalo county, on the policy herein declared upon, and for the same cause as herein asserted, in which there had been a trial of the issues and judgment for the company, to avoid the effect of which the unsuccessful party had perfected an appeal to the district court of Buffalo county, and after the appeal dismissed said action; "that the appeal was not taken in good faith, but for the purpose of avoiding the force and effect of the judgment rendered by the justice of the peace." To the portion of the answer in which the appeal from the judgment of the justice of the peace, etc., was pleaded there was interposed a general demurrer, and of the other new matter contained in the answer there was

a general denial. In the district court there was judgment against the company, to reverse which it has prosecuted error proceedings to this court.

The demurrer to the third count of the company's answer—the portion which related to the appeal of a former action on the same cause from the judgment of a justice of the peace, and the subsequent dismissal by the appellant of the action—was sustained, and for the company it is urged that in the favorable ruling on the demurrer the district court erred. After the appeal had been perfected, the parties were to proceed in all respects in the same manner as though the action had been originally instituted in the appellate court. (Code of Civil Procedure, sec. 1010.) A judgment of dismissal, if there has been no hearing on the merits, does not bar another action. (*Philpott v. Brown*, 16 Neb. 387; *Cheney v. Cooper*, 14 Neb. 415.) The plaintiff could dismiss his action and the judgment of dismissal constituted no bar to this, a second action on the same cause; hence the court did not err in its ruling on the demurrer.

The further questions argued all turn upon the determination of the answer to be given from an inspection of the evidence to one query, Did the insured, after the contract in suit, obtain other insurance on the corn which was burnt? The evidence discloses that a policy was issued to the assured, Deets, by the Farmers Mutual Insurance Company, of a date subsequent to that of the policy on which this action is based; that in the policy issued by the Farmers Mutual the property described and the amount for which designated portions were insured were as follows:

"To the amount of Three Thousand Dollars, as follows:

| | | |
|---|---|---|
| On dwelling-house ..... | | Dollars. |
| On contents of dwelling-house Four hundred ..... | 400 | Dollars. |
| On barn five hundred..... | | Dollars. |
| On contents of barn one hundred..... | | Dollars. |
| On granary and cribs fifteen hundred.... | | Dollars. |

On contents of granary ..... Dollars.
On hay and grain in stacks..... Dollars.
On live stock five hundred..... 500 Dollars."

The policy bore the date April 19, 1892. The fire by which the corn was destroyed occurred May 21, 1893. It was of the testimony of Deets that the policy of the Farmers Mutual was changed "some time in June, 1893, after he rebuilt;" it appears that he had built a barn in the place of one destroyed by the fire which is described in the policy as changed as "new barn." The policy as changed reads as follows:

"To the amount of ~~Three Thousand~~ 3500 Dollars, as follows:

On dwelling-house ..... Dollars.

On contents of dwelling-house Four hundred ..... 400 Dollars.

On new barn ~~five hundred~~ ..... 450 Dollars.

On contents of barn one hundred..... 150 Dollars.

On granary ~~and cribs~~ ~~fifteen hundred~~.... Dollars.

On contents of granary and cribs.... 1500 Dollars.

On hay and grain in stacks..... Dollars.

On live stock five hundred..... 500 Dollars.

On Farm machinery, wagons, buggies, Democrats 500 Dollars.

On ~~.....~~ Dollars."

At close of policy appear the following words: "500 added June 20th, 1893." On June 10, 1893, the loss of Deets was appraised by two men called for the purpose by the proper officer of the Farmers Mutual Company, and of the items of loss as fixed by them was that "On contents of crib, three hundred and ninety-two (392) dollars." The whole loss was estimated at $1,020; of this Deets subsequently received $855, of which $227 was in-

tended in payment for the corn burned. Deets testified that he told the agent of the Home Fire Insurance Company some time in June, 1893, that he had the corn insured with the Farmers Mutual, and also told the agent or officer of the latter company, at or about the time of its adjustment of the loss, that the corn was included in its policy. He also testified that he thought at the time that such statements were true, but discovered afterwards, and subsequent to receiving the money from the Farmers Mutual, that the policy issued by it did not insure the corn; that there had been a mistake made. A portion of his testimony on this subject is as follows:

Q. You were asked by the other side if you did not state to their agent, Mr. Denman, some time in June, 1893, that the Farmers Mutual Insurance Company of Buffalo County, Nebraska, had insurance on the corn that was burned?

A. I either said so, or said I thought I had. I supposed at that time that they had.

Q. Did you find out afterwards that they had not or that you were mistaken in what you told Denman?

Objected to. Sustained.

Q. What did you ascertain after that?

A. After I read my policy over a little bit carefully in the Farmers Mutual Insurance Company, I found it was not on grain.

Q. Have you received any insurance from that company since you found out that there was no insurance on grain?

A. No, sir.

Q. Whatever money you received from the Farmers Mutual Insurance Company on corn, you received it by mistake or before you found there was a mistake?

A. Yes, sir.

He gave some further testimony to the same effect. Of this there was no contradiction and no evidence to the contrary. There may have been evidence which would have developed a different state of facts and which would

have supported the counsel for the defendant company's theory that Deets had applied to the Farmers Mutual for insurance on the corn, and the policy had been issued, and by mistake the corn had not been included in the contract, and in June it had been reformed to conform to the original intention; but if such evidence was in existence it was not produced at the trial and the jury was warranted in believing the testimony of Deets relative to the mistake in the adjustment and payment by the Farmers Mutual, and the verdict rendered herein must have followed such belief. The conditions established by the evidence relative to the payment by the Farmers Mutual seem somewhat novel and it would further almost seem that they ought not or could not exist unless there had been quite considerable lack of care in the transaction of the business, out of which they were evolved, but under the evidence there is scarcely any tenable or apparent way of escape from them. And furthermore, the verdict must be allowed to stand, for if the Farmers Mutual, through a mistaken belief of their liability for the loss of the corn, paid Deets therefor, he, receiving, at the same time entertaining the mistake as to the fact of the liability of the mutual company to him for its payment, it constituted and can make no defense herein for the other company and does not establish the defense that Deets had other insurance on the property, which, if established, would have released the defendant company from liability. (That it would have done so see *German Ins. Co. v. Heiduk*, 30 Neb. 288; *Hughes v. Insurance Co. of North America*, 40 Neb. 626.)

With the conclusions which we have been forced to adopt, as hereinbefore outlined, the judgment must be

AFFIRMED.

## LEE HERDMAN V. STATE OF NEBRASKA.

FILED APRIL 21, 1898. No. 9702.

1. **Contempt:** CRIMINAL LAW. A proceeding against a party for contempt is in the nature of a prosecution for a crime and the rules of strict construction applicable in criminal proceedings are governable therein.
2. ———: INFORMATION. The affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution for a crime.
3. ———: ———. The statements must be as of the personal knowledge of the affiant. They may not be on information and belief.
4. ———: ———. The affidavit in such a proceeding is jurisdictional.

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

*Guy R. C. Read* and *William F. Gurley*, for plaintiff in error.

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

HARRISON, C. J.

By a petition in error a review is sought of a judgment of the district court of Douglas county whereby the plaintiff in error was adjudged guilty of a contempt of court and to be punished therefor. The affidavit filed in the district court, the basis of the proceedings there, was as follows:

"WILLIAM W. COX, Plaintiff,
v.
BOARD OF FIRE AND POLICE COMMISSIONERS, FRANK E. MOORES, ET AL., Defendants. } Doc. 60. No. 313.

"STATE OF NEBRASKA, DOUGLAS COUNTY, } ss.

"R. H. Olmsted, being duly sworn, deposes and says he is one of the attorneys for the plaintiff in the above en-

titled action, and comes now and represents to the court that the restraining order issued herein on July 16, 1897, has been violated by the defendant R. E. L. Herdman in this, to-wit: That on September 29, 1897, the said Herdman, as a member of the board of fire and police commissioners of the city of Omaha, Nebraska, did, as affiant is informed and believes, vote 'yes' at a meeting of said board on a resolution then adopted by said board removing plaintiff herein from the police department of the city of Omaha; that thereafter, on the 1st day of October, 1897, at a special meeting of said board, the following proceedings were had, and the following is a copy of the journal of said board showing a record of the proceedings then and there had:

" 'OMAHA, NEB., October 1, 1897.

" 'The board met pursuant to call. Present, Commissioner Gregory in the chair, and Commissioners Peabody, Bullard, and Herdman; absent, Commissioner Moores.

" 'The secretary presented a communication from the chief of police addressed to Hon. C. R. Scott, with the reply of his honor thereto attached, and reading as follows:

" ' "*Hon. C. R. Scott, Judge District Court, Omaha, Neb.*— DEAR SIR: I have the honor to enclose herewith a resolution adopted by the board of fire and police commissioners at the meeting of that body held last night. It was the sense of the board and also my personal opinion that, in so far as the said resolution affected Chief of Detectives W. W. Cox, your attention should be called to it, as the board and myself desire to be guided by both the letter and spirit of the restraining order made by your honor in the matter of W. W. Cox v. The Board of Fire and Police Commissioners.

" ' "I am sure that the form of my communication to your honor is strictly in accordance with legal practice in such cases; but I simply seek to convey to your honor the meaning and intention of the board touching the matters mentioned herein, and we would be glad to be

guided by such advice and instructions as you may deem consistent to give in the premises.

"'"Very respectfully yours,

"'"C. V. GALLAGHER, *Chief of Police.*"

"'"Reply:

"'"*Chief Gallagher:* You are notified that the action of the board of fire and police commissioners respecting the discharge of Chief of Detectives Cox, in discharging him from the service, is in direct conflict with the restraining order issued by me, and should be rescinded at once. Until the case is heard no such action should be taken by the board.

"'"(Signed) CUNNINGHAM R. SCOTT, *Judge.*

"'"Omaha, Sept. 30, 1897."

"'On motion, the communications were ordered spread upon the record and placed on file, and the following resolution was passed, Commissioners Peabody, Gregory, and Bullard voting in the affirmative, Commissioner Herdman in the negative:

"'*Resolved,* That the order removing certain officers and patrolmen, passed September 29th, be, and is hereby, modified in so far as it relates to one W. W. Cox, and it is ordered that as to him the said order be, and is hereby, rescinded.

"'On motion, the board then adjourned.

"'SECRETARY.'

"Affiant further says that he is informed and believes that the said R. E. L. Herdman is the secretary of the said board of fire and police commissioners, and was the person who, as secretary, presented the first two aforesaid communications to the said board at its meeting held October 1, 1897.

"Affiant further says that the aforesaid proceedings of the said board of October 1, 1897, have been personally examined by him and the foregoing are true copies thereof as appears in Journal F at pages 148 and 149 of the records of said board. And further affiant saith not.

"R. H. OLMSTED.

"Subscribed and sworn to before me this 4th day of October, 1897.

"[SEAL] FRANK L. MCCOY,
"*Notary Public.*

"My commission expires January 22, 1899."

That this was insufficient was raised during the proceedings and is presented by the petition in error and is of the points urged in the brief filed for plaintiff in error. It is of the doctrine of this court that proceedings for constructive contempt are in the nature of prosecutions for crimes, and as much certainty is required in a statement of acts of which complaint is made as in the statements of offenses in prosecutions under the provisions of the Criminal Code. (*Gandy v. State*, 13 Neb. 445; *Boyd v. State*, 19 Neb. 128; *Johnson v. Bouton*, 35 Neb. 903; *Percival v. State*, 45 Neb. 741; *Hawes v. State*, 46 Neb. 149; *Cooley v. State*, 46 Neb. 603; *O'Chander v. State*, 46 Neb. 10.) The affidavit in such a proceeding is jurisdictional. (*Gandy v. State*, 13 Neb. 445; *Ludden v. State*, 31 Neb. 437; *Hawthorne v. State*, 45 Neb. 871.) The affidavit must state positive knowledge, if, on information and belief, it is insufficient. (*Ludden v. State, supra;* 4 Ency. Pl. & Pr. 779, 780; *Gandy v. State, supra; Freeman v. City of Huron*, 66 N. W. Rep. [S. Dak.] 928; *Thomas v. People*, 23 Pac. Rep. [Colo.] 326.) Viewed in the light of these well established rules the affidavit, the basis of the proceedings against plaintiff in error, was wholly insufficient. Some of its most important statements were on information and belief. There is no statement of the substance, or any of the terms, of the order of which it is asserted there had been a violation, nor is there any statement that the party to be cited for contempt in its violation had any notice of its making or existence; in short, the affidavit was so lacking in requisite statements of substance as to be fatally defective. It follows that the judgment must be reversed and the prosecution dismissed.

REVERSED.

NORVAL, J.

I concur in reversal of the judgment on the grounds that the evidence adduced on the trial is insufficient to sustain the judgment and sentence imposed by the district court.

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

FILED APRIL 21, 1898. No. 7531.

1. **Review:** ASSIGNMENTS OF ERROR. An assignment in a petition in error that the court erred in rejecting evidence, "as appears at record, pages 209, 209½, 210, 211, 212, 216, 216½, 217, 220, 223, 224, 230, 238, 239, 240, 241, 243," is too general for consideration.
2. ———: ———. To obtain a review of the rulings of the trial court on the admission or exclusion of testimony each ruling must be specifically assigned in the petition in error.
3. ———: ———: ARGUMENTS. Alleged errors argued in the brief which are not assigned in the petition in error are unavailing.

REHEARING of case reported in 52 Neb. 562. *Affirmed.*

*Wright & Stout*, for plaintiff in error.

*R. R. Dickson, contra.*

NORVAL, J.

The judgment below was affirmed at the last term of this court. (52 Neb. 562.) An application for a rehearing was filed which assailed the former decision upon two grounds: First, in holding the third, fourth, fifth, and sixth assignments of error relating to the admission and exclusion of testimony to be too indefinite to require consideration; second, in sustaining the action of the trial court in allowing the sheriff to amend his return on the several orders of sale. At the request of the writer

a rehearing was allowed on the first ground, and the cause has been again submitted on briefs and oral argument. The action was brought by King & Cronin to recover certain sheriff's fees assigned to them, which it is alleged the officer earned in the execution of seven orders of sale in as many decrees of foreclosure obtained in Holt county by the Phœnix Insurance Company of Hartford. Verdict and judgment were against the defendant, and it prosecuted error.

The third assignment in the petition in error is as follows:

"3. The court erred in rejecting and refusing evidence offered on behalf of plaintiff in error as appears at record, pages 209, 209½, 210, 211, 212, 216, 216½, 217, 220, 223, 224, 230, 238, 239, 240, 241, 243." In the same manner numerous rulings of the trial court on the admission and exclusion of testimony are pointed out in the fourth, fifth, and sixth assignments in the petition in error. All of these assignments are too indefinite to require consideration. To obtain a review of alleged errors they must be assigned in the petition in error with such particularity as to enable this court to ascertain the ruling, out of a great number, of which complaint is made. The particular decision assailed must be specifically assigned; a general assignment is unavailing. (*Lowe v. City of Omaha*, 33 Neb. 587; *Farwell v. Cramer*, 38 Neb. 61; *Eagle Fire Co. of N. Y. v. Globe Loan & Trust Co.*, 44 Neb. 380; *Sigler v. McConnell*, 45 Neb. 598; *Kearney Electric Co. v. Laughlin*, 45 Neb. 390; *Bloedel v. Zimmerman*, 41 Neb. 695; *City of Omaha v. Richards*, 49 Neb. 244.) *Darner v. Daggett*, 35 Neb. 695, sustained a general assignment in a petition in error quite like those in this case, but that decision stands alone, and is believed to be unsound. It is accordingly disapproved.

Another assignment is that the court erred in allowing the sheriff to amend his return. The officer made no amendment to any process issued in this case. It is disclosed that the sheriff was permitted in each of the seven

foreclosure actions to amend his return on the several orders of sale issued therein, by giving an itemized statement of his fees. But whether such rulings were proper or not cannot be determined at this time, since they were not made in this case but in other causes. The question of the admissibility of said amended returns as evidence is not raised by the petition in error, the assignment therein being the "court erred in allowing amendment of sheriff's returns." The sufficiency of the petition in the court below, and of the evidence to sustain the verdict are not raised by the petition in error, and the argument in the brief relating thereto will not be noticed. The former opinion is adhered to, and the judgment stands

AFFIRMED.

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CHARLES D. COLE V. ARLINGTON STATE BANK ET AL.

FILED APRIL 21, 1898. No. 8039.

**Review Without Bill of Exceptions.** Assignments of error relating to rulings on the admission of evidence will be disregarded on review in absence of a properly authenticated bill of exceptions.

ERROR from the district court of Washington county. Tried below before KEYSOR, J. *Affirmed.*

*Bradley & De Lamatre*, for plaintiff in error.

No appearance for defendants in error.

NORVAL, J.

Charles D. Cole instituted two actions of replevin to recover certain chattels, one being against the Arlington State Bank, and the other against the Blair State Bank. The causes were consolidated and tried as one action. The verdict was for the defendants, and from the judgment entered thereon plaintiff has prosecuted this proceeding.

The three assignments argued in the brief filed relate to the rulings of the court below on the admission of evidence, and they cannot be considered, since there is no bill of exceptions included in the transcript. (*Sweeney v. Ramge*, 46 Neb. 919; *Reed v. Rice*, 48 Neb. 586; *McKenna v. Dietrich*, 48 Neb. 433; *Wood v. Gerhold*, 47 Neb. 397; *White v. Smith*, 47 Neb. 625; *Reynolds v. McCandless*, 50 Neb. 225; *Stuart v. Burcham*, 50 Neb. 823; *Douglas v. Smith*, 50 Neb. 899.) The judgment is

AFFIRMED.

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## MISSOURI PACIFIC RAILWAY COMPANY V. MARY LYONS, ADMINISTRATRIX.

FILED APRIL 21, 1898. No. 7849.

1. **Injury to Servant**: CONTRIBUTORY NEGLIGENCE. Evidence examined, and *held* to sustain the jury's finding that the death of plaintiff's intestate was not caused by his negligence.

2. **Master and Servant**: RISKS OF EMPLOYMENT: FELLOW-SERVANTS. When one enters the employment of another, agreeing to serve him for a stipulated salary or wage, he thereby assumes, in the absence of an express contract to the contrary, the ordinary perils incident to that service, and included in these is the liability to injury at the hands of a negligent fellow-servant.

3. ———: NEGLIGENCE: FELLOW-SERVANTS. The general rule is that where a master is not guilty of negligence in the selection or retention of servants, nor in furnishing them with suitable appliances for the performance of the work in which he employs them, he is not answerable to one of them for an injury caused by the negligence of a fellow-servant while both are engaged in the same work in the same department of the master's business.

4. ———: FELLOW-SERVANTS. Where two switching crews are in the employ of the same railway company, subject to the control and direction of the same yardmaster, no member of either of said crews having any right of control or direction over any member of the other crew, both crews simultaneously engaged in switching the same cars from one part to another of the same switch yard, then the two crews and the members thereof are consociated in the same department of duty or line of employment, and each member of one crew is the fellow-servant of each member of the other crew.

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

Contentions and citations of counsel appear in the opinion.

*John C. Watson, James W. Orr,* and *B. P. Waggener,* for plaintiff in error.

*T. J. Mahoney, contra.*

NORVAL, J., and RAGAN, C.

The switch yard of the Missouri Pacific Railway Company at Omaha, Nebraska, extends north and south, is more than a quarter of a mile in length, and it is down grade from the south end thereof. This switch yard is covered with a net-work of tracks. The first four, counting from the east side of the yard, are called the main-line track, the old main-line track, the train track and the west track, respectively. June 11, 1893, two shifting engines and crews were at work in this yard. The crew working in the south part of the yard was composed of the engineer and fireman of the switch engine and George Duncan, James Mordant, and Samuel Deems. Duncan was the foreman of the south crew. The crew working in the north end of the yard was composed of the engineer and fireman of the switch engine and B. F. Miller, John R. Hughes, and George Lyons, Miller being the foreman of that crew. All the men in both these crews were subject to the direction and control of the master of the switch yard, named Kennedy. He seems to have employed the men and had authority to discharge them. From day to day he determined what men should work in the switch yard and in what part of the yard each crew should work. The foreman of each crew had the direction of the men under his charge as to how the work should be done and what each should do, but was vested with no other control of the men under him. No

person in one crew had any direction or control over the members of the other crew. While each crew was assigned to work at a particular end of the yard, this seems to have been a matter of convenience, as either crew was at liberty to go to any part of the yard if the business in hand required. Both crews were engaged in transferring cars from one track to another, the crew at the south end taking cars from certain tracks or sidings, putting them on one of the tracks already mentioned, and running the cars down toward the north end of the yard, and there turning them over to the crew at work in the north end for further disposition. As it was down grade from the south to the north end of the yard it was customary, when a car was put on a track to go to the north end of the yard, for either Deems or Mordant to "ride the car down." On the date above stated, and at the time of the happening of the casualty hereinafter referred to, there were a number of cars standing on the train track, the third track from the east side of the yard, and standing pretty well down toward the south end thereof. A coal car was standing on the old main track pretty well toward the south end of the yard. Lyons, one of the north crew, was standing west of the west track; or, in other words, there were four tracks between him and the old main-line track. The north crew switching engine was on the old main-line track pretty well down toward the north end of the yard. With things in this situation, the crew at the south end of the yard switched a box car loaded with coal on the old main-line track. As this car started down the grade Deems, one of Duncan's crew, was about to board it for the purpose of "riding it down," when Duncan said to him: "Let that car go; let Jimmie [that is Mordant, the other man helping him] catch some of these cars." For some reason, not clearly shown by the record, Mordant did not "ride the car down," and it went down without any one upon it, came in contact with the coal car, loosened the brakes thereon, and both cars started down

the old main-line track toward the north end of the yard. The foreman of the crew in the north end, seeing these two cars, "hallooed" to warn the men on the switch engine of the approaching cars. Lyons, presumably for the same purpose, ran east toward the old main-line track, and, either because he did not observe the proximity of the two loose cars or because he attempted to board them, was struck by one of those cars and injured, from the effects of which he died. His widow, as administratrix, brought this suit against the railway company for damages. She had a verdict and judgment, to reverse which the railway company has prosecuted here a petition in error.

1. The administratrix in her petition claimed that the railway company had been guilty of negligence in employing or retaining in its employ Deems and Mordant, two of the men of the south crew, knowing that they were incompetent. We do not understand that the judgment in this case rests upon a finding made by the jury that the railway company was guilty of negligence in employing or retaining in its employ these two men, and the evidence in the record before us would not sustain a finding that the railway company had been guilty of negligence in employing or retaining in its employ either of these two men.

2. The administratrix also claimed in her petition that the proximate cause of the death of her husband was the negligence of the foreman, Duncan, in permitting this box car loaded with coal to run down the old main-line track with no one on it to control and stop it. We assume, for the purposes of this case only, that Duncan's permitting this box car loaded with coal to run down this track without some one on it to control and stop it was negligence and that this negligence was the proximate cause of the death of Lyons.

3. It is strenuously insisted by counsel for the railway company that Lyons' untimely death was the result of his own negligence; that he was standing some distance

west of the old main-line track on which the two wild cars were running when he first discovered them; that he was in a place of safety and that he voluntarily ran to the track on which the two cars were moving, and by reason of neglecting to observe their proximity to him or while attempting to board them received his injury; that his presence at the place where he was injured was not due to an order of his foreman nor made necessary by any of the demands of his employment, and, therefore, the finding of the jury that Lyons' injury was not the direct result of his own negligence is unsustained by sufficient evidence. But when we consider the circumstances surrounding Lyons at the time he left the place of safety, the two cars running down grade toward an engine standing upon the same track on which were an engineer and fireman, the certainty of a collision unless the cars were stopped, and the probabilities that if a collision occurred not only would there result a destruction of the property of the railway company but perhaps the loss of human life, we are not disposed to disturb the jury's finding which acquitted Lyons of negligence. Imprudent and unwise his conduct may have been, unselfish it certainly was, but, when examined in the light of all the surrounding circumstances, we cannot say as a matter of law that it was negligence. (*Omaha & R. V. R. Co. v. Kraycnbuhl*, 48 Neb. 553.)

4. The district court instructed the jury as follows: "I instruct you, gentlemen, that on the 11th day of June, 1893, the foreman, Duncan, and Lyons were not fellow-servants within the rule that exempts the master from liability for the negligence of one fellow-servant causing injury to another, but, on the contrary, said Duncan was intrusted by the defendant with the control of such a part of the defendant's business as impressed upon him the duty of so conducting said part of said business as not to negligently or carelessly subject other servants of the company to unusual and unnecessary danger, and if you find from the evidence that said Duncan was guilty

of negligence in the discharge of said duty, such negligence is chargeable to the defendant." To the giving of this instruction the railway company excepted. Counsel for the administratrix concedes that if this instruction was erroneous the judgment must be reversed. It was doubtless the doctrine of the common law that a master was not liable for an injury inflicted upon one servant through the negligence of a fellow-servant. This is the English rule and, except where modified by statute, is the doctrine of the American courts. (See the rule stated and the authorities collated in 7 Am. & Eng. Ency. Law 821; 3 Wood, Railway Law, sec. 388.) This doctrine results from the nature of the contract between the employer and the employé. When one enters the employment of another agreeing to serve him for a stipulated salary or wage he thereby assumes, in the absence of an express contract to the contrary, the ordinary perils incident to that service, and included in these is the liability to injury at the hands of a negligent fellow-servant. The doctrine was thoroughly discussed by Evans, J., in *Murray v. South C. R. Co.*, 1 McMullan [S. Car.] 385, and by Shaw, C. J., in *Farwell v. Boston & A. R. Co.*, 4 Met. [Mass.] 49, the two leading cases in this country; and the rule is there declared to be founded not only upon principles of justice but upon considerations of public policy as well. To this general rule exempting the master from liability for the injury of one servant caused by the negligence of a fellow-servant there is this exception: The master himself must not have been guilty of negligence in the selection or retention of the offending servant, tool, or appliance. To bring the master within the protection of the rule the relation existing between the offending and the injured servant must not have been that of master and servant. The offending servant must not have been the *alter ego* of the master. The negligent servant must have been a co-laborer, a co-servant—that is, a fellow-servant with the injured one in the performance of the work in and about which the injury

occurred. The general rule is admirably stated by the supreme court of Massachusetts in *Farwell v. Boston & A. R. Co., supra,* in the following language: "Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service."

With an apology to the profession for this digression, and statement of a rule so familiar, we now proceed to inquire whether Duncan and Lyons were fellow-servants within the meaning of the rule just stated. This is always the difficult question in this class of cases, and he who asserts that two servants of the same master under a certain state of facts are or are not fellow-servants will have little trouble to find some case which will tend to support his contention. Counsel for the administratrix insists that Duncan and Lyons were not fellow-servants, and cites in support of this contention the following cases: *Atchison, T. & S. F. R. Co. v. Moore,* 29 Kan. 632; *Baltimore & O. R. Co. v. Baugh,* 149 U. S. 368; *Garrahy v. Kansas City, S. J. & C. B. R. Co.,* 25 Fed. Rep. 258; *Texas & P. R. Co. v. Reed,* 31 S. W. Rep. [Tex.] 1058; *Chesson v. Roper Lumber Co.,* 23 S. E. Rep. [N. Car.] 925; *Gowan v. Bush,* 22 C. C. A. 196; *Illinois C. R. Co. v. Hilliard,* 37 S. W. Rep. [Ky.] 75; *Houston & T. C. R. Co. v. Talley,* 39 S. W. Rep. [Tex.] 206; *West Chicago S. R. Co. v. Dwyer,* 57 Ill. App. 444; *Pendergast v. Union R. Co.,* 41 N. Y. Supp. 927; *Denver Tramway Co. v. Crumbach,* 48 Pac. Rep. [Colo.] 503; *Rouse v. Downs,* 47 Pac. Rep. [Kan.] 982. On the other hand, counsel for the railway company insist that Duncan and Lyons were fellow-servants, and in support of their contention cite the following cases: *O'Leary v. Wabash R. Co.,* 52 Ill. App. 641; *Clarke v. Pennsylvania Co.,* 31 N. E. Rep. [Ind.] 808; *Pittsburg C. & S. L. R. Co. v. Adams,* 5 N. E. Rep. [Ind.] 837; *Baltimore & O. R. Co. v. Baugh,* 149 U. S. 368; *Warmington v. Atchison, T. & S. F.*

*R. Co.*, 46 Mo. App. 159; *Wellman v. Oregon S. L. & U. N. R. Co.*, 21 Ore. 530, 28 Pac. Rep. 625; *St. Louis, I. & S. R. Co. v. Needham*, 63 Fed. Rep. 107; *Northern P. R. Co. v. Mase*, 63 Fed. Rep. 114; *Norfolk & W. R. Co. v. Hoover*, 29 Atl. Rep. [Md.] 660; *Herrington v. Lake S. & M. S. R. Co.*, 31 N. Y. Supp. 910; *Thom v. Pittard*, 62 Fed. Rep. 232; *Ell v. Northern P. R. Co.*, 48 N. W. Rep. [N. Dak.] 222; *Frazer v. Red River Lumber Co.*, 45 Minn. 235; *Ohio & M. R. Co. v. Robb*, 36 Ill. App. 627; *Unfried v. Baltimore & O. R. Co.*, 34 W. Va. 260; *Kerlin v. Chicago, P. & St. L. R. Co.*, 50 Fed. Rep. 185; *Baltimore & O. R. Co. v. Andrews*, 50 Fed. Rep. 728; *Marshall v. Schricker*, 63 Mo. 308; *What Cheer Coal Co. v. Johnson*, 56 Fed. Rep. 810; *Harley v. Louisville & N. R. Co.*, 57 Fed. Rep. 144; *McBride v. Union P. R. Co.*, 21 Pac. Rep. [Wyo.] 687; *O'Brien v. American Dredging Co.*, 21 Atl. Rep. [N. J.] 324; *Sherrin v. St. Joseph & St. L. R. Co.*, 15 S. W. Rep. [Mo.] 442; *Chicago & A. R. Co. v. May*, 108 Ill. 288. Not all the cases cited by counsel sustain their respective contentions, and we shall not attempt a review of these cases, or any of them; nor shall we attempt to formulate a rule which will afford a test for determining in all cases whether two servants are or are not fellow-servants within the meaning of that term, but leave that question to be determined in each case from the particular facts and circumstances of the case in which the question is presented.

In *Moore v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588, it was said: "If we may venture a general proposition on the subject, it is that all are fellow-servants who are engaged in the prosecution of the same common work having no dependence upon or relation to each other except as co-laborers, without rank, under the direction and management of the master himself, or of some servant placed by the master over them."

The supreme court of North Dakota, in *Ell v. Northern P. R. Co.*, 48 N. W. Rep. 222, laid down this proposition: "The negligence of a servant engaged in the same general business with the injured servant is the negligence

of a fellow-servant, whatever position the former occupies with respect to the latter, as to all acts which pertain to the duties of a mere servant as contradistinguished from the duties of the master to his employés."

In *O'Leary v. Wabash R. Co.*, 52 Ill. App. 641, it was held that two switching crews employed in the same railroad yard, the one in delivering cars, and the other in receiving them as kicked across the main tracks, are fellow-servants.

The supreme court of Indiana, in *Clarke v. Pennsylvania Co.*, 31 N. E. Rep. 808, held that a member of one section-gang and the boss of another section-gang employed by the same railroad company were fellow-servants. The same court in *Pittsburg C. & St. L. R. Co. v. Adams*, 5 N. E. Rep. 837, held that a servant could not recover for an injury caused by the negligence of a co-servant in the same line of employment, although of a superior grade, unless the negligent servant occupies the place of a vice-principal as to the injured servant.

The cases cited by the respective counsel in this case, including the cases just noticed, we think justify the following conclusion: Where two switching crews are in the employ of the same railway company, subject to the control and direction of the same yardmaster, no member of either of said crews having any right of control or direction over any member of the other crew, both crews simultaneously engaged in switching the same cars from one part to another of the same switch yard, then each member of one crew is the fellow-servant of each member of the other crew, although the foreman of each crew may sustain the relation of vice-principal to the members of his own crew; and this is because, to paraphrase the language of IRVINE, C., in *Union P. R. Co. v. Erickson*, 41 Neb. 1, the two crews and the members thereof are consociated in the same department of duty or line of employment. An analysis of the instruction under consideration shows that the district court reached the conclusion that Duncan and Lyons were not fellow-

servants, because the court was of opinion that Duncan had been delegated by his master to control and direct a certain line or department of its business, and, therefore, Duncan represented the railway company and his negligence was its negligence. But this is a mistake. There is no dispute as to the facts, and the uncontradicted evidence is that Duncan and Lyons were both in the employ of the same master, subject to the orders and directions of the same yardmaster, neither one having any right of control or direction of the other. They were not engaged in a separate line of the company's business or in a separate department of the company's service. They were both engaged in the same switch yard. They were both handling the same cars. They were associated together in the same department of the company's service and transacting identically the same business. The doctrine announced in this instruction would make a switch tender in a switch yard a vice-principal as to a fellow-switchman riding a car from the main line to a side track. It would make a brakeman on a car, whose duty it was to set a brake, a vice-principal as to his fellow-brakeman about to couple the car to another. The theory of the district court was that, because it was Duncan's business to switch cars from the south end of the switch yard toward the north end and there deliver them to the north switching crew, he was, therefore, engaged in a separate department or line of the company's service from that of the members of the north switching crew, and, therefore, he was performing a duty personal to the master and represented him. But Duncan was not performing a duty which the law required the master to perform. He was not engaged in a separate and distinct department of the company's service from the members of the north crew. As to the members of the north crew he was not a vice-principal. Had he been the instruction would have been correct.

The conclusion we have reached in this case does not conflict with any decision of this court.

*Smith v. Sioux City & P. R. Co.*, 15 Neb. 583, *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb. 254, *Burlington & M. R. R. Co. v. Crockett*, 19 Neb. 138, *Omaha & R. V. R. Co. v. Krayenbuhl*, 48 Neb. 553, and *Union P. R. Co. v. Doyle*, 50 Neb. 555, were all cases in which the master was held liable for the injury to one servant which resulted from the negligence of a co-servant. But in these cases, and each of them, the offending servant sustained to the injured one the relation of vice-principal and was invested with the right of control and direction not only of the work in hand but of the injured servant.

*Union P. R. Co. v. Erickson*, 41 Neb. 1, was a case in which the railway company was held liable for an injury which a track hand standing by the side of the road received from being struck by a lump of coal which fell from the tender of a rapidly passing engine, and the company was held liable. But the decision rests upon the principle that the employés of the company engaged in the business of loading the engine tenders with coal were engaged in a distinct and separate department of the company's service from the department to which the injured section hand belonged; that the two servants, though in the employ of the same master, were not engaged in the same department of the company's business.

In *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 127, the railway company was held liable for an injury which its station agent had sustained while attempting to set a defective brake on a car left at his station, the injury resulting from the negligent failure of the car inspectors of the road to discover and properly repair the defective brake. But this case rests upon the principles that it was the duty of the master to furnish brakes for its cars which were reasonably safe and fit for the purposes for which they were intended, and that the employés whose duty it was to inspect and repair brakes were engaged in a separate and distinct department of the service from that of the station agents of the master.

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

REVERSED AND REMANDED.

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## MCCORMICK HARVESTING MACHINE COMPANY V. HENRY MILLER ET AL.

FILED APRIL 21, 1898. No. 7994.

1. **Contracts:** DURESS. It is those contracts made under fear of unlawful arrest, and not those executed under threat of lawful imprisonment, which can be avoided on the ground of duress.
2. ———: COMPOUNDING FELONY. A contract, the consideration of which, in whole or in part, is the compounding of a felony or the stifling of a criminal prosecution, is contrary to public policy, illegal, and void.
3. ———: ———: RATIFICATION. The payment of money on an agreement to compound a felony cannot be considered as a ratification, since the contract was illegal and void and incapable of ratification.

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

*George B. France*, for plaintiff in error.

*F. C. Power, contra.*

NORVAL, J.

This was an action by the McCormick Harvesting Machine Company upon a written contract executed by the defendants and one George Miller, whereby they promised to pay plaintiff on March 1, 1888, the sum of $802.95, with interest thereon at the rate of eight per cent per annum from December 27, 1884. The execution of the contract is admitted, and the answer sets up that the same was obtained by duress, and that the consideration was the compounding of a felony. These averments were

put on the issue by the reply. The trial resulted in a verdict for the defendants, and to reverse the judgment entered thereon is the purpose of this proceeding.

C. D. Miller, of Westside, Iowa, is a brother of the defendant Henry Miller, and Belle Miller is the wife of the latter. C. D. Miller, while acting as agent for plaintiff, collected for it the sum of $802.95, which he converted and embezzled to his own use, and has never made restitution thereof to plaintiff. One A. W. Wass was employed by the company to call upon C. D. Miller at his home in Westside and settle said defalcation. Wass did as directed, and demanded security for the money. To this Miller replied that he had some brothers living in Nebraska who might come to his relief. It was suggested that the brothers be seen, and thereupon both started for Nebraska. While waiting for a train in Omaha, Wass had the contract in question drawn up, and he and C. D. Miller went to the defendants' home in York county, where the agreement was executed by them. It recites, substantially, that C. D. Miller, of Westside, Iowa, during the year 1884, while acting as agent of the McCormick Harvesting Machine Company, collected for it various sums of money aggregating $802.95, which he has retained; and the contract stipulates, *inter alia*, that in consideration that said company "shall release the said C. D. Miller from any further claim or demand, civilly or otherwise, on account of the money collected as aforesaid * * * we, the undersigned, promise and agree to pay to said McCormick Harvesting Machine Company the sum of $802.95 on the 1st day of March, 1888, with interest at the rate of eight per cent per annum. * * * And it is further agreed on the part of the said Henry Miller and Belle Miller, his wife, and George Miller that the foregoing indebtedness shall be a lien upon any and all real estate and personal property owned by us, whether exempt or not."

There was testimony introduced by the defendants tending to prove that at and prior to the execution of

the contract, and as an inducement to the defendants to sign the same, Wass, as agent of plaintiff, threatened to have C. D. Miller prosecuted and sent to the penitentiary, for the entire amount of the money belonging to plaintiff which he had collected and converted, unless security should be given for the amount converted, but that, if the defendant would sign the contract sued on, it would prevent any criminal prosecution from being brought against said C. D. Miller. Relying upon these statements and promises the contract was signed. Wass, on the other hand, testified positively no threats or promises of the character just stated were made by him to the Millers or either of them. The jury by their verdict have resolved all conflict in the testimony in favor of the defense, which finding this court declines to disturb.

It is insisted that C. D. Miller having embezzled the money of plaintiff, he was liable to a criminal prosecution, and therefore the mere threat to have him prosecuted for the crime did not constitute such duress as to avoid the contract in question. This position is entirely sound, since it is those contracts made under fear of unlawful arrest, and not those executed under threat of lawful imprisonment, that can be avoided for duress. (*Mundy v. Whittemore*, 15 Neb. 647; *Sanford v. Sornborger*, 26 Neb. 295.)

The evidence is sufficient to establish that the contract was given to compound a crime; in other words, that the consideration for the agreement and promise of the defendants was that C. D. Miller should not be prosecuted for embezzlement of plaintiff's money. This contract is against public policy, and is illegal and void. (*Biendorff v. Kaufman*, 41 Neb. 824; *Snyder v. Willey*, 33 Mich. 483; *Buck v. First Nat. Bank of Paw Paw*, 27 Mich. 293; *Springfield Fire & Marine Ins. Co. v. Hull*, 51 O. St. 270; *Friend v. Miller*, 52 Kan. 139; *Peed v. McKee*, 42 Ia. 689; *Smith v. Steely*, 80 Ia. 738; *Baird v. Boehner*, 77 Ia. 622; *Bowen v. Buck*, 28 Vt. 308; *Plummer v. Smith*, 5 N. H. 553.) The fact that the sum of $160 has been paid on

the contract cannot be considered a ratification, since the agreement was illegal and void, and incapable of ratification.

The court below excluded from the jury the deposition of O. L. Binford, which ruling is now assailed. There was no error in this decision, since the testimony was hearsay, and did not tend to establish or disprove any issue in the case. We have examined the several rulings on the admission and exclusion of testimony, as well as the instructions given and refused, and discover no error therein prejudicial to the plaintiff. The judgment is

AFFIRMED.

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## STATE OF NEBRASKA, EX REL. JOHN A. PEARSON, V. JOHN F. CORNELL, AUDITOR OF PUBLIC ACCOUNTS.

FILED APRIL 21, 1898. No. 9874.

1. **County Treasurer's Fees:** AMOUNT OF TAXES COLLECTED. Under section 20, chapter 28, Compiled Statutes 1897, in computing the amount of taxes collected by a county treasurer for the purpose of charging percentage, all sums collected for each fiscal year, from whatever funds derived, except school moneys, whether belonging to the state or county, or any of its subdivisions, must be included together, the fees to be allowed but once and charged *pro rata* to the different funds.

2. ——: ——. A county treasurer is not entitled to ten per cent. commission on the first $3,000 of state taxes, and a like percentage on the first $3,000 of county moneys, collected by him for each fiscal year, but a fee of ten per cent alone is chargeable on the first $3,000 from whatever source derived, without regard to the year the taxes were levied, except school moneys, and such fees or commissions are to be apportioned *pro rata* among the various funds on account of which the collections were made.

3. **Counties:** FISCAL YEAR. The fiscal year of a county is the calendar year.

4. ——: ——: TAXES. The words "fiscal year," as employed in said section 20, chapter 28, Compiled Statutes, mean the fiscal year during which the taxes are collected, and not the year in which they were levied or imposed.

5. **Statutes**: RE-ENACTMENT: JUDICIAL CONSTRUCTION. Where the legislature re-enacts a law of the state, it thereby adopts the judicial construction which had been placed thereon by the highest court of such state.

6. **County Treasurer's Commission**: LEGISLATIVE APPROPRIATION: STATE WARRANT. The auditor of public accounts is powerless to draw a warrant upon the treasury for commissions due a county treasurer upon moneys collected by him for the state and paid into the treasury, unless a specific appropriation has been made for that purpose by the legislature.

ORIGINAL application for mandamus to compel the auditor of public accounts to draw a warrant on the state treasury for fees claimed by relator, as county treasurer of Phelps county, in collecting revenues belonging to the state. *Writ denied.*

*W. S. Morlan* and *John S. Kirkpatrick*, for relator.

References: *State v. Babcock*, 22 Neb. 33; *State v. Moore*, 36 Neb. 579; *Moose v. State*, 49 Ark. 599; *State v. Roderick*, 23 Neb. 505; *State v. Harvey*, 12 Neb. 31; *State v. Weir*, 33 Neb. 35; *Bedwell v. Custer County*, 51 Neb. 387; *McKeen v. Delancy*, 5 Cranch [U. S.] 22; *Martin v. Hunter*, 1 Wheat. [U. S.] 304; *Cohens v. Virginia*, 6 Wheat. [U. S.] 264; *Myrick v. Hasey*, 27 Me. 9; *Whitcomb v. Rood*, 20 Vt. 49; *Franklin v. Kelley*, 2 Neb. 87; *Stewart v. Daggy*, 13 Neb. 290; *Jackson v. Washington County*, 34 Neb. 680; *Sampson v. Sampson*, 3 L. R. A. [R. I.] 349; *Bloxham v. Consumers E. L. & S. R. Co.*, 29 L. R. A. [Fla.] 507; *In re Contest Proceedings*, 31 Neb. 262.

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

NORVAL, J.

This is an application to this court, in the exercise of its original jurisdiction, by the state, on relation of John A. Pearson, for a peremptory writ of mandamus to compel the respondent, as auditor of public accounts, to draw his warrant upon the state treasury in favor of relator

for the sum of $808.24, in payment of fees and mileage alleged to have been earned by him as county treasurer of Phelps county, in the collection of the revenues belonging to the state, between January 1, 1897, and January 5, 1898. The application sets forth the total amount of taxes collected by relator during that period on account of each of the several funds, as well as the amount received by him from the levy of taxes from 1885 and during each year subsequent thereto, and avers that respondent has audited and allowed as commissions and mileage for the collection of the state's money the sum of $411.87 and no more. The cause has been submitted upon a general demurrer to the application.

The question involved is one of statutory construction, namely, the manner of computing the commissions authorized to be paid to a county treasurer for the collection of the revenues of the state. Section 20, chapter 28, Compiled Statutes 1897, reads as follows:

"Sec. 20. Each county treasurer shall receive for his services the following fees: On all moneys collected by him for each fiscal year, under three thousand dollars, ten per cent. For all sums over three thousand dollars and under five thousand dollars, four per cent. On all sums over five thousand dollars, two per cent. On all sums collected, percentage shall be allowed but once; and in computing the amount collected, for the purpose of charging percentage, all sums, from whatever fund derived, shall be included together, except the school fund. For going to the seat of government to settle with the state treasurer, and returning therefrom, a traveling fee of ten cents per mile, to be paid out of the state treasury. The treasurer shall be paid in the same *pro rata* from the respective funds collected by him, whether the same be in money, state or county warrants. On school moneys by him collected, he shall receive a commission of but one per cent."

The construction given the foregoing section by counsel for relator is that the commissions of a county treasurer

for the collection of state taxes, other than school moneys, are ascertained by making a computation alone on the amount of the revenues of the state collected by him for each fiscal year, disregarding the county, city, and other taxes which he has collected, and that the sums received on account of the assessment for one year are not to be included with collections made on taxes imposed for any other year. If the basis of calculation just suggested is the correct one, relator is entitled to the amount of fees demanded; otherwise not. It is noticeable that the statute authorizes the treasurer to charge certain percentages on "all money collected by him for each fiscal year." The fiscal year of a state commences on December 1 and ends on November 30 following. (Compiled Statutes, ch. 83, art. 3, sec. 17; ch. 83, art. 4, sec. 9.) The fiscal years of cities of the several classes begin and end at different times. Thus, in cities of the metropolitan class, the fiscal and calendar years are the same. (Compiled Statutes, ch. 12*a*, sec. 40.) In cities of the first class having over 25,000 inhabitants, the financial year commences on the first Monday in September, while in cities belonging to the second class, having a population of over 5,000 and not exceeding 10,000, the fiscal period begins on the second Monday in August (Compiled Statutes, ch. 14, art. 2, sec. 38), and the first Tuesday in May marks the beginning of the fiscal year in villages, and all cities having less than 5,000 inhabitants (Compiled Statutes, ch. 14, art. 1, sec. 85.) The legislature has not in express terms defined what period of time shall constitute the fiscal or financial year for county purposes, but it is conceded by relator that it is the calendar year. A consideration of the various provisions of the revenue law relating to the levy, collection, and disbursement of the public moneys of the county, the statute requiring the usual levy of taxes for county purposes to be made annually upon estimates prepared by the county board in January of each year, and forbidding such board from contracting any indebtedness for any object not enumerated in such

yearly estimate of expenditures, and the enactment that the compensation of the county treasurer cannot exceed a specified sum per annum, make it reasonably certain that the lawmakers intended that the fiscal period of a county should correspond to the calendar year.

It is strenuously argued that the purpose of the legislature to allow the county treasurer ten per cent on the first $3,000 of state moneys collected is manifest from the fact that the fiscal year for the state and the county does not begin or end at the same time. The conclusion suggested is unsound. It is contrary to the plain import of the statute. The lawgivers never intended the state should pay the treasurer a commission of ten per cent on the first $3,000 collected for the state for the fiscal year commencing on December 1, a like percentage on the same amount of village taxes first received by the treasurer after May 1, and a like commission on the first $3,000 of county revenues collected in any calendar year. Had it been the purpose of the legislature that commissions on the collection of taxes should be so computed, language more appropriate to indicate the intent would doubtless have been chosen in the framing of the section under consideration. The words "fiscal year," as employed therein, do not refer to the various fiscal periods already mentioned, but to the fiscal year as applied to counties alone. This is indicated by the fact that a county treasurer is not a state officer, but a county official. He collects in that capacity the state's revenue, and the section treats alone of his compensation. The legislature must have intended that his fees should be calculated on collections made with reference to a single fixed period. Any other rule would render it exceedingly difficult, if not almost impossible, to adjust his commissions in accordance with the provisions of the statute.

It is specified that the county treasurer shall receive for his services "on all moneys collected by him for each fiscal year, under three thousand dollars, ten per cent." The law reads "all moneys." It means what it says, and

not a portion of all moneys collected. If it had been the purpose that all the state moneys for each fiscal year should alone be included together, it would not have been a difficult matter to have used language to make such intent clear. On the first $3,000 of the public revenue, other than school moneys, collected by the treasurer for any calendar year, belonging to the state, county, village, or any subdivisions of the state, he is entitled to charge a commission of ten per cent, no more and no less. That this is the proper exposition is strengthened by the fact that the section under review in express terms declares that "in computing the amounts collected for the purpose of charging percentage, all sums, from whatever fund derived, shall be included together, except the school fund," and further, "the treasurer shall be paid in the same *pro rata* from the respective funds collected by him." There is no room for controversy that all moneys collected by a county treasurer for any fiscal year, belonging to the state, county, and village, other than school moneys, must be considered together for the purpose of allowing commissions.

In *State v. Roderick*, 25 Neb. 629, section 20 of chapter 28, Compiled Statutes, was before the court, and it was there determined that in computing the amount collected, for the purpose of charging percentage, all sums, from whatever source derived, except school money, should be added together, the commissions apportioned *pro rata* among the different funds, and be allowed but once.

Another argument against this construction is that there is no means by which the auditor could ascertain and adjust the commissions except upon an examination of the treasurer's books in regard to the county funds collected, and that there is no provision of statute which requires a county treasurer to report to the auditor the amount of county moneys received by him. Let us see if this position is tenable. Section 5, article 3, chapter 83, Compiled Statutes, relating to the settlement of the auditor with county treasurers, requires all such treasurers

to "exhibit their accounts and vouchers to the state auditor." There is as much authority for a county treasurer to render a statement to the auditor of the county moneys collected as there is of the state funds; especially is this true when sections 162 and 163 of the revenue law are considered. (Compiled Statutes, ch. 77, art. 1.) Section 162 declares that "the county clerk shall make out and deliver to the county treasurer, as soon as adjustment is made with the county board or county clerk, annually, the statements, certificates, and lists appertaining to the settlement of the accounts of such treasurer; which statements, certificates, and list shall be made out in proper form, under his seal of office, on blanks which it is hereby made the duty of the auditor to furnish, annually, for that purpose. The treasurer shall deliver the same to the auditor and make a final settlement of his accounts on or before the first day of February in each year." Section 163 makes it the duty of the county clerk to furnish a duplicate copy of said statement, duly certified, whenever requested so to do by the auditor. With these provisions in force the auditor can make settlement with the treasurer, and determine the amount of his commissions on state funds, without a personal examination or inspection of the books in the office of the county treasurer.

It is urged by the relator, and it is so averred in the application for the writ, and by the demurrer admitted to be true, that for many years past the state auditor and state treasurer have universally construed the statute to mean that the revenues of the state and those belonging to the county were to be separately considered in ascertaining the fees to be paid the county treasurer for the collection of the state taxes. It is, doubtless, true that the construction of a statute by the legislative or executive department, when deliberately made, is entitled to great weight in many cases, although not conclusive upon the court; but such an interpretation will not be followed by the judiciary where to do so would be to

ignore the plain and obvious meaning of the law and override the judicial exposition placed thereon.

It has been frequently asserted that in case the legislature adopts the statute of another state, it likewise adopts the construction which it had already received by the highest court of such state; and, by a parity of reasoning, where a law is re-enacted by a legislature, which had been interpreted by the supreme court of the same state, such construction is thereby adopted. Said section 20, chapter 28, Compiled Statutes, in almost the present form, has been part of the statute law of this state for many years, and it was construed by this court at the January term, 1889, in *State v. Roderick*, 25 Neb. 629. The section was re-enacted at the session of the legislature in 1891. (Session Laws 1891, ch. 27.) It must, therefore, be presumed that the construction given the section in that case was adopted by the legislature, and is as much a part of the law as if it had been by apt language incorporated in the body of the statute. The conclusion is, therefore, irresistible that all public moneys collected by a county treasurer for each fiscal year for and on behalf of the state, and each of its subdivisions, except educational funds, must be added together for the purpose of determining the compensation of the officer, and that he is entitled to ten per cent upon the first $3,000 of such aggregate sum, four per cent on the next $2,000, and two per cent on the residue, the commissions to be charged *pro rata* to the various funds, and to be paid only once.

The next propositions for consideration are whether the compensation of a county treasurer should be determined by adding together the various revenues collected by him during a single year without regard to the year the taxes were imposed, or must the several amounts collected in one year, on account of the levies of different years, be separately considered in making the calculation? Counsel for relator place the latter construction upon the statute, and they insist that where the officer

has during a single year received taxes raised by levies made in different years, he is entitled to ten per cent commission on the first $3,000 collected by him on account of each separate year's levy. In other words, if during 1897 he collected taxes imposed in 1890, 1891, and 1892, respectively, he should receive for his services ten per cent on the first $3,000 collected on the levy of 1890, a like percentage on the first $3,000 paid in on account of the levy of 1891, and the same basis of computation to obtain for the levy of 1892. Such an exposition of the statute is not permissible. The words "for each fiscal year," as used by the legislature, can have but one of two meanings, namely, the fiscal year the taxes are imposed, or the financial year during which the collections are made. If the former is the correct interpretation of the provision of the section, then it is plain that ten per cent can be charged once only on the first $3,000 collected on account of the levy of a single year, whenever received. Thus, if $3,000 is paid on account of the levy of 1895, during that year, upon which ten per cent commissions have been paid the officer, and $3,000 is received by him on account of the same levy during 1896, he is not entitled to ten per cent on this latter sum. The statute expressly prohibits the payment of percentage more than once. Giving the word "for" in the phrase "for each fiscal year" its ordinary signification, the writer is of the opinion that the statute has reference to the fiscal year the taxes are imposed, rather than the year in which the same are collected. The word "for" means "on account of" or "during." The latter definition was given the word "for" in *Lawson v. Gibson*, 18 Neb. 137, and in effect it was held to have been so used in the section of the statute under review in *State v. Roderick*, 25 Neb. 632. In the latter case the county treasurer collected in 1886 from all sources, exclusive of school moneys, $148,475.94, and the court held that in computing the amount of fees of the officers all sums, from whatever source derived, should be added together. The whole decision proceeds

upon the theory that "fiscal year," as employed in the section, meant during the year the money is collected, and that no account is to be taken whatever, in determining the officer's compensation, of the different years on account of which the levies were made from which the moneys were derived. The section having been reenacted after that decision was rendered, as already stated, the exposition then given the statute was thereby adopted by the legislature, and we do not feel at liberty to now ignore such construction, especially since it is not an unreasonable one.

It is suggested that "If the delinquent taxes for the various years are to be treated as one fund, and belonging to the fund of a subsequent year, as the auditor has done in this case, the delinquent taxes for ten years can be merged in one year, and the purpose for which the money is appropriated be entirely defeated." The construction we have placed upon the section does not treat the levies of different years as one fund for the purpose of distribution, or divert them to purposes different from that for which the taxes were levied. The moneys are not commingled, but for the single purpose of determining the compensation of the treasurer those derived from the levies of the various years are computed together. The calculation is based upon the entire revenue paid, except school moneys, from whatever source derived, without regard to the year the levy was made. It follows, from the views already expressed, that the application states no grounds for relief.

The same conclusion is reached by a different and shorter course of reasoning. The application is to require the auditor of public accounts to draw his warrant upon the state treasurer in payment of the fees and mileage claimed to be due the relator on account of the collection of the moneys of the state. The constitution forbids the drawing of a single dollar from the state treasury except when authorized so to do by a specific appropriation. (Constitution, art. 3, sec. 22; *State v. Wallichs*, 12

Neb. 407, 15 Neb. 457, 609, 16 Neb. 679; *State v. Moore*, 50 Neb. 88; *State v. Babcock*, 18 Neb. 221.) In the last case it was decided that the auditor had no power to draw a warrant upon the state treasury for commissions due the county treasurers on account of moneys collected by them for the state. The application for the writ in the case in hand contains no averment that any appropriation has been made by the legislature which is available to pay the fees for collecting moneys belonging to the state. Therefore, in any aspect of the case, the demurrer to the application should be sustained, and the

WRIT DENIED.

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FARMERS LOAN & TRUST COMPANY, APPELLANT, V. PETER SCHWENK ET AL., APPELLEES.

FILED APRIL 21, 1898. No. 7980.

1. **Homestead:** LIEN OF JUDGMENT. Under the exemption laws of this state, a judgment is not a lien on lands occupied as a homestead, where the debtor's interest therein does not exceed $2,000.
2. **Mortgages:** FORECLOSURE: ESTOPPEL. Where, under a decree foreclosing one of two mortgages of equal priority given to plaintiff in one transaction and covering the same lands, the appraisers erroneously deducted from the value of the premises the amount of a judgment as a senior lien, the plaintiff, being the purchaser at the foreclosure sale, cannot be heard, in a subsequent action by him to foreclose the other mortgage, to assert that such judgment was the junior lien.

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

*M. J. Sweeley*, for appellant.

*Wigton & Whitham, contra.*

NORVAL, J.

This was an action to foreclose a real estate mortgage. A decree was entered which subordinated the mortgage

to the lien of the judgment of the defendants Westervelt, Hays, and Yost. Plaintiff appeals from that portion of the decree which adjusted the liens.

The facts are briefly these: On April 12, 1888, the defendants Westervelt, Hays, and Yost obtained a judgment in the district court of Madison county against the defendant Peter Schwenk for the sum of $131.15 and accrued costs, which judgment has been kept alive by the issuance of executions thereon, and no portion thereof has been collected or paid. On March 1, 1890, Peter Schwenk borrowed from plaintiff the sum of $1,500 on five years' time, agreeing to pay six per cent interest on the money, besides a bonus or commission of $225 for making the loan. Schwenk at that time, and as parts of the same transaction, gave his two promissory notes, one for $1,500 and the other in the sum of $225, and secured the payment of each by a separate mortgage upon the south half of lot 1, block 4, in Haas' Suburban Lots in the city of Norfolk, which mortgages were duly recorded. The premises at the time of the rendition of the judgment, until after the delivery of the mortgage, were occupied by Schwenk as a homestead. On August 13, 1891, plaintiff instituted an action against the Schwenks to foreclose the mortgage given it to secure the smaller note, which suit proceeded to decree. An order of sale was issued thereon, the premises were sold to plaintiff thereunder, and a sheriff's deed was issued. To that action Westervelt, Hays, and Yost were not made parties. Schwenk's interest in the lot in question at the time of the rendition of the judgment against him was, and ever since has been, of less value than $2,000. The appraisers, under the order of sale, in determining the interest of Schwenk in the lot, deducted from the value of the premises as found by them the amount of said judgment, interest, and costs, together with the taxes against the lot and the sum due on the $1,500 mortgage, which is sought to be foreclosed herein. Plaintiff at said foreclosure sale purchased the premises for the sum of $400,

subject to said judgment lien, taxes, and the mortgage of $1,500, and is now the owner of the property by virtue of said purchase. It was upon the foregoing undisputed facts that the court below entered its decree; and the single question presented is whether the placing of the judgment lien ahead of this mortgage was erroneous.

It is undisputed that the judgment was obtained a long time prior to the execution of the mortgages, which fact would have made the judgment the senior lien were it not that the premises at the date of the judgment and at all times since were used and occupied by the Schwenks as a homestead. Under the homestead law in force in this state a judgment is a lien alone on the debtor's interest in lands, impressed with the character of a homestead, in excess of $2,000. This principle has been so frequently recognized in this jurisdiction as not to require discussion, or the citation of authorities in its support. As the interest of the judgment debtor in this property at no time exceeded said sum, the judgment in question never was a valid and subsisting lien against the mortgaged premises. The question for determination is whether, under the facts in this case, plaintiff has the right to insist that the judgment is not a lien upon the property and that the mortgage now being foreclosed is the paramount lien? The principle which must control the decision has more than once been announced in the adjudications of this court, as a brief reference to the cases will disclose.

In *Koch v. Losch*, 31 Neb. 625, it was held that where, in making an appraisement of lands at a judicial sale, the amount of a mortgage is deducted from the true value of the property, the purchaser at such sale is not in a position to thereafter deny the validity of such mortgage.

In *Nye v. Fahrenholz*, 49 Neb. 276, it was decided that where a lien junior to that foreclosed was erroneously, by the appraisers, treated as a superior lien, and its amount deducted from the value of the premises in mak-

ing the appraisement, the purchaser cannot be heard, in a subsequent suit to foreclose such lien, to assert that it was junior to that under which he bought.

In *Norfolk State Bank v. Schwenk*, 51 Neb. 146, POST, C. J., in speaking of the sale made under the $225 mortgage involved in the case at bar, said: "'This judgment was recognized as a lien prior to the decree under which the property was sold, and the loan and trust company, having purchased subject thereto, is presumed to have assumed the indebtedness thereby represented."

Both mortgages, it is true, were liens upon the premises therein described paramount to that of the judgment, but, in the proceedings to sell under the decree based on the smaller mortgage, the amount of the judgment was deducted as a lien, and plaintiff having purchased at such sale, under the authorities cited, it recognized the judgment as a prior lien. It is conceded by counsel, in argument, if plaintiff had no claim other than its sheriff's deed, and if it was basing its rights on that conveyance, the decisions referred to would be controlling. It is insisted, however, that plaintiff is not claiming anything by virtue of its deed but under the larger mortgage; therefore, such mortgage is not rendered subject to the judgment, on the ground that plaintiff admitted its smaller mortgage was junior to the judgment. It was admitted on the trial in the court below that plaintiff is the present owner of the property by virtue of the sheriff's deed, and that both mortgages were given in the same transaction, and, so far as disclosed, there existed no priority of liens between the mortgages. Plaintiff, therefore, having admitted that one of its said liens was junior to the judgment, it cannot assert the priority of the lien of the mortgage sought to be foreclosed. The decree is right and is accordingly

AFFIRMED.

## PICKLE MARBLE & GRANITE COMPANY V. J. H. MCCLAY ET AL.

FILED APRIL 21, 1898. No. 7988.

**Action on Contractor's Bond for Value of Materials: REVIEW: BRIEFS.** One who furnishes a contractor for the erection of a court house with materials used in the building may maintain an action for their value on the contractor's bond given to the county as security for the performance of his contract, requiring *inter alia* the contractor to satisfy all lawful claims of laborers and materialmen.

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

*William Leese* and *E. E. Brown*, for plaintiff in error.

*C. A. Atkinson* and *Walter A. Leese, contra.*

NORVAL, J.

William H. B. Stout was awarded the contract for the erection of a court house for Lancaster county, the contract providing that Stout was, at his own cost and charges, to provide all labor and materials necessary for the construction of the building, and that there should not be any legal or lawful claims against him in any manner from any source whatever for labor performed or materials furnished during the progress of the work. Stout gave the county a bond, executed by himself as principal, with J. H. McClay, Louie Meyer, and J. H. Harley, as sureties, in the sum of $75,000, conditioned as follows: "That if the said William H. B. Stout shall duly perform the said contract, with all the conditions of the plans and specifications, and discharge all of its liabilities, then this obligation is to be void, otherwise the same shall be and remain in full force and virtue." Plaintiff furnished Stout, under said contract, with certain materials which were used in the erection of the court house,

and Stout having failed and refused to pay for the same, this action was instituted upon said bond to recover the amount alleged to be due plaintiff on account of the materials so furnished. The defendant sureties demurred to the amended petition on the ground that it did not state a cause of action. The demurrer was sustained and the action dismissed. This ruling is before us for review.

The question involved is whether the bond in suit inured to the benefit of plaintiff, and can it maintain an action on the bond for a breach of its conditions by the principal therein named? The decisions of this court sustain the proposition that these sureties are liable for the materials furnished by plaintiff which were used by Stout in the construction of the building. This case is on all fours with *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb. 649, which was a suit on the identical bond herein involved. In that case a general demurrer was sustained by the trial court to a petition substantially like the one now before us, but which decision was reversed on review. The following cases sustain the doctrine that one not a party to a bond may maintain an action thereon when such bond was executed for his benefit: *Sample v. Hale*, 34 Neb. 220; *Lyman v. City of Lincoln*, 38 Neb. 794; *Kaufmann v. Cooper*, 46 Neb. 644; *Doll v. Crume*, 41 Neb. 655; *Hickman v. Layne*, 47 Neb. 177; *Fitzgerald v. McClay*, 47 Neb. 816; *Roman v. Gaiser*, 53 Neb. 474.

Counsel for the defendant Harley insisted on the hearing that the judgment below should be affirmed as to his client, for the reason the brief of plaintiff was not served upon him within the time prescribed by the rules of this court. It is true the rule providing for the service and filing of briefs was violated in this case; yet we are not willing to affirm by reason thereof, since plaintiff's brief was served upon all the defendants, and filed herein, more than two years prior to the submission of the case for decision. At the hearing, for the first time, the court's attention was challenged to the fact that the brief had been served out of time, and then no motion

was made to strike the same from the files. Defendant Harley could not have been in the least prejudiced in the premises, inasmuch as his counsel had abundant opportunity, after the service of the brief of plaintiff, to have answered it. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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## PIONEER FIRE-PROOF & CONSTRUCTION COMPANY V. J. H. MCCLAY ET AL.

FILED APRIL 21, 1898. No. 7987.

**Action on Contractor's Bond: PARTIES.** One not a party to a contractor's bond may maintain an action thereon, when such bond was executed for his benefit.

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

*William Leese* and *E. E. Brown*, for plaintiff in error.

*C. A. Atkinson* and *Walter A. Leese, contra.*

NORVAL, J.

This was a suit on a building contractor's bond. A general demurrer was sustained to the petition, and the plaintiff electing to stand on its pleading, the cause was dismissed.

The decision is controlled by that of *Pickle Marble & Granite Co. v. McClay*, 54 Neb. 661. For the reason given in the opinion filed therein, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

## CHARLES LEPIN V. GEORGE E. COON, SHERIFF.

FILED APRIL 21, 1898. No. 7925.

1. **Chattel Mortgages**: SALES BY MORTGAGOR: FRAUD. Where the mortgagor of a stock of merchandise remains in possession thereof and continues to sell the same in the usual course of business pursuant to agreement with the mortgagee that he will apply the proceeds of all sales upon the debt secured by the mortgage, the court cannot pronounce the transaction fraudulent as a matter of law.

2. ———: ———: ———: QUESTION FOR JURY: INSTRUCTIONS. And an instruction, in such case, which withdraws from the consideration of the jury the question of whether the transaction was an honest or fraudulent one is prejudicially erroneous.

3. ———: ———: ———: ———. The vital question in such case is the intent with which the sale of the stock was authorized or permitted, and when that does not appear on the face of the mortgage, it is always a question of fact to be determined by the jury from a consideration of the entire evidence.

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

*A. M. Walters*, for plaintiff in error.

*A. H. Bowen, contra.*

SULLIVAN, J.

On August 21, 1893, Schumann, being engaged in the retail liquor business at Blue Hill, in this state, executed to Charles Lepin a chattel mortgage covering his saloon fixtures and his stock of whiskies, wines, and cigars. The mortgage was filed in the office of the county clerk and the mortgagor thereafter remained in possession of the saloon and continued to sell the mortgaged property in the usual course of the retail trade. While so engaged, Coon, as sheriff of Webster county, and acting under orders of attachment issued in actions commenced by other creditors of Schumann, seized the property and took it into his possession. Thereupon, Lepin, by an ac-

tion of replevin, asserted his rights under the chattel mortgage. A trial in the district court resulted in a verdict and judgment for the sheriff.

The petition in error filed by the plaintiff presents to this court for determination the correctness of two instructions given by the trial court at defendant's request. These instructions are as follows:

"1. If you find from the evidence that the plaintiff knowingly permitted the mortgagor to use the property covered by the mortgage to the plaintiff as his own, selling the same in the usual course of trade, as his own, after said mortgage was given, then and in that case said mortgage was void as against the creditors of said mortgagor, Schumann, and you will find for the defendant."

"3. The jury are instructed that a mortgage upon a stock of goods, where the mortgagor continues in possession and disposes of the same in the usual and ordinary course of trade, is void as against the creditors of said mortgagor. Hence, if you find from the evidence that after Schumann executed the mortgage upon his saloon fixtures and stock, the plaintiff permitted him to continue the business of retail dealer in intoxicating liquors in the same place, with the same goods, and with and under the same license, you will find for the defendant, providing you first find that E. F. Hartwig, in whose behalf the defendant held said goods by attachment, was a creditor of said Schumann, mortgagor."

The mortgage itself conferred no authority on the mortgagee to sell the stock or any part of it in the usual course of business, but there was an agreement outside of the mortgage providing that it might be done. There is evidence in the record tending to show that the arrangement between the parties was that Schumann should continue to conduct his business in the usual way; that he should dispose of the mortgaged stock at retail and apply the proceeds, as it should be received, to the payment of defendant's claim against him. There is also evidence tending to prove that this arrangement

had been carried out in good faith. By the instructions in question the jury were told that if Schumann used and sold the stock as his own, and did so with defendant's permission, the mortgage was void as against Schumann's creditors. The facts to which the court thus directed the attention of the jury were evidence of fraud, but they were not conclusive. It was the function of the jury to determine whether the mortgage was a fraudulent or an honest one, and in reaching a conclusion upon that question it was their duty to take into account every fact disclosed by the evidence bearing upon the intent and motives of the parties. The intent with which the sale of the stock was authorized or permitted was the vital question to be decided. It was a question of fact and not of law. It was to be ascertained from a consideration of the whole evidence and not from a part of it merely. The court should have told the jury that plaintiff's consent to the sale of the stock would not vitiate the mortgage if his purpose was thereby to secure payment of his own claim and not to hinder, delay, or defraud other creditors in the collection of their demands. Permission to sell did not *per se* render the mortgage fraudulent and void. (*Turner v. Killian*, 12 Neb. 580; *Robinson v. Elliott*, 22 Wall. [U. S.] 513; *Klein v. Katzenberger*, 20 O. St. 110; *Brackett v. Harvey*, 91 N. Y. 214.) The instructions complained of were, therefore, erroneous and plainly prejudicial to the rights of the plaintiff. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

## IN RE WILLIAM C. REAM.

FILED APRIL 21, 1898. No. 9932.

1. **Habeas Corpus:** IRREGULARITIES IN TRIAL OF ACCUSED. Mere errors or irregularities in the proceedings or judgment of a court in a criminal case will not be examined or inquired into on an application for a writ of habeas corpus.
2. ——: ——: VALIDITY OF CONVICTION: CRIMINAL LAW. If the court has jurisdiction of the person of the accused and of the crime charged and does not exceed its lawful authority in passing sentence, its judgment is not void, whatever errors may have occurred during the trial.

ORIGINAL application for writ of habeas corpus. *Writ denied.*

*H. H. Bowes*, for petitioner.

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

SULLIVAN, J.

This is an application by William C. Ream, to this court in the exercise of its original jurisdiction, for a writ of habeas corpus directed to the warden of the penitentiary, in whose custody the petitioner is held under a sentence pronounced against him by the district court. Accompanying the petition is an agreed statement of facts, from which it appears that the crime of which Ream was convicted and for which he is now imprisoned was set forth in the information in the following language: "Said county attorney for the third count of this information further gives the court to understand and be informed that said William Ream, at the time and place mentioned in the first count of this information, being on or about the 12th day of May, A. D. 1896, in the county of Thurston and state of Nebraska aforesaid, then and there being, did then and there willfully, feloniously, and unlawfully

buy and receive said twenty-three steers of the value of the sum of five hundred dollars, and said two cows of the value of forty dollars, being the property of said Swan Olson, which had then and there been stolen, he, the said William Ream, then and there well knowing the same to have been so stolen, with the intent thereby of him, the said William Ream, by such receiving and buying to defraud the owner thereof, said Swan Olson, contrary to the statute in such case made and provided and against the peace and dignity of the people of the state of Nebraska." The contention of the petitioner is that he was prosecuted, convicted, and sentenced under an act of the legislature of 1895, 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," and that such act did not pass both branches of the legislature and never became a law. A decision of the question thus raised is not essential to a proper disposition of this case and we do not now decide it. Conceding the position of the petitioner to be correct, it does not follow that he is unlawfully imprisoned and therefore entitled to be discharged. Section 116 of the Criminal Code has been in force since 1873 and is as follows: "If any person shall receive or buy any goods or chattels [of] the value of thirty-five dollars or upwards, that shall be stolen or taken by robbers, with intent to defraud the owner, or shall harbor or conceal any robber or thief guilty of felony knowing him or her to be such, every person so offending shall be imprisoned in the penitentiary not more than seven years, nor less than one." The third count of the information distinctly charged the petitioner with a violation of this section, the jury declared him guilty, and the court sentenced him to imprisonment in the penitentiary for a period of six and one-half years. So it clearly appears that Ream is in the custody of the respondent by virtue of a judgment rendered by the district court in the exercise of its undoubted jurisdiction. If error was

committed at the trial it cannot be reviewed or corrected in this proceeding. It is a fundamental principle that errors or irregularities, not jurisdictional, will not be examined or inquired into on habeas corpus. The writ cannot be converted into a writ of error. (*Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651; *In re Betts*, 36 Neb. 282; *In re Havlik*, 45 Neb. 747; *In re McVey*, 50 Neb. 481.) If the court has jurisdiction of the person of the accused and of the crime charged in the information and does not exceed its lawful authority in passing sentence, its judgment is not void whatever errors may have preceded the rendition thereof. (*Ex parte Siebold*, 100 U. S. 371; *Ex parte Watkins*, 3 Peters [U. S.] 193.) The information charged Ream with the commission of a crime. The court had jurisdiction of that crime and of the prisoner who was brought before it. The sentence pronounced was based on a verdict of conviction, was within the limits fixed by the statute, and, not having been set aside in a direct proceeding, must now be enforced. That the prosecution may have been instituted and carried forward and sentence passed with reference to a void enactment and in ignorance of the existence of section 116 aforesaid would not at all affect the question. The validity of judicial orders and judgments does not depend upon the reason for the court's action, but upon the possession by it of lawful authority to hear and determine the matter before it. The writ is

DENIED.

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## J. L. STEVENS & COMPANY v. RILEY KIRK.

FILED APRIL 21, 1898. No. 8041.

**Conflicting Evidence:** REVIEW. A verdict found upon substantially conflicting evidence will not be disturbed in this court.

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

*H. Z. Wedgwood* and *W. W. Quivey*, for plaintiffs in error.

*O. J. Frost* and *Robertson & Wigton, contra.*

SULLIVAN, J.

The plaintiffs, who are real estate brokers, brought this action in the district court for Pierce county to recover $175 claimed to be due them as a commission for negotiating a sale of defendant's farm. The issues formed were tried to a jury, who found in favor of the defendant. The trial court approved the finding and rendered judgment accordingly. By this proceeding in error a reversal of the judgment is sought on the ground that the verdict does not rest upon sufficient evidence. Nothing would be gained by an extended review of the evidence. We have given it a careful examination and see no reason to find fault with the conclusion of the jury. The judgment is right and is

AFFIRMED.

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GEORGE M. MURPHY, APPELLEE, V. EFFIE M. GUNN, APPELLANT, ET AL.

FILED APRIL 21, 1898. No. 9264.

1. **Judicial Sale:** APPRAISEMENT: CONFIRMATION: REVIEW. On the hearing of a motion to confirm a sale of real estate it appeared that the value of the land as fixed by the appraisers was $2,000. Four witnesses for plaintiff estimated the value at $1,800. One witness for defendant estimated the value at $2,700 and the other at $2,400. A decision of the trial court sustaining the appraisement was not erroneous.

2. ———: OBJECTIONS TO CONFIRMATION. Objections to the confirmation of a sale must specifically indicate the irregularity complained of. Failing to do this they will be disregarded.

3. ———: ———: TIME. When it is claimed that the time limited to show cause against confirmation of a judicial sale is too short, the defendant should apply to the court for additional time and, if necessary, accompany his application with a proper showing.

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

*Joshua Palmer*, for appellant.

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

SULLIVAN, J.

This case is here on appeal from an order of the district court of Saline county confirming a sale of real estate made pursuant to a decree of foreclosure. After the property was appraised, and before the sale, the appellant, Effie M. Gunn, filed the following objections to the appraisement: "Now comes Effie M. Gunn, one of the above named defendants, and objects to the confirmation and sale of the property in the above entitled action for the following reasons: (1.) The appraisers were not resident freeholders. (2.) The appraisers did not view the property. (3.) The property was appraised at less than its cash value. (4.) The property is worth more than it was appraised at. (5.) The appraisement and notice of sale were irregular, and not according to law. (6.) The sheriff did not appraise said property according to law." These objections were considered in connection with the motion for confirmation and were overruled. The first two are unsupported by any evidence and are completely refuted by the recitals in the return of the sheriff, from which it appears that the appraisers were resident freeholders of Saline county and that the appraisement was made upon actual view of the premises. The third and fourth objections call in question merely the correctness of the conclusion reached by the appraisers in regard to the value of the land. The appraisers fixed its value at $2,000. Four witnesses for the plaintiff estimated its market value at $1,800. One witness for the defendant swore it was worth $2,700, and another that its cash value was $2,400. On this evidence the ruling of the trial court sustaining the appraisement was correct. The fifth

and sixth objections are too indefinite to invite attention. They do not point out wherein the notice and sale were irregular nor in what respect the appraisement failed to meet the requirements of the law. The rule is well settled in this state that objections of this character must specifically indicate the irregularity complained of. Failing to do this they will be disregarded. (*Johnson v. Bemis*, 7 Neb. 224; *Hooper v. Castetter*, 45 Neb. 67; *Ecklund v. Willis*, 44 Neb. 129.)

Appellant finally insists that she was not afforded a sufficient opportunity to prepare for the hearing on the motion to confirm the sale. This contention is grounded on the fact that the order to show cause against confirmation was made on the morning of March 26, and the motion to confirm was submitted and decided on the afternoon of the same day. On this point it is only necessary to say that if appellant needed more time for preparation, a seasonable application to the district court, accompanied by a proper showing, would, undoubtedly, have secured it. If she went into the contest unprepared, the fault was hers alone. The court was not advised of her lack of preparation. Wherefore the order appealed from is

AFFIRMED.

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## LINCOLN STREET RAILWAY COMPANY v. MARY J. MCCLELLAN.

FILED APRIL 21, 1898. No. 7974.

1. **Street Railways: INJURY TO PASSENGER: CONTRIBUTORY NEGLIGENCE.** One cannot recover for an injury received while a passenger on a street railway if the accident from which the injury resulted was due in part to his own want of ordinary care.

2. ———: ———: ———. And in an action to recover damages in such case an instruction which informs the jury that, the injuries being shown, the carrier, to escape liability, must prove that the passenger was guilty of gross contributory negligence is erroneous.

3. ———: NEGLIGENCE. Street railways are common carriers of pas-

sengers and as such are required to exercise the utmost skill, diligence, and foresight, consistent with the business in which they are engaged, for the safety of their patrons; and they are liable for the slightest negligence.

4. ———: ———: BURDEN OF PROOF. In an action for damages for an injury received while being transported by a common carrier, the injury being shown, the burden of proof is upon the carrier to show that it was in nowise at fault.

5. ———: ———: COMMON CARRIERS: STATUTES. Section 3, article 1, chapter 72, Compiled Statutes 1897, providing that "Every railroad company as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured," etc., has no application to street railways.

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

*Ames & Pettis* and *William G. Clark*, for plaintiff in error.

*Clark & Allen, contra.*

SULLIVAN, J.

The plaintiff Mary J. McClellan was injured while a passenger on one of the cars of the defendant, the Lincoln Street Railway Company, on June 21, 1892. Claiming her injury was caused by the negligence of defendant's servants, she brought this action in the district court of Lancaster county and recovered a verdict and judgment for $1,125. The answer of the defendant was a general denial, coupled with an allegation of contributory negligence. The court instructed the jury as follows:

"3. When it once appears from the evidence that the plaintiff was injured while a passenger upon defendant's street car, then the burden is upon the defendant to show by a preponderance of the evidence that such injury was not caused by any negligence upon its part, and that plaintiff herself contributed to the injury by her own gross negligence, unless it should appear in establishing

plaintiff's own case that the injury was caused by causes beyond the control of defendant or contributed to by plaintiff's own gross negligence."

"6. It was the duty of the plaintiff when entering the car of the defendant to exercise reasonable and ordinary care in discovering the opening in the floor of the car and avoiding the same; and if you find from the evidence that plaintiff failed to do so, then it is a proper matter for you to consider in determining whether or not the plaintiff was guilty of gross negligence that contributed to the accident complained of. And if you find from the evidence that plaintiff, by her own gross, careless, and negligent acts, contributed to the injury complained of, then she cannot recover even though you should conclude from the evidence that the plaintiff was negligent as charged."

By these instructions the jury were told that if the accident was proven the defendant would be liable, unless it established by a preponderance of the evidence that it was not itself at fault and that the plaintiff's own gross negligence contributed to her injury. It is settled by the decisions of this court that street railway companies are common carriers of passengers. (*Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890; *Pray v. Omaha Street R. Co.*, 44 Neb. 167; *East Omaha Street R. Co. v. Godola*, 50 Neb. 906.) As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. This is the liability imposed by the common law on all carriers of passengers for hire. (*Spellman v. Lincoln Rapid Transit Co., supra; Topeka City R. Co. v. Higgs*, 38 Kan. 375; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225; *Indianapolis & S. L. R. Co. v. Horst*, 93 U. S. 291.) The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's negligence; and to escape liability it must show that it has

discharged the full measure of its legal duty and was in nowise to blame for the accident. It need not, however, under the rules of the common law, acquit itself of all blame and in addition thereto convict the plaintiff of gross contributory negligence. This counsel for plaintiff seem to concede, but they contend that the provisions of section 3, article 1, chapter 72, Compiled Statutes 1897, are applicable to street railway companies, and, therefore, the rule stated in the foregoing instructions is correct. The section referred to is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The act of which this section is a part was passed in 1867 and contained five sections. The first imposes on railroad corporations a duty to erect and maintain fences along their lines for the protection of domestic animals. The second relates to the liability resulting from a failure to comply with the first. The fourth provides the manner in which summons may be served on railroad companies, and the fifth forbids them from limiting their liability as common carriers without express notice. There is nothing whatever in the title or body of the act which indicates a legislative intent to make its provisions, or any of them, applicable to street railways. When this law was enacted there was neither occasion nor demand for legislation of this character in the interests of tramway passengers. The means then employed for their transportation was the old-fashioned lagging horse car, in which the transit was not only safe but peculiarly free from every suggestion of peril. Cable traction had not yet come into use, and electricity as a propulsive power was not even within the dreams of legislative philosophy, and had no existence anywhere save, perhaps, as a dim

possibility in the minds of some ardent theorists. In the common understanding, a railroad and a street railway have always been separate and distinct things. One is a graded road over which heavy cars, running on iron or steel tracks and usually propelled by steam, carry passengers, freight, and baggage, while the other is exclusively employed for the transportation of passengers in cities and is so constructed as to interfere but little with ordinary traffic. (Elliott, Roads & Streets, 557; *Funk v. St. Paul City R. Co.*, 61 Minn. 435, 63 N. W. Rep. 1099; *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duv. [Ky.] 175.) In the case last mentioned it is said: "A 'railroad' and a 'street railroad,' or way, are, in both their technical and popular import, as distinct and different as 'a road' and 'a street' or as 'a bridge' and 'a railroad bridge.'" And in *Bloxham v. Consumers' Electric Light & Street R. Co.*, 36 Fla. 519, the court say: "The word 'railroad,' as generally used, applies to commercial railways engaged in the transportation of freight and passengers for long distances, and, as a general rule, having steam engines for motive power, and making stops at regular stations for the receipt and discharge of freight and passengers. The term 'street railroad' applies only to such roads, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public are not excluded from the street as a public highway, which runs at a moderate rate of speed compared with commercial railroads, which carries no freight, but only passengers from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at street crossings or other places irregularly, as the convenience of its patrons may require, for the receipt and discharge of its passengers." In the decisions of this court above cited the duty of street railway companies to their patrons is declared to be only commensurate with that imposed by the common law on common carriers of passengers. But railroad

companies, it has been held, are absolutely liable for injuries to a passenger resulting from the operation or management of their trains, unless they can show that the gross negligence of such passenger or the violation by him of some known rule or regulation of the company was the cause of the injury. (*Union P. R. Co. v. Porter*, 38 Neb. 226; *Missouri P. R. Co. v. Baier*, 37 Neb. 235; *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803; *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638.) In other words, it has been distinctly settled by our own decisions that the liability of one is that of an insurer, while the other is only answerable for the failure to exercise the highest degree of care. The difference in the liability of the two kinds of carriers results from the fact that one is affected by the statute in question and the other is not. It follows from these considerations that the instruction requiring the defendant to prove gross negligence on the part of the plaintiff as an essential element of its defense to the action was erroneous. It is argued, however, that if this was error it was error without prejudice, because the sixth instruction defines gross negligence to be a want of ordinary care. We do not so understand it. The meaning of the instruction plainly is that if the plaintiff did not exercise reasonable and ordinary care in discovering the opening in the floor of the car and avoiding it, the jury should take that fact into account in determining whether she was guilty of gross negligence; in other words, the doctrine of the instruction is that want of ordinary care is evidence tending to prove gross negligence. For the error committed in submitting to the jury the instructions quoted the judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

# MARY ANDRESEN, ADMINISTRATRIX OF THE ESTATE OF DORA WITTE, V. JOHN L. CARSON.

FILED APRIL 21, 1898. No. 7652.

1. **Judgment by Agreement:** APPEAL. Where the record of a judgment, at the time of an appeal taken therefrom, recited that it had been rendered upon the consideration of agreement of parties, the appeal was unavailing and, on motion of appellee, was properly dismissed.
2. **Amendment of Record After Appeal.** After an appeal perfected, an amendment of the record of the judgment appealed from to show certain facts and a subsequent amendment whereby such facts were eliminated from the record, *held* to have accomplished nothing by way of amendment.
3. **Journal Entry:** APPEAL. The mere fact that in a journal entry a motion sustained was described as "a motion to dismiss an appeal because not taken in time" *held* not sufficient to prevent the appellate court from considering whether or not the ruling on said motion was proper, in view of grounds urged therein, but not recited in said journal entry.

REHEARING of case reported in 53 Neb. 136. *Judgment below affirmed.*

*Boehmer & Rummons* and *W. E. Stewart*, for plaintiff in error.

*J. H. Broady, contra.*

RYAN, C.

In this case there has been an order of reversal on a memorandum opinion filed December 21, 1897 (53 Neb. 136). On motion a rehearing was allowed and the case has been again submitted for our determination.

The transcript shows that, as against the estate of Dora Witte, the following proceedings were had in the county court of Lancaster county on December 4, 1893: "The claim of John L. Carson filed August 29, 1893, is taken up. J. H. Broady appears as attorney for claimant. Upon consideration of the agreement of parties the court

finds that Dora Witte executed a note to L. Meyer for $7,000 on June 21, 1892; that the same was assigned before maturity to John L. Carson; that said estate is indebted to said claimant in the sum of seven thousand three hundred twenty and 33-100 dollars ($7,320.33) as principal and interest on said note to date. Wherefore said claim is allowed for the sum of $7,320.33, with interest thereon from date until paid." A transcript of the above record was duly filed in the district court of Lancaster county January 4, 1894. This was not within thirty days from the allowance of the claim, which was December 4, 1893. But it is now insisted that the administratrix, not being required to give bond, could appeal by giving notice of such appeal within thirty days from the date of the allowance of the claim, and that, as such a notice was given December 30, 1893, the time for filing the transcript in the district court did not expire before January 13, 1894, because the statute gives ten days to the county court to prepare and file the transcript after due notice of appeal. This contention will be conceded for the purposes of this case, and from this concession it results that the appeal must be treated as having been taken on December 30, 1893, the date of notice thereof.

On January 3, 1894, a motion was made by the representative of the estate of Dora Witte to amend the above record of the county court, and on the same day this motion was sustained. The effect of this amendment was that the amended record recited that the hearing of the claim of December 4, 1893, had been on the answer filed by the administratrix and "upon the evidence introduced." On February 20, 1894, this amendment, upon motion of Carson, was set aside, so that the record of the county court is in the same form that it was when, as we have conceded for the purposes of this case, the appeal was taken. It is very obvious that if one of the amendments made after appeal is good the other is equally so. Neither of them can, therefore, be considered, and we are required to determine this case as

though no amendment of the record in the county court was ever attempted.

A judgment on the agreement of parties thereto is binding and will not be reversed on appeal. (*Ellis v. Karl*, 7 Neb. 381; *Chamberlain v. Brown*, 25 Neb. 434; *Norwegian Plow Co. v. Bollman*, 47 Neb. 186; *Weander v. Johnson*, 42 Neb. 117.) Against the application of the rule just invoked plaintiff in error urges upon our consideration a portion of the language of the order of the district court of Lancaster county, which order is assailed by these proceedings. This portion of said order is as follows: "This cause now comes on to be heard upon the motion of the plaintiff to dismiss the appeal in this case for the reason that the said appeal was not taken within the time prescribed by law, and is submitted to the court, on due consideration whereof the court doth sustain said motion." It is argued with reference to this language that the motion was sustained by the district court solely because the appeal was not taken in time. Even if this theory was correct the result contended for might not necessarily follow; but we cannot consider this question, for it is not presented. In the petition in error the recitation with regard to the appeal not being taken in time was described as a finding. The order sought to be reviewed, and specifically complained of in said petition in error, was that dismissing the appeal from the county court. The motion sustained is in the record and best speaks for itself. The reference to it in the journal entry, in the attempt to summarize its objects, was futile, in so far as the effect of such an attempt ignored the contents of the motion itself. The identification could just as properly have been attempted by a reference to the date of its filing, and yet a mistake in giving the date of filing could not eliminate a portion of the motion. It might lead to confusion as to what particular motion was under consideration, but that question does not arise, for it is conceded that the motion passed on is the one found in the record in this court.

One of the grounds of this motion was stated in this language:

"2. The transcript from the county court shows that the judgment sought to be appealed from was a judgment by agreement of parties, and that the claim of John L. Carson, appellee, was allowed by agreement of parties. * * * for which reason the case is not appealable."

This ground was well taken on the theory of plaintiff in error as to the date of the appeal from the county court, as we have already seen, and the order of the district court on this motion is accordingly

AFFIRMED.

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## ALBION NATIONAL BANK v. GEORGE M. MONTGOMERY ET AL.

FILED APRIL 21, 1898. No. 8009.

1. **National Banks:** USURY. The inhibition contained in section 5197, Revised Statutes U. S., is general and forbids the taking of usurious interest by a national bank from an artificial as well as from a natural person.

2. **Statutes:** CONSTRUCTION: PENALTIES. A statutory enactment which provides by whom, and under what procedure, a penalty previously created may be recovered is not a penal statute, and there exists no reason for a requirement that it be strictly construed.

3. **National Banks:** ACTION FOR USURY: PARTIES. The right to recover double the amount of usury paid to a national banking association is, by section 5198, Revised Statutes U. S., conferred as well upon artificial as upon natural persons.

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

*J. A. Price*, for plaintiff in error.

*H. C. Vail* and *Montgomery & Hall, contra.*

RYAN, C.

In this case there was a judgment on a verdict against the Albion National Bank in the sum of $560.60. In the

petition there were twenty-two causes of action, which were tried, and each of these was for double the amount of interest paid to the bank in excess of ten per cent per annum. The errors assigned in the motion for a new trial were as follows:

"1. The verdict is not sustained by sufficient evidence.

"2. The verdict is contrary to law.

"3. Errors of law occurring at the trial duly excepted to.

"4. The verdict is contrary to the instruction asked by defendant.

"5. The court erred in giving the instruction given by the court on its own motion."

Considering these in the inverse order of the statement of them, it is sufficient to say as to the final assignment that we cannot consider it, for it is directed to a single instruction in a class of which there were nine.

The instruction asked by defendant was to the effect that the taking of unlawful interest must have been done "knowingly." This assignment, therefore, is in effect that there was no evidence to sustain the contention that the usurious interest was intentionally exacted. Mr. Montgomery testified that interest was paid, as agreed with the bank, at the rate of one per cent per month. He likewise testified as to several payments of usurious interest that they were knowingly received by the bank. Aside from this, his description of the uniform rates at which interest was paid to the bank sufficiently warranted the jury in finding that this uniformity was not attributable to either accident or mistake on the part of its officers.

The assignment of "errors of law occurring at the trial duly excepted to" is not sufficiently definite to challenge attention to any particular part of the trial, and for enlightenment on this subject we must resort to the petition in error, in which we find that the particular error assigned as having occurred on the trial was the overruling of an objection to the introduction of any evidence

against the bank for the reason that the federal statute, by virtue of the provisions of which this suit was brought, authorized a person, but not a partnership, to maintain such an action. Section 5197 of the Revised Statutes of the United States authorizes the taking of interest allowed by the laws of the state or territory wherein a national bank is located, but forbids taking interest in excess of such rate. In the section immediately following that above referred to there are the following provisions: "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same." It is argued that the statute under consideration is penal in its nature; that it therefore should receive a strict construction; from which predicates it would of necessity result that only a natural person could sue for the recovery of usurious interest. It is observable that section 5197, with respect to the exaction of usury, is general in its provisions and is applicable to all national banking associations. The rule that penal statutes must be strictly construed has no application to this inhibition, for national banks are forbidden to collect interest in excess of the legal rate from either an artificial or a natural person. The provisions quoted from section 5198 apply to a national bank only when it has already violated the provisions of the preceding section, and even then it prescribes how a penalty, for which it has rendered itself civilly liable, may be recovered. We have been cited to no adjudicated case holding that under such circumstances, where a statute provides that a suit may be brought for a statutory penalty by a person, the plaintiff must of necessity be a natural person. On the other hand, we have found that the cases cited by the defendant in error sustain his contention that the person contemplated may be artificial as well as natural. (*United States v. Amedy*, 11 Wheat. [U. S.] 391; *Commer-*

*cial Bank of Manchester v. Nolan*, 7 How. [Miss.] 508; *Grand Gulf Bank v. Archer*, 8 S. & M. [Miss.] 151; *United States v. McGinnis*, 1 Abb. [U. S.] 120; *Dickie v. Boston & A. R. Co.*, 131 Mass. 516; *Brookhouse v. Union R. Co.*, 132 Mass. 178.) By an independent search we have found no reason for doubting the correctness of the position sustained by the cases just cited, and we therefore conclude that the above quoted provisions of the federal statute are as available to a partnership as to a natural person.

Incidentally this disposes of the assignment that the verdict was contrary to law; and, with respect to the assignment that the verdict was not sustained by sufficient evidence, it would be unprofitable to state it in detail. We therefore content ourselves with the general observation that this position is not well taken.

The judgment of the district court is accordingly

AFFIRMED.

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LOUIS MENDELSSOHN, APPELLEE, V. WILLIAM H. CHRISTIE ET AL., APPELLEES, IMPLEADED WITH BRAD D. SLAUGHTER, APPELLANT.

FILED APRIL 21, 1898. No. 8007.

**Mortgages:** FORECLOSURE: DEFICIENCY JUDGMENT: EVIDENCE. The evidence in this case examined, and found insufficient to sustain the judgment of the district court.

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

*L. H. Kent*, for appellant.

*Kennedy & Learned* and *C. W. Young, contra.*

RYAN, C.

The record submitted in this case begins with a decree entered in the district court of Douglas county for the

foreclosure of two mortgages made by William H. Christie and Sarah M. Christie, each securing payment of a promissory note for $5,000. The property by this decree required to be sold was lots 8 and 9, block 16, in Kountze Place, an addition to the city of Omaha. Brad D. Slaughter was a defendant in this action, and in the decree aforesaid it was found that about April 15, 1891, he, the said Slaughter, for a good and sufficient consideration, had assumed and agreed to pay the amounts secured by said mortgages. This decree was entered October 24, 1894. At the same term of court, and after the entry of said decree, the record recites that this cause came on to be heard on the application of Brad D. Slaughter to modify the decree in so far as it had found him personally liable for the mortgage debt, and thereupon it was ordered that the finding of such personal liability should be stricken from said decree. Following the above order there was in the journal entry this language: "It is further ordered and decreed that the question of the liability of the defendant Brad D. Slaughter for said debt be reserved and held for decision on such evidence as may be presented by the parties upon a motion for a deficiency judgment herein." After the above modification of the terms of the decree there was issued an order of sale, under which the mortgaged property was sold. After confirmation of the sale there was filed a motion for a deficiency judgment against William H. Christie, Sarah M. Christie, and Brad D. Slaughter in the sum of $4,081, the amount of the mortgage debt not satisfied by the sale previously confirmed. Upon a hearing of this motion there was an order sustaining it, and, on a finding that Brad D. Slaughter had assumed the payment of said debt, there was a judgment against him for the amount of the deficiency above recited, with interest thereon. The appeal of Brad D. Slaughter is from this deficiency judgment against him.

The appellee Mendelssohn in the first place contends that there can be no review of the correctness of the judg-

ment appealed from because the record recites that the deficiency judgment was rendered upon consideration of the pleadings and the evidence in the case, and as there is in this record no transcript of the pleadings, it is argued that it is presumable that in the petition or cross-petition in the district court there may have been an averment that defendant Slaughter had assumed payment, and that by his failure to controvert this allegation its truth was admitted. To this contention it is proper to answer that we do not feel justified in presuming that there may have been in the petition or cross-petition the averments indicated, in view of the fact that after findings in the decree consistent with this assumption these findings, on the simple suggestion of Slaughter, were stricken out and it was thereupon expressly ordered that the question of Slaughter's liability should be determined on the motion for a deficiency judgment against him when it afterwards should be filed. Again the default of Slaughter did not admit any definite amount to be due from him. (Code of Civil Procedure, sec. 134; *Campbell v. Brosius*, 36 Neb. 792.) By these considerations it is rendered necessary to consider the evidence contained in the bill of exceptions in determining whether or not Slaughter was properly held personally liable.

In the deed whereby William H. Christie and wife conveyed lots 8 and 9, in block 16, Kountze Place, to Brad D. Slaughter it was recited that the conveyance was subject to the mortgages above referred to, and these mortgages were excepted from the covenant against incumbrances. This deed was dated April 18, 1891. It was preceded by a written agreement of date April 15, 1891, whereby the terms on which the conveyance to be made from Christie and his wife to Slaughter were defined between said Christie and said Slaughter. By this agreement an exchange of real property was provided for in effect as follows: Lots 8 and 9 aforesaid, owned by Christie, were valued at $12,500 and were to be

conveyed to Slaughter free from incumbrance except the above mortgages for security of $10,000, and even of this $10,000 Slaughter was required to pay $1,000. This $1,000, it seems from the evidence, he at once paid. All other liens than the balance of $9,000 on lots 8 and 9 were to be paid by Christie. In consideration of the above conveyance to him Slaughter agreed to convey to Christie lot 4, block 34, in Kountze Place, at a valuation of $6,500, subject to installments of unpaid purchase-money on an executory contract aggregating $4,860 in amount. Slaughter was also to pay Christie $800 in cash and from the evidence it seems this payment was duly made. If from the agreed valuation of the property to be conveyed by Christie, $12,500, there is deducted the incumbrance of $10,000, there remained what, in common parlance, is called an equity, which is equal to $2,500 in value. If from the agreed valuation of the property to be conveyed by Slaughter, $6,560, there is deducted the incumbrance thereon, $4,860, there is found to exist a so-called equity of the value of $1,700, which, added to the $800 cash paid by Slaughter, indicates that these parties were merely exchanging what are ordinarily called equities. It is true that there was proof that after Slaughter received the conveyance of lots 8 and 9 he paid interest and taxes thereon as they became due, but this was perfectly consistent with the idea that he was hoping that the so-called equity might some day be of value to him. On each note secured by mortgage there was an undated memorandum that payments of $500 would be received by the payee at any time, but this is in harmony with Slaughter's theory. When the executory contract was entered into he agreed to make two of these payments at once, and it is not in conflict with this theory to admit, as Slaughter admitted in his testimony, that he would not have gone into an agreement to make a payment of a part of a note before its maturity without knowing that the payee would receive it when tendered. There was not sufficient evidence to

render Slaughter personally liable and the judgment of the district court is therefore

REVERSED.

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## MARTIN B. ATKINS V. CHARLES SEELEY.

FILED APRIL 21, 1898. No. 8018.

1. **Evidence:** BOOKS OF ACCOUNT. Under section 346, Code of Civil Procedure, books of account are not admissible, unless it affirmatively appears that the essential requirements of said section are complied with.
2. ———: HARMLESS ERROR. The admission of immaterial evidence from which no prejudice could result furnishes no sufficient ground for the reversal of a judgment.

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

*N. V. Harlan* and *Gilbert Bros.*, for plaintiff in error.

*F. C. Power, contra.*

RYAN, C.

This action was brought in the district court of York county for the price of a burial case. On the trial the defendant in open court waived all matters presented by the answer, except the plea of payment. There was a verdict and judgment for the defendant.

Plaintiff insists that it was erroneous to exclude certain books of account and a bank pass-book, all of which, it is urged, were offered for the purpose of rebutting the fact of payment. In argument it is said this negative evidence was the failure of each of the books to show a credit which would have appeared had the payment of $80 in currency been made, as was testified by the defendant. These books are referred to in the bill of exceptions as Exhibit A, Exhibit B, etc., but neither of these exhibits is attached to the bill of exceptions, nor

has either been filed in the court. We cannot, therefore, determine whether or not they show a continuous dealing with persons generally, or several items of charges at different times against the same party in the same book, and this showing must appear by the book offered to render it admissible. (Code of Civil Procedure, sec. 346; *Anderson v. Beeman*, 52 Neb. 387.) The charges were not verified by the oath of the party or clerk who made the entries, to the effect that they were believed by such author of the entries to be just and true, neither was there a sufficient reason given why this verification was not made. Compliance with the requirements was indispensable to entitle plaintiff to the introduction of his books of account under the provisions of the section above cited. For either of these reasons the proposed books as books of account were properly rejected.

To excuse his inability to produce a receipted bill defendant was permitted to show that, after his wife returned home with said receipted bill, defendant's household goods and papers were in a confused condition, owing to the removal of his family to Ravenna, then in progress. We think that this was such an immaterial matter that proof of it might well have been dispensed with, and yet we cannot see how proof of it prejudiced plaintiff in any way. The same observation may be made with reference to proof of the fact that defendant had settled with Mr. Wright, who, as defendant's agent, had made the payments to plaintiff, according to the theory of the defendant. When it was further proposed to show that this particular payment was allowed as a credit in the settlement between Wright and defendant, this evidence was excluded, and thereby what might have been prejudicial error was avoided. There are complaints of testimony of certain conversations between defendant's wife and Mr. Wright, with reference to what was said and done, just before and just after the alleged payment was made. There was no objection to very much of this testimony, and a considerable portion of it was

given in a narrative in connection with matters which were material. There was none of it which was material admitted over defendant's objection.

In the cross-examination of plaintiff he was asked if his books had not failed to show a payment which had been made by one John Walker. It is urged, with a considerable degree of plausibility, that this should not have been permitted, especially as the books had been excluded. In his direct examination plaintiff had testified that his books showed all moneys received, and the bank book showed all deposited each day, and that in neither did this item appear. It was to meet the claim that any payment actually made would appear on his books that the question with reference to the failure to show the credit in favor of Mr. Walker was asked. In answer to this question plaintiff said that he could not say whether Mr. Walker's credit was omitted or not without looking at the books, but that, if permitted to use the books, he could make the matter very plain. He said the credit was on the books in plain figures, though such figures had not been made by himself. We cannot say that plaintiff was prejudiced by this line of examination, though the evidence itself seems immaterial.

There is found no error in the record and the judgment of the district court is

AFFIRMED.

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WILLIAM T. POWELL ET AL. V. WILLIAM BINNEY, JR.

FILED APRIL 21, 1898. No. 8011.

**Contract to Sell Realty:** MEMORANDUM OF AGENT: CONSTRUCTION: SPECIFIC PERFORMANCE. In view of the facts that a real estate broker gave a memorandum in writing to one who thereon claims rights as a purchaser of real property, in which memorandum it was recited that the proposed sale was subject to the approval of the owner of the real property, and that from the entire evidence adduced in the case it was shown that there was a prompt

disapproval of said terms when submitted to the owner of the real property, it is *held* that the district court properly instructed the jury to return a verdict against said claimant.

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

*McNish & Oleson* and *A. A. Welch*, for plaintiffs in error.

*Frank M. Northrop* and *Northrop & Burdick, contra.*

RYAN, C.

William Binney, by an ejectment suit in the district court of Wayne county, sought to recover from William T. and E. C. Powell the possession of the north half of the northwest quarter of section 31, in township 25 north, range 5 east, 6th principal meridian, together with the rental value of the same during the time the possession thereof had been held by defendants. There was a peremptory instruction to find for plaintiff and a judgment accordingly. The questions urged in these proceedings arose upon the answer, whereby the defendants, constituting the partnership firm of Powell Bros., sought to enforce the performance of an alleged written contract, by the terms of which, as they alleged, plaintiff was bound to convey the above described real property upon payment to him of the balance of the purchase price. There was a tender of this alleged balance and a prayer for a specific performance. By reply issues were joined on the affirmative allegations of the answer. William Binney, during the whole time in which the transactions which are involved in this case were taking place, was a resident of the state of Rhode Island. For the management of his land in Iowa and Nebraska, of which he was the owner of several tracts, he had in his employ the partnership firm of Gilman, Son & Co. of the city of New York. This firm had a correspondent in Sioux City, Iowa, through whom it transacted its business in disposing of real property situated in Iowa and Nebraska. The name

of this correspondent was D. T. Gilman. It appears from the evidence that D. T. Gilman intrusted the partnership firm of Bressler & Dearborn with the transaction of certain real estate business in Wayne county, Nebraska. September 1, 1891, D. T. Gilman wrote Gilman, Son & Co. as follows: "I can sell to T. J. Kearns N. ½, SW. ¼ and SW. ¼, SW. ¼, 31, 25, 5 E., 459 and 460, C. R. G., in Wayne county, Nebraska, at $17 per acre, if you will accept cash payment of $140 and wait till Jan. 1, '92, for balance of cash payment. We would not expect contract till Jan. 1." September 8, 1891, Gilman, Son & Co. wrote a letter to D. T. Gilman in which was this language: "We will sell at $17 tracts 459, 460, C. R. G., on terms named by you." October 7, 1891, John T. Bressler, for the firm of Bressler & Dearborn, wrote to D. T. Gilman as follows: "Kearns has failed to come to time on buying N. ½ and SW. ¼ of NW. 31, 25, 5, so we have sold the same to W. T. Powell and E. C. Powell on the following terms: $200 cash; $400 and interest on the whole amount from Jan. 1st, 1892; $500 Jan. 1, '93; $500 Jan. 1st, 1894, and $500 Jan 1st, 1895. We inclose herewith ck. for $170, the cash payment less one-half fees, $30." October 14, 1891, D. T. Gilman wrote John T. Bressler thus: "Yours of 7th is at hand as to sale of N. ½ NW. 31 and SW. ¼ NW. ¼ 31, 25, 5, to W. T. Powell and E. C. Powell. I take it we are to receipt for the $200 till Jany. 1, 1892, as a forfeit only and make cont. only if the $400 and int. are promptly paid."

Two members of the firm of Gilman, Son & Co. were examined as witnesses, as was also the plaintiff William Binney, and by the testimony of all three it was shown, without question, that the firm of Gilman, Son & Co. was never authorized to fix prices on the real property under its management. From the correspondence above quoted it is very evident that D. T. Gilman and the firm of Bressler & Dearborn acted on the assumption that any proposed sale must be approved to render it binding on William Binney. It is unnecessary to describe more fully the powers of these agents for a reason which will

be apparent from an examination of the memorandum given Powell Brothers and upon which their claim for relief was based, which memorandum was in this language:

"WAYNE, NEBR., October 6, 1891.

"Received from Powell Bros. two hundred dollars, cash payment on N. ½ and SW. ¼ of NW. ¼ of sec. 31, Tp. 25, R. 5 E., Wayne Co., sold him this day on following terms: Cash as above $200; Jan. 1st, 1892, $400 and interest to that date; Jan. 1893, $500 int.; Jan. 1st, 1894, $500 and int., and Jan. 1st, 1895, $500 and int. All payments to draw interest at 8 per cent. Subject to approval of owners.

"$200. BRESSLER & DEARBORN."

There was evidence tending to show that this offer was rejected by Binney, for there was proof that the above described $200, together with $409, afterwards collected and forwarded by Bressler & Dearborn, were returned to the firm last named between February 2 and February 10, 1892. On the date last named this money was sent to Powell Bros., but the letter containing the remittance came back unopened to Bressler & Dearborn. This money was then sent to a bank at Wisner to be returned to Powell Bros., but the members of that firm, on the trial, denied having received it. There was complaint in argument of a ruling which permitted the introduction of testimony that the wife of one of the members of the firm of Powell Bros. was notified that the proposed sale had been disapproved. In view of the fact that the memorandum, upon which the firm of Powell Bros. predicates its claim, recited that the proposed sale was subject to the approval of the owner we cannot see that there was any impropriety in showing what efforts Bressler & Dearborn made use of to apprise Powell Bros. of the rejection of the offer made to the owner. It is not as though there was a consummated bargain of which one party sought a rescission. It was a mere inchoate contract dependent upon acceptance to render it binding and the burden of

showing such acceptance was on Powell Bros. In this there was not only a failure, but there was affirmative proof of a prompt rejection of the terms proposed. The district court therefore, in view of the undisputed facts, very properly directed a verdict for plaintiff, and its judgment is accordingly

AFFIRMED.

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## WILLIAM T. POWELL ET AL. V. HORACE BINNEY.

FILED APRIL 21, 1898. No. 8010.

**Contract to Sell Realty:** MEMORANDUM OF AGENT: CONSTRUCTION: SPECIFIC PERFORMANCE.

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

*McNish & Oleson* and *A. A. Welch*, for plaintiffs in error.

*Frank M. Northrop* and *Northrop & Burdick, contra.*

RYAN, C.

There was a stipulation in this case that the same disposition should be made of this case as of No. 8011 (54 Neb. 690), and accordingly the judgment herein is

AFFIRMED.

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## ELIZABETH FELLERS, APPELLANT, V. LLEWELLYN FELLERS ET AL., APPELLEES.

FILED APRIL 21, 1898. No. 8049.

1. **Antenuptial Contracts:** RELEASE OF DOWER. The manner in which dower may be barred by an antenuptial arrangement between the parties concerned is regulated by statute, and in the absence of any contravening equitable considerations the method prescribed by statute is exclusive.

2. ——: ——: WILLS. An alleged antenuptial contract whereby each party agreed to claim no interest in the property of the other after marriage, and by which the proposed husband was required after the making of the antenuptial contract to make his will in such terms that his intended wife, thereunder, would be entitled to a certain estate in his real property, *held* to be an entirety; that the two above provisions were interdependent, and that, therefore, the alleged antenuptial agreement was but an executory contract, which, in view of the statute prescribing the method of barring dower in this state, is unenforceable.

APPEAL from the district court of Pawnee county. Heard below before BABCOCK, J. *Reversed.*

*Lindsay & Raper* and *Francis Martin*, for appellant.

References: *Brandon v. Dawson*, 51 Mo. App. 237; *Noel v. Noel*, 1 Clarke [Ia.] 423; *Williamson v. Williamson*, 4 Clark [Ia.] 279; *Taylor v. Riggs*, 1 Pet. [U. S.] 591; *Elwell v. Walker*, 52 Ia. 256; *Fries v. Griffin*, 17 So. Rep. [Fla.] 66; *Bragg v. Geddes*, 93 Ill. 60; *Dennis v. Barber*, 6 S. & R. [Pa.] 425.

*J. H. Broady* and *Story & Story, contra.*

References: *Hafer v. Hafer*, 33 Kan. 449; *McNutt v. McNutt*, 2 L. R. A. [Ind.] 372; *Johnson v. Hubbell*, 66 Am. Dec. [N. J.] 773; *Tant's Appeal*, 40 Am. Rep. [Pa.] 646; *Edwards v. Martin*, 39 Ill. App. 145; *Kesler's Estate*, 143 Pa. St. 386; *Johnson v. McCue*, 34 Pa. St. 180; *Smith v. Tait*, 127 Pa. St. 341; *Carmichael v. Carmichael*, 72 Mich. 85; *Raysdale v. Barnett*, 5 Chicago L. J. [Ind.] 442; *Mintier v. Mintier*, 28 O. St. 307; *Johnston v. Spicer*, 107 N. Y. 185.

RYAN, C.

This action was one for an assignment of the dower interest of Elizabeth Fellers in the estate of her husband who had died leaving a will whereby the share of the said widow in said estate had been limited to the use of the homestead during her lifetime and a life estate of one-seventh of the residue. At the trial in the district

court of Pawnee county there was a finding adverse to the widow, whereupon her action was dismissed by the court at her costs.

The judgment of the district court was based upon an alleged antenuptial contract in writing entered into by Andrew Fellers and Mrs. Elizabeth Wheaton about January 27, 1890. This contract was not produced and its existence was denied most emphatically by Mrs. Fellers. There were only two witnesses who testified to ever having seen a contract of the nature indicated. One of these was Frank Goudy, who testified that on a typewriter he wrote the terms of the contract in accordance with the directions of his father, J. K. Goudy. Frank described these terms as being in effect that neither party to it, after they were married, would claim any interest in the property of the other, but he did not see it signed or have any knowledge that it ever was executed. J. K. Goudy was an attorney at law at Pawnee City in January, 1890. His description of the making of the antenuptial contract was as follows: "They [Andrew Fellers and Elizabeth Wheaton] afterward came in together and made an agreement in regard to these matters, which agreement was reduced to writing by myself and was read over by each of them or read to both of them by me and was duly executed by them. * * * As I have already said, the contract was signed by those parties and was acknowledged by them both and was delivered on the same day—the 27th day of January, 1890. * * * Each of these persons had children by former marriage. Each of them also claimed to own property in their own right. Their desire was for each, after the marriage, to hold and keep the same and control the right of disposition of their respective properties as they would have done if they remained sole. So it was agreed, and so the contract provided, that each of them should have and retain the right to dispose of the property belonging to them as if they were sole and unmarried; that Andrew Fellers was to acquire no interest in Mrs. Wheaton's

property, and Mrs. Wheaton, after marriage, was to acquire no right or interest in Mr. Feller's property; that a will should be executed by Mr. Fellers containing certain provisions which are set up in the will itself." With reference to the making of this will Mr. Goudy testified: "I cannot state anything about the date of the will any further than I have testified as shown by the entry of the cash received for drawing it, which is the 31st of July, 1890. The will may have been drawn prior to this and simply the payment of it entered here at the time it was executed and delivered." The defendants offered the will in evidence, and as it bore date July 31, 1890, that must be accepted as the date of its execution. From this testimony there can be but one conclusion, and that is that the so-called antenuptial agreement testified to by Mr. Goudy was at most but an executory contract on the part of Mr. Fellers, to become complete when Mr. Fellers should execute a will containing certain conditions, and that in fact this will was made July 31, 1890. But in this connection it is a very important circumstance that intermediate between January 27, 1890, and July 31, 1890, to-wit, on February 5, 1890, Andrew Fellers and Elizabeth Wheaton were married. He died on December 5, 1892. In view of the holding of this court with reference to the disability of a married woman, interesting questions might arise as to the power of Mrs. Fellers to consummate any agreement with her husband after their marriage, but we are relieved from any considerations of this class by others which cannot be passed over.

The portion of chapter 23, Compiled Statutes, which pertains to the subject under consideration is embraced within the following sections thereof, to-wit:

"Sec. 12. A married woman residing within this state may bar her right of dower in any estate conveyed by her husband, or by his guardian if he be a minor, by joining in a deed of conveyance, and acknowledging the same as prescribed by law, or by joining with her husband in a subsequent deed acknowledged in like manner.

"Sec. 13. A woman may also be barred of her dower in all the lands of her husband by jointure settled on her, with her assent, before the marriage, provided such jointure consists of a freehold estate in lands for the life of the wife at least, to take effect, in possession or profit, immediately on the death of the husband.

"Sec. 14. Such assent shall be expressed, if the woman be of full age, by her becoming a party to the conveyance by which it is settled, and if she be under age, by her joining with her father or guardian in such conveyance.

"Sec. 15. Any pecuniary provision that shall be made for the benefit of an intended wife, and in lieu of dower, shall, if assented to as provided in the preceding section, bar her right of dower in all the lands of her husband.

"Sec. 16. If any such jointure or pecuniary provision be made before marriage, and without the assent of the intended wife, or if it be made after marriage, she shall make her election before the death of her husband, whether she will take such jointure or pecuniary provision, or be endowed of the lands of her husband; but she shall not be entitled to both.

"Sec. 17. If any lands be devised to a woman, or other provisions be made for her in the will of her husband, she shall make her election whether she will take the lands so devised or the provision so made, or whether she will be endowed of the lands of her husband; but she shall not be entitled to both, unless it plainly appears by the will to have been so intended by the testator.

"Sec. 18. When a widow shall be entitled to an election under either of the two preceding sections, she shall be deemed to have elected to take such jointure, devise, or other provision, unless within one year after the death of her husband she shall commence proceedings for the assignment or recovery of her dower."

The word "jointure," as it is employed in the above quotation, signifies "An estate or property settled on a woman in consideration of marriage and to be enjoyed

by her after her husband's decease." (Century Dictionary, title, "Jointure.") To same effect is the definition of this word in Anderson's Dictionary of Law, Black's Law Dictionary, and Rapalje & Lawrence's Law Dictionary, as such word is used in the sections above quoted. As we are dealing with nothing but real estate in this case it is unnecessary to comprehend in this discussion the statutory provisions quoted with reference to pecuniary provisions in lieu of dower. The testimony of Mr. Goudy was that there was an antenuptial agreement that neither contracting party, after marriage, should have any interest in the property of the other and that Mr. Fellers thereafter should make a will containing certain provisions, which provisions were afterwards incorporated in his will. With reference to barring the dower right of a woman before marriage the statutory provisions quoted require this to be effected by a jointure settled on her, with her assent, before the marriage. As the contract drawn by Mr. Goudy was an entirety, the provision that neither party was to claim any interest in the property of the other cannot be segregated and enforced as an independent covenant by both. The object of this arrangement was to settle the rights of the parties and this confessedly did not admit of treating the contract as containing provisions independent of each other. The provision that each party should claim no interest in the property of the other must therefore depend upon the validity of the contract as a whole. It is very clear that an agreement to provide for a wife by a will which in fact was not made until after the marriage had been consummated falls very far short of the above statutory requirement. The assent of this proposed wife was required to be expressed to the terms expressed in the antenuptial contract by becoming a party to the conveyance by which the jointure was settled. As the testimony of Mr. Goudy was that there was not a present settlement of a jointure, but an agreement that the will of Mr. Fellers in future should be made contain-

ing certain provisions for the benefit of his intended wife, it was clearly impossible that she could become a party to the conveyance, even though the will should be deemed to be a conveyance. The antenuptial agreement testified to by Mr. Goudy as having been entered into January 27, 1890, was not effective to bar the dower right of Mrs. Fellers, which came into existence by virtue of a marriage subsequently consummated. If the will is relied upon as being a consummation of the antenuptial contract, its inadequacy as a bar to the dower right of appellant is obvious, for the statute prescribes that the dower right of a married woman shall be barred by a deed of conveyance in which she shall join with her husband.

We have not considered the testimony of witnesses other than J. K. Goudy and his son Frank, for the reason that, in our view, the statute which defines the right of dower of a married woman also provides how that dower may be barred. The testimony by which it was sought to be shown how Mrs. Fellers understood the terms of the antenuptial contract, and the absence of her dower right measured thereby, was immaterial. The wisdom of the statutory provisions which guard against the consideration of evidence of this unsatisfactory and usually conflicting character is illustrated by the history of this case. If Mr. Fellers, before his marriage, desired to agree with his proposed wife as to her relinquishment of her right of dower in his property, the statute defined very clearly how that purpose might be accomplished. The same considerations of public policy which justified the enactment of the statute of frauds justified the provisions of our statute prescribing the manner in which dower must be barred.

Appellees, in argument, attempted to bring this case within the operation of equitable considerations, but in this, we think, they were quite unsuccessful. There was nothing in the evidence to show that the wife, by virtue of the original antenuptial contract, received any property whatever. By the terms of the will of her husband

she was entitled to possession of the homestead, but to no other property of his, until the payment of his debts had been made in full, and then her share was a life estate in one-seventh of the residue. The statute gave her the right to occupy the dwelling-house of her husband so long as she remained his widow (Compiled Statutes ch. 23, sec. 22), and the recognition of this right in the will did not equitably estop her to claim other rights conferred on her by statute. In any event, such rights as she acquired under and by virtue of the will after it had been probated could not be deemed to be under a contract then made with her husband. There was, therefore, no ground upon which could be raised an equitable estoppel against her. The circumstances called for the application of no equitable or other rules than those prescribed by the statute above quoted. The judgment of the district court is reversed and this cause is remanded for further proceedings not inconsistent with the views above expressed.

REVERSED AND REMANDED.

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JOHN A. VAN PELT ET AL., APPELLEES, V. WILLIAM A. GARDNER ET AL., APPELLANTS.

FILED APRIL 21, 1898. No. 7923.

1. **Corporations: RIGHTS OF CREDITORS: LIABILITY OF STOCKHOLDERS: TIME ACTION ACCRUES.** A corporation creditor's cause of action against the stockholders thereof, to subject their unpaid stock subscriptions to the payment of his debt, accrues when the exact amount justly due the creditors from the corporation has been ascertained and the corporate property exhausted. (Constitution, art. 11, sec. 4, under Miscellaneous Corporations.)

2. ———: ———: ———: ———. Within the meaning of said section of the constitution, the exact amount justly due has been ascertained when the creditor's claim against the corporation has been reduced to judgment; and the corporate property has been exhausted when execution issued on such judgment has been duly returned unsatisfied.

3. ———: ———: ———: PARTIES TO ACTION. To such a suit the corporation is not a necessary party.

4. ———: ———: ———. A provision in the charter of a corporation organized under the laws of this state which provides that the private property of a stockholder shall not be liable for the debts of the corporation is void, in so far as it attempts to exempt the stockholder from liability—for his unpaid stock subscription—for the payment of corporate debts.

5. ———: ———: ———: REPEAL OF STATUTE. Section 2 of an act passed February 18, 1873, entitled "Homestead Associations," being section 146, chapter 16, Compiled Statutes 1897, was repealed by the adoption of section 4, article 11, Constitution 1875, under Miscellaneous Corporations.

6. ———: ———: ———: CONSTITUTIONAL LAW. The present constitution not only determines what the liability of a stockholder in a corporation, for the corporate debts thereof, shall be, but it limits this liability, and it is not within the power of the legislature to extend it.

7. ———: ———: ———. The liability of a stock subscriber, for corporate debts, except he be a stock subscriber of a banking corporation, is limited to the amount of his unpaid stock subscription.

8. ———: ———: ———: CONTRIBUTION. As between the stock subscribers and the creditors of a corporation, each stock subscriber is liable to the extent of his unpaid stock subscription. As between themselves, each stock subscriber is liable for his proportionate share of the corporate debts, and one stock subscriber who has been compelled to pay more than his proportionate share may sue his co-subscribers for contribution.

9. ———: ———: ———: ACTIONS: PARTIES. One creditor of a corporation cannot maintain an action in his own name and for his own benefit against the debtor stock subscribers of a corporation; but, to subject unpaid stock subscriptions to the payment of corporate debts, all debtor stock subscribers and all creditors of the corporation should be made parties, and a receiver appointed.

10. ———: ———: ———: ———: DECREE. The decree in such case should not be a joint one against all subscribers for the amount of the corporate debts, but a several judgment against each subscriber for the amount of his unpaid subscription.

11. ———: ———: ———: ———: ———: EXECUTIONS. The decree should provide for an execution against each subscriber for his proportionate share of the corporate debts, interest, and costs, and, if any execution should not be collected in full, then for the issuance, upon order of the court, of additional executions from time to time against each solvent subscriber for his proportionate share of the corporate debt remaining unpaid.

APPEAL from the district court of Douglas county. Heard below before AMBROSE, J. *Modified.*

The opinion contains a statement of the case.

*Saunders & Macfarland*, for appellants:

The action is barred by the statute of limitations. (*McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401; *Payne v. Bullard*, 23 Miss. 88; *Glenn v. Dorsheimer*, 23 Fed. Rep. 695; *Penniman v. Briggs*, 1 Hopk. Ch. [N. Y.] 343; *Kleckner v. Turk*, 45 Neb. 176; *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175; *Merchants Nat. Bank v. Northwestern Mfg. & Car Co.*, 48 Minn. 349; *First Nat. Bank of Garretsville v. Greene*, 64 Ia. 448; *Hunt v. Ward*, 99 Cal. 612; *Gray v. Coffin*, 9 Cush. [Mass.] 192; *Dane v. Dane Mfg. Co.*, 14 Gray [Mass.] 488; *Coffin v. Rich*, 45 Me. 507; *Libby v. Tobey*, 82 Me. 397; *Chase v. Lord*, 77 N. Y. 1.)

The corporation was dissolved at the time the original judgment was entered against it; hence an action cannot be maintained against the stockholders. (*Dane v. Dane Mfg. Co.*, 14 Gray [Mass.] 488; *Coffin v. Rich*, 45 Me. 507; *Libby v. Tobey*, 82 Me. 397; *Chase v. Lord*, 77 N. Y. 1; *Scanlan v. Crawshaw*, 5 Mo. App. 337; *Mumma v. Potomac Co.*, 8 Pet. [U. S.] 281; *Hardman v. Sage*, 124 N. Y. 25; *Bonafee v. Fowler*, 7 Paige Ch. [N. Y.] 576; *Hogue v. Capital Nat. Bank*, 47 Neb. 929.)

There was no evidence that the stockholders were indebted to the Metropolitan Building & Loan Association, and until such indebtedness is shown no judgment can be entered against the defendants. (*Union Savings Ass'n v. Seligman*, 92 Mo. 635; *Davidson v. Rankin*, 34 Cal. 503; *Van Hook v. Whitlock*, 3 Paige Ch. [N. Y.] 409.)

The corporation had no right to enforce the payment of subscriptions, consequently the creditors had no such right. (*Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174; *Glenn v. Garth*, 133 N. Y. 18.)

The corporation is a necessary party in an action to

require the stockholders to pay unpaid installments on the stock. (*Walsh v. Memphis, C. & N. W. R. Co.*, 6 Fed. Rep. 797; *Coleman v. White*, 14 Wis. 762; *First Nat. Bank v. Smith*, 6 Fed. Rep. 215.)

If the complainant himself be a stockholder, he should be made to contribute his share to his own debt. (*Perkins v. Sanders*, 56 Miss. 733.)

The amount due on the shares of those stockholders who are creditors should be deducted from the amount due in respect to their stock, and they should participate equally with their creditors in the distribution of the balance. (*Emmert v. Smith*, 40 Md. 123.)

*Estabrook & Davis, contra:*

The Nebraska statutes provide that actions shall be commenced within the prescribed periods after the cause of action shall have accrued. The action does not accrue against the stockholder until judgment and execution against the corporation. The pretended dissolution did not relieve plaintiffs from the necessity of obtaining judgment. The action was commenced against the stockholders within four years from the time the plaintiffs' cause of action accrued. (Cook, Stock & Stockholders, sec. 225, and cases cited.)

The judgment against the corporation was not void. (*McCormick v. Paddock*, 20 Neb. 486.)

It is unnecessary to make the corporation a party to the second action. (*Nolan v. Hazen*, 44 Minn. 478; *Mickles v. Rochester City Bank*, 11 Paige Ch. [N. Y.] 118; *Wellman v. Howland Coal & Iron Works*, 19 Fed. Rep. 51.)

Other references: *Warner v. Callender*, 20 O. St. 190; *White v. Blum*, 4 Neb. 555; *Ogilvie v. Knox Ins. Co.*, 22 How. [U. S.] 380; *Hatch v. Dana*, 101 U. S. 205; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Buffalo & A. R. Co. v. Cary*, 26 N. Y. 27; *Boggs v. Washington County*, 10 Neb. 297; *State v. Page*, 12 Neb. 386; *Poffenbarger v. Smith*, 27 Neb. 788.

RAGAN, C.

In 1887 there was organized in the city of Omaha, Nebraska, a corporation known as the Metropolitan Building & Loan Association. The general nature of the business which this corporation was organized to transact was to sell and buy real estate, to build, rent, and sell houses, to lease its property and borrow and loan money. The capital stock was fixed at $50,000, divided into shares of $1,000 each; the shares to be paid for in monthly installments of $12.50 each. In the district court of Douglas county, in 1890, John A. Van Pelt and others recovered a judgment against said corporation. An execution was issued on this judgment and returned wholly unsatisfied. Van Pelt and others then brought this action in the district court of Douglas county against William A. Gardner and others, the stockholders of said corporation, claiming, among other things, that they were largely indebted to the corporation for subscriptions of stock made by them and which subscriptions they had not paid. In other words, the object of this action was, in effect, to compel each of the said stock subscribers to pay into court such a part of his unpaid stock subscription as would be sufficient to satisfy Van Pelt's judgment, interest, and costs. The plaintiffs below had a decree as prayed, and the parties made defendants below have appealed.

1. The first argument is that the action, when brought, was barred by the statute of limitations. The suit was commenced November 18, 1893, and the appellants allege that the corporation was duly dissolved by a two-thirds vote of its stockholders February 5, 1889; that plaintiffs' cause of action accrued at that date and was barred within four years thereafter. When did the appellees' cause of action accrue? Section 4, article 11 (Miscellaneous Corporations) of the constitution provides: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first

ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription and the liability for the unpaid subscription shall follow the stock." The claim of the appellees here was a debt of the corporation. The exact amount due from the corporation to appellees has been ascertained and determined by the judgment in favor of the appellees, and since an execution against the corporation has been issued and returned wholly unsatisfied, the presumption is that the corporate property has been exhausted and the liability of the stock subscribers on their unpaid stock subscriptions for this debt of the corporation has attached. The liability of the stock subscribers attached when the corporate property was exhausted in this case on the return of the execution unsatisfied, and the cause of action of the appellees accrued at that time. This was in 1890, or less than four years prior to the bringing of this suit. (*Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175; *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333; *Ball v. Wicks*, 45 Neb. 367; *State v. German Savings Bank*, 50 Neb. 734; *Wyman v. Williams*, 53 Neb. 670; Cook, Stock & Stockholders, sec. 225.)

2. A second argument is that the findings of the district court as to the amount that the appellants were indebted on their unpaid stock subscriptions are not sustained by sufficient evidence. There is no merit whatever in this contention.

3. A further argument is that the corporation was a necessary party to this action. But the appellees in this suit are not claiming anything against the corporation. They are not seeking to take its property, to divest it of any right it has, or to hold it liable in any manner whatever. The liability of the corporation to the appellees has already been determined by the judgment which the appellees hold, and they have exhausted their remedies against the corporation. We do not see that the making

of the corporation a party to this action would have subserved any useful purpose whatever. (*Nolan v. Hazen*, 47 N. W. Rep. [Minn.] 155.) This is an action—for we are now considering only that feature of it which seeks to hold the stock subscribers liable for their unpaid stock subscriptions—not based upon any statute, penal or otherwise, but is one for the recovery of a liability imposed by the constitution of the state upon every subscriber to the stock of every corporation organized under the laws of this state. The constitution declares that after the amount justly due from a corporation to its creditors shall have been ascertained, and after the corporate property shall have been exhausted, the stock subscribers shall be individually liable to the extent of their unpaid stock subscriptions. This is a liability which the legislature can neither take away nor impair. Unpaid stock subscriptions, the constitution declares, in effect, shall constitute a fund out of which shall be paid the debts due the creditors of the corporation, when the exact amount justly due such creditors has been ascertained and the corporate property has been exhausted; and the liability of the stock subscribers for these unpaid subscriptions is not to the defunct corporation, not, technically speaking, to its creditors, but for the corporate debts. (*State v. German Savings Bank*, 50 Neb. 734; *Wyman v. Williams*, 53 Neb. 670.)

4. A provision of the articles of association of this corporation provided: "In no event shall the private property of the members of this corporation be liable for the indebtedness of this association." A final argument, as we understand it, is that the appellants are not liable to the appellees in this action because of this provision in the articles of association. This provision of the corporation's charter was and is absolutely void, in so far as it attempts to protect the stock subscriber from liability for his unpaid stock subscriptions for the debts of the corporation. This is more than the legislature itself could do; and, so long as section 4, article 11, of the

constitution shall remain in force, every person who is indebted on a stock subscription is liable for the debts of that corporation to the extent of his unpaid stock subscription, after the exact amount justly due from the corporation has been ascertained and the corporate property has been exhausted, any provision in the charter of the corporation to the contrary notwithstanding.

5. A section of the statute, under which the corporation of which the appellants were stockholders was organized, to-wit, section 2 of an act passed February 18, 1873, entitled "Homestead Associations," being section 146, chapter 16, Compiled Statutes 1897, contained this provision: "All stockholders of any such association shall be deemed and held liable to any amount equal to their stock subscribed, or by them at any time held in addition to said stock, for the purpose of securing the creditors of said association." By the decree in this case the district court made each of the appellants liable, not only for the amount unpaid on the stock subscribed for by him, but also for the full face value of the paid-up stock owned and held by him in the corporation. We think the decree in this respect was erroneous. This section 146 of the statute just quoted was passed in 1873, prior to the time the constitution of 1875 took effect. The constitution of 1875 determined the extent of the liability of stockholders of corporations organized under the laws of this state for the debts of such corporations. The constitution dealt with railway corporations, municipal corporations, banking corporations, and miscellaneous corporations. It fixed the liability of a stockholder in a banking corporation for the debts thereof at the amount of such subscriber's unpaid stock subscription plus the amount of the face or par value of the paid-up stock held by him in such corporation. By said section 4 it fixed the liability of stockholders of corporations other than banking corporations at the amount of the stock subscribed for by the stockholders and un-

paid, and made this liability follow the stock. The constitution of 1875 then repealed this section 146, chapter 16, Compiled Statutes 1897. The constitution has not only determined the liability of a stockholder in a corporation for the debts thereof, but it has limited this liability, and it is not within the power of the legislature to extend it. If, therefore, one subscribes for the stock of a corporation organized under the laws of this state, other than a banking corporation, and at the time of such subscription pays into the treasury of the corporation in cash the full face value of the stock for which he subscribes, he cannot afterwards be made liable for any debt due from the corporation. The decree in this case should have held each of the appellants severally liable only to the extent of the unpaid stock for which he had subscribed.

6. The decree of the district court provided that any of the appellants, upon paying the amount due the appellees, might sue their co-subscribers for contribution. The majority of the court is of opinion that this feature of the decree is correct. The constitution which makes the stock subscriber, whose subscription is unpaid, liable for the debts of an insolvent corporation does not fix this liability at such a proportion of the corporation's indebtedness as his unpaid stock subscription bears to all the unpaid stock subscriptions, but in express terms declares that each original subscriber for stock shall be individually liable to the extent of his unpaid stock subscription. As between the stock subscribers and the creditors of the corporation each stock subscriber is liable to the extent of his unpaid stock subscription. As between themselves each stock subscriber is liable for his share of the corporate debts. But this is an individual, not a joint, liability. (Cook, Stock & Stockholders [2d ed.] sec. 211, and cases there cited; *Umsted v. Buskirk*, 17 O. St. 113; *Harpold v. Stobart*, 21 N. E. Rep. [O.] 637.)

7. So far as the record before us discloses, no question was made in the court below, nor is any made here, of the

right of the appellees to maintain this action in their own name and on their own behalf. So far as the record before us discloses, the appellees are the only creditors of the defunct corporation. The record being in this condition, we will presume that the appellees are the only creditors of the insolvent corporation and that this suit is properly brought. We deem it proper to remark, however, that we are all of opinion that in such a case as this all creditors of the corporation and all the debtor stock subscribers thereto should be made parties to the action; that the entire indebtedness of the corporation, for which the stock subscribers are liable, may be ascertained and determined in one action. These unpaid stock subscriptions constitute a kind of reserve fund for the benefit of all the corporation's creditors after the corporate property has been exhausted; and in order that the court may properly and equitably distribute this fund among the corporate creditors they, as well as all the debtor stock subscribers, should be parties to the action. (See Cook, Stock & Stockholders, secs. 205, 206; *Umsted v. Buskirk*, 17 O. St. 113; *Coleman v. White*, 14 Wis. 762; *Pollard v. Bailey*, 87 U. S. 520; *Low v. Buchanan*, 94 Ill. 76; *Terry v. Little*, 101 U. S. 216.)

The constitution of the state of Oregon (sec. 3, art. 11) provides: "The stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid and no more." The supreme court of that state, in construing this section of the constitution, held that one creditor of a corporation organized under the laws of that state could not maintain an action in his own name and for his own benefit against the debtor stock subscribers of the corporation; that his action must be one in equity to which all the creditors of the corporation were parties. (See *Ladd v. Cartwright*, 7 Ore. 329.) This case was followed and approved by the supreme court of the United States in *Patterson v. Lynde*, 106 U. S. 519. The principles upon which the

doctrine rests were stated by Waite, C. J., in the following language: "The constitution of Oregon created no new right in this particular. It simply provided for the preservation of an old one. The liability under this provision is not to the creditors, but for the indebtedness. That is no more than the liability created by the subscription. The subscription is part of the assets of the corporation, at least so far as the creditors are concerned. The liability of the stockholder to the creditor is through the corporation, not direct. There is no privity of contract between them, and the creditor has not been given, either by the constitution or the statute, any new remedy for the enforcement of his rights. The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds, and when sued for the money he owes, it must be in a way to put what he pays, directly or indirectly, into the treasury of the corporation for distribution according to law. No one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself." This provision of the constitution of Oregon, in the respect under consideration, is substantially like our own and we are entirely satisfied with the construction placed upon it by the supreme court of that state and the supreme court of the United States. When a corporation becomes insolvent, when its corporate property has been exhausted, the constitution does not mean that one creditor may bring an ordinary suit at law for his sole benefit against one or more debtor stock subscribers to such corporation; but what the constitution does contemplate is that, after the corporate property has been exhausted, then, in a proper proceeding in the nature of a bill in chancery, the court will appoint a receiver and ascertain, or cause to be ascertained, the amount of the unpaid corporate debts and collect from all the unpaid stock subscribers a sufficient sum of money to discharge such indebtedness.

The decree should not be a joint one against all subscribers for the amount of the corporate debts; but a several judgment against each stock subscriber for the amount of his unpaid subscription. The decree should also provide for an execution against each subscriber for his proportionate share of the corporate debts, interest, and costs, and, if any execution should not be collected in full, then for the issuance, upon order of the court, of additional executions from time to time against each solvent subscriber for his proportionate share of the corporate debt remaining unpaid. The court should keep the case open upon the docket until the corporate debts have been discharged or the property liable for their payment exhausted. (*Harper v. Carroll*, 69 N. W. Rep. [Minn.] 610.)

The decree appealed from is reversed and the cause remanded, not for retrial, but with instructions to the district court to set aside its decree and enter a new one against each of the appellants within its jurisdiction for the amount of such appellant's unpaid stock subscription, the decree to be framed in other respects and carried into execution in accordance with this opinion.

JUDGMENT ACCORDINGLY.

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PETERBOROUGH SAVINGS BANK, APPELLANT, V. A. W. PIERCE ET AL., APPELLEES.

FILED APRIL 21, 1898. No. 7971.

1. **Estates:** MERGER. It is a general rule that where two unequal estates vest in the same person at the same time, without an intervening estate, the smaller is thereupon merged in the greater.
2. ———: ———. But merger does not always or necessarily result from such a coinciding of such estates.
3. ———: ———. Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected.

4. ———: ———: MORTGAGES: FAILURE TO REGISTER ASSIGNMENT: ATTACHMENT. The mortgagee of a real estate mortgage securing a negotiable note sold and assigned the same, but the assignment was not recorded. Subsequently the mortgagee obtained a conveyance of the legal title to the real estate on which the mortgage was a lien. Afterwards, and before the maturity of the mortgage debt, a creditor of the mortgagee attached the real estate, purchased it for value at the attachment sale, procured a sheriff's deed therefor, and filed the same for record. The creditor had no knowledge that the mortgage had been assigned, but supposed the mortgagee owned it and that it had merged in the legal title acquired by him. No communication whatever took place between the mortgagee and the creditor concerning the mortgage. *Held*, (1) That the presence of the mortgage unsatisfied upon the record was of itself sufficient to put an intending purchaser of this real estate upon inquiry as to the whereabouts of the note which the mortgage secured, and as to whether such mortgage had been satisfied by merger or otherwise; (2) that the presence of the mortgage unsatisfied upon the record was notice to an intending purchaser of the real estate that the mortgagee intended at the time he acquired the legal title to keep the two estates separate.

5. **Execution Sales:** CAVEAT EMPTOR. The doctrine of *caveat emptor* applies to purchasers of real estate at execution sales.

6. ———: TITLE OF PURCHASER. Except when controlled by the registry acts, a purchaser of real estate at execution sale acquires only the interest which the execution debtor had in such real estate, when the lien attached on which it was sold.

7. ———: SHERIFFS' DEEDS. Generally, a sheriff's or master's deed conveys only the estate which a quitclaim deed from the execution debtor to the purchaser would have conveyed had it been made and delivered at the date when the lien attached under which the judicial sale occurred.

8. **Vendor and Vendee:** MORTGAGES: BONA FIDE PURCHASER. One who purchases the legal title to real estate from a mortgagee thereof, the mortgage securing a negotiable unmatured note being of record, is not a purchaser without notice, within the meaning of the recording acts, and entitled to protection against such mortgage then in the hands of a *bona fide* purchaser thereof, although no assignment of such mortgage is of record.

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

*John W. Lytle*, for appellant.

References: *Miller v. Finn*, 1 Neb. 298, 300; *Hunt v. Hunt*, 14 Pick. [Mass.] 382; *Jewett v. Tomlinson*, 36 N. E.

Rep. [Ind.] 1106; *Brounty v. Daniels*, 23 Neb. 164; *Fulton v. Hanlow*, 20 Cal. 450; *Hawks v. Truesdell*, 99 Mass. 557; *Auld v. Smith*, 23 Kan. 66; *Eggert v. Beyer*, 43 Neb. 711; *Mundy v. Whittemore*, 15 Neb. 652; *Webb v. Hoselton*, 4 Neb. 308; *Cheney v. Janssen*, 20 Neb. 129; *Bridges v. Bidwell*, 20 Neb. 185; *Mulcahy v. Fenwick*, 36 N. E. Rep. [Mass.] 689; *Biggerstaff v. Martson*, 36 N. E. Rep. [Mass.] 785; *Marsh v. Rice*, 1 N. H. 167; *Burhaus v. Hutcheson*, 25 Kan. 626.

*Smith & Sheean* and *Herdman & Herdman, contra.*

References: *McClain v. Weise*, 22 Ill. App. 272; *Bleckley v. Branyan*, 26 S. Car. 424; *Clark v. Clark*, 76 Wis. 306; *Lynch v. Pfeiffer*, 110 N. Y. 33; *Norris v. Morrison*, 45 N. H. 490; *Gregory v. Savage*, 32 Conn. 250; *Allen v. Anderson*, 44 Ind. 395; *Condit v. Wilson*, 36 N. J. Eq. 370; *Ettenheimer v. Northgraves*, 75 Ia. 28; *Weaver v. Carpenter*, 42 Ia. 343; *Gower v. Doheney*, 33 Ia. 36; *Foorman v. Wallace*, 75 Cal. 552; *Riley v. Martinelli*, 97 Cal. 575; *Luton v. Sharp*, 94 Mich. 202; *Whipple v. Fowler*, 41 Neb. 675; *Porter v. Ourada*, 51 Neb. 510; *Swartz v. Leist*, 13 O. St. 419.

RAGAN, C.

January 15, 1889, A. W. Pierce was the owner of lot 3, in block 1, Brigg's Place Addition to the city of Omaha. On that date Pierce, being indebted to the Kimball-Champ Investment Company, executed and delivered to said company his three notes, one for $1,500 and two for $50 each. These notes were payable to the order of the investment company and due five years after date and bore interest payable semi-annually. January 15, to secure the payment of said notes, Pierce executed and delivered to the investment company two mortgages upon the above described real estate, one securing the $1,500 note, which was made a first lien upon the property, and the other securing the two $50 notes, and

it was a second lien upon the property. These mortgages were duly recorded about the date of their execution. February 6, 1889, the investment company sold, assigned, and delivered the $1,500 note and the mortgage securing the same to the Peterborough Savings Bank, a New Hampshire corporation, but the savings bank never placed of record the assignment of the mortgage made to it by the investment company. Subsequent to this date the investment company assigned the two $50 notes and the mortgage securing the payment of the same to one M. C. Patrick. In September, 1889, the investment company brought a suit in the district court of Douglas county, claiming that it was then and there the owner of the said $1,500 note and the mortgage securing the payment of the same; that Pierce had made default in the payment of an installment of interest due thereon, by reason of which the entire mortgage debt had become due, and prayed the court for a decree foreclosing that mortgage. To this suit Patrick was a party and he filed therein a cross-petition setting out that he was the owner of the two $50 notes above mentioned and the mortgage securing the same and prayed for a foreclosure of his mortgage. In December, 1890, this case came on for hearing, and the district court found that the investment company was then and there the owner of the $1,500 note and mortgage and that there was a large sum due to it on said mortgage from said Pierce. The court also found that Patrick owned the two $50 notes and the mortgage securing the same, what was due on that mortgage debt, and entered a decree foreclosing the Patrick mortgage and ordering the real estate sold for its payment. But the decree foreclosed the Patrick mortgage subject to the $1,500 mortgage and ordered the real estate sold subject to the lien of that mortgage. The real estate was so sold and purchased by Patrick, the sale confirmed, and a master's deed executed to him for the real estate. This deed recited that the conveyance was made to him subject

to the $1,500 mortgage. To this suit the savings bank was not a party, nor had it any knowledge, until years afterward, that such a suit had ever been brought, and at the time the suit was brought, and at all times after February 6, 1889, it owned the $1,500 mortgage and the debt which it secured, which the investment company claimed in that suit it owned and which the court found it owned. October 8, 1891, Patrick conveyed the real estate which he had purchased at the mortgage foreclosure sale and two other lots in the same block to the investment company, the conveyance reciting "that such premises are free and clear of all liens and incumbrances except three mortgages of $1,500 each and interest and taxes now due." After the conveyance by Patrick to the investment company it became indebted to one Hendee, and she brought a suit against it and caused the property embraced in this controversy, to-wit, said lot 3, in said block 1, to be attached. Hendee procured a judgment against the investment company for a considerable sum of money and an order that the attached property should be sold for the payment of such judgment. The sale occurred, and one Smith, as the assignee of the Hendee judgment, purchased the property. This sale was confirmed and in due time a sheriff's deed executed to Smith. This deed was recorded December 28, 1893. June 14, 1894, Smith conveyed the property to one Wertman, and on July 5, 1894, Wertman conveyed it to Bert O. Carver, who still owns it. On this same date Carver executed to Smith a mortgage upon the real estate which he then or soon afterward assigned to Wertman, who now holds the same. June 20, 1894, one Mary Stack recovered a judgment against the said Hendee and the said Carver, and on October 22 of said year she brought a suit in the district court of Douglas county to subject the property in controversy here to the payment of her judgment. Thus matters stood when on February 9, 1895, the savings bank brought this suit in the district court of Douglas county

to foreclose the $1,500 mortgage. To this suit Pierce, the original mortgagor, Carver, the owner of the real estate, Wertman, the assignee of the mortgage made by Carver to Smith, Stack, Hendee, and others were parties. Carver claimed to be the owner of the real estate discharged of the lien of the mortgage sought to be foreclosed. Wertman claimed to have a first lien upon the real estate by virtue of the mortgage executed by Smith and by the latter assigned to him.

Since the only title which Carver has to the real estate comes through Smith, the purchaser at the Hendee attachment sale, it is only necessary to inquire into the correctness of this decree as affecting Carver's title. Before Smith purchased at the attachment sale he examined the public real estate records of Douglas county, and they did not disclose any assignment of the $1,500 mortgage from the investment company, but did disclose that the investment company, while the apparent owner of that mortgage, acquired the legal title to the real estate upon which the mortgage was a lien, this conveyance of the legal title not evidencing any intention on the part of the investment company to keep the two estates separate. Smith at this time had notice neither actual nor constructive that the $1,500 mortgage had been assigned by the investment company to the savings bank, and, relying upon the facts disclosed by the record, he was led to believe, and did believe, that at the time the investment company accepted the conveyance of the legal title it was then the owner of the $1,500 mortgage, and that a purchaser of the real estate at the attachment sale would take the title to such real estate discharged from the lien of such mortgage. Influenced by the knowledge and the notice thus furnished him by the records Smith purchased the real estate in controversy at the Hendee attachment sale for a valuable consideration, obtained a deed therefor, and caused it to be recorded.

The decree of the district court, as we understand

it, is based upon the following proposition: That had the investment company actually been the owner of the $1,500 mortgage at the time it received the conveyance of the legal title of the real estate from Patrick, there being no intervening estate, that then, by operation of law, the two estates would have merged and the mortgage been satisfied; and from the condition of the record and Smith's want of notice that the $1,500 mortgage had been assigned, he was justified in supposing that the mortgage had been merged in the legal estate, and is, therefore, a purchaser in good faith without notice, within the meaning of section 16, chapter 73, Compiled Statutes, and entitled to hold the real estates purchased discharged of the savings bank's mortgage. It is a general rule that where two unequal estates vest in the same person at the same time without an intervening estate the smaller is thereupon merged in the greater. (2 Cooley's Blackstone [3d ed.] 277; 2 Washburn, Real Property 564.) But merger does not always or necessarily result when two unequal estates coincide in the same person without an intervening estate. Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the intention of the party acquiring the two estates, and the equities of the parties to be affected thereby. (See the rule stated and the authorities collated in 15 Am. & Eng. Ency. Law 321; *Miller v. Finn*, 1 Neb. 254; *Wygant v. Dahl*, 26 Neb. 562; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207; *Mathews v. Jones*, 47 Neb. 616.) Had the investment company then owned the $1,500 mortgage at the time it acquired the legal title to the real estate upon which it was a lien, it could not be held, as a matter of law, that Smith, by purchasing this real estate under the Hendee attachment suit, would have taken it discharged of that mortgage, even as against the investment company. The conduct of the investment company might have been such in the premises that it would

have been estopped from asserting the mortgage against Smith's title; but simply because it held the mortgage at the time it acquired the legal estate upon which the mortgage was a lien, and that Smith purchased this legal estate at execution sale, would not, without more, have entitled him to hold the real estate discharged of the mortgage. The doctrine of *caveat emptor* has always been applied by this court to purchasers of real estate at execution sales, and, except when controlled by the registry acts, a purchaser of real estate at an execution sale acquires only the interest which the execution debtor had in such real estate when the lien attached under which the sale occurred; that the sheriff's or master's deed has only the effect that a quitclaim deed from the execution debtor to the purchaser would have if made and delivered at the date when the lien attached on which the judicial sale is based. (*Miller v. Finn*, 1 Neb. 254; *Norton v. Nebraska Loan & Trust Co.*, 35 Neb. 466; *Butler v. Fitzgerald*, 43 Neb. 192; *Hargreaves v. Menken*, 45 Neb. 668; *Nye v. Fahrenholz*, 49 Neb. 276; *Motley v. Motley*, 53 Neb. 375.)

We do not think that Mr. Smith was a subsequent purchaser in good faith without notice within the meaning of the section of the statute just quoted. That he purchased the real estate in good faith, that he paid value for it at the time, having no notice or knowledge that the savings bank held this mortgage, stands undisputed in the record. But before he purchased this real estate he examined the real estate records of Douglas county and they disclosed that in January, 1889, Pierce owned this real estate; that at that time he executed and delivered to the investment company the mortgage in controversy; that subsequently Pierce's equity of redemption in this real estate was sold to Patrick subject to the mortgage, and that Patrick subsequently conveyed Pierce's equity of redemption to the investment company. At the time Mr. Smith purchased the real estate the investment company held the title to the land

and the mortgage upon the land as disclosed by the record. But Smith made no inquiry, so far as the record before us shows, of the investment company as to whether it intended, by taking the conveyance of the legal title to the land, that the mortgaged estate should be merged in such legal title; nor did he make any inquiries of the investment company as to the whereabouts of the $1,500 mortgage or the note which it secured; and he was not justified in presuming that the two estates had merged in the investment company. This mortgage secured a negotiable promissory note which was not then due, and the record of this mortgage was of itself a notice and a warning to all persons dealing with this real estate to beware. The presence of the mortgage upon the record unsatisfied was of itself sufficient to put an intending purchaser of this real estate upon inquiry as to the whereabouts of the note which it secured and as to whether it had been satisfied by operation of law or otherwise. The presence of the mortgage upon the record unsatisfied was a notice to an intending purchaser of this real estate that, if the investment company owned the mortgage and the legal title to the land upon which it was a lien, as well by keeping the mortgage upon the record unsatisfied, it intended at the time of acquiring the legal title to keep the two estates separate.

This case is not ruled by *Whipple v. Fowler*, 41 Neb. 675, nor by *Porter v. Ourada*, 51 Neb. 510, but is controlled by *Mathews v. Jones*, 47 Neb. 616, which holds that one who purchases the legal title of real estate from a mortgagee thereof, the mortgage securing a negotiable, unmatured promissory note being of record, is not a purchaser without notice, within the meaning of recording acts, and entitled to protection against such mortgage then in the hands of a *bona fide* purchaser thereof, although such purchaser had neglected to record his assignment. Furthermore, the record discloses that, when the property was appraised for sale in the attachment suit, the mortgage in suit was deducted from the

appraised value of the property. Smith, therefore, purchased subject to the mortgage in suit, as the record in the attachment suit disclosed.

The decree appealed from is reversed and the cause remanded to the district court with instructions to enter a decree in favor of the savings bank foreclosing its mortgage as prayed for in its petition.

REVERSED.

HARRISON, C. J., and NORVAL, J., concurring in the above opinion of RAGAN, C.

IRVINE, C., concurring specially.

While concurring in the conclusion reached by the court, I think the reasons upon which that conclusion is chiefly based in the opinion are unsound, and therefore wish to express my own views separately.

To my mind the fact upon which the case should turn, and the only fact leading justly to a conclusion in favor of the appellant, is that at the attachment sale the plaintiff's mortgage was deducted as a lien prior to the attachment, and that the purchaser at that sale did not obtain the apparent title on which appellee now relies. The sale did not purport to convey the title discharged from the mortgage lien. One who buys at an execution sale of land, where the appraisement shows that a particular lien has been deducted in order to reach the value of the debtor's interest, is thereafter estopped to deny the validity of that lien. (*Koch v. Losch*, 31 Neb. 625; *Nye v. Fahrenholz*, 49 Neb. 276.) Smith, when he purchased at the attachment sale, was charged with notice of the appraisement. (*Norton v. Nebraska Loan & Trust Co.*, 35 Neb. 466, 40 Neb. 394.) He was charged, therefore, with notice that he was obtaining only the equity of redemption, and that the mortgage lien had been deducted in such a manner as to estop him from questioning its validity or existence. This was of record, and his grantees, in searching his title, would obtain the

same notice and were also charged therewith. This consideration is sufficient to dispose of the case. Regarding all other matters unnecessary to a decision, I regret that the court has deemed it necessary to consider them, because, in my opinion, outside of the feature just discussed, there is nothing to charge the purchaser with notice.

When Smith searched the records, preparatory to bidding at the attachment sale, he found a mortgage to the investment company, the record of a foreclosure suit, where all parties the record disclosed to be interested were before the court, a decree foreclosing a junior mortgage and establishing the investment company's mortgage as a senior lien, a sale under that decree, duly confirmed, and a deed to the purchaser duly recorded. He found a deed whereby that purchaser conveyed the property to the investment company. He thus found, so far as the records disclosed, a mortgagee buying and receiving a conveyance of the equity of redemption, without any other estate intervening. Was he not then justified in assuming that the two estates had merged? It is conceded that under such circumstances merger occurs unless by intention of the parties, or by intervening equities, such a result is prevented. The presumption is in favor of merger, and there was nothing here to rebut that presumption, so far as the records disclosed. It is said that the fact that the conveyance from Patrick to the investment company was subject to the mortgage was sufficient to rebut the presumption, or at least to notify Smith that there might be no merger. *Mathews v. Jones*, 47 Neb. 616, is cited as applicable to this phase of the case. But the facts are very different. In *Mathews v. Jones* the deed to the mortgagee recited that the conveyance was subject to the mortgage, which the mortgagee "assumed and agreed to pay." Of course the mortgagee would not expressly assume and agree to pay a mortgage which he himself then owned. In this case there was no such covenant. On the contrary the deed was one of

general warranty, except that the grantor, in conveying to the mortgagee, excepted the mortgage from his covenant of warranty. A mortgagor, in conveying to the mortgagee with the intention on the part of both to thereby extinguish the mortgage, would, for the very purpose of effecting that object, avoid covenanting against the existence of a mortgage owned by the grantee himself. There is a vast difference between a covenant by the grantee to pay a mortgage and the refusal of the grantor to covenant against it when it is held by the grantee himself. In the latter case the exception of the mortgage from the covenant, if it has any significance, strengthens the presumption of a merger.

It is also said that it was the duty of Smith to inquire whether there had been in fact a merger. Finding the mortgagee had acquired the remainder of the estate, Smith would know that if no merger had taken place it would be necessary for the owner to begin a suit against himself in order to preserve the estate which he was endeavoring to keep distinct. In that case he would have to allege that he as defendant had made a default against himself as plaintiff, and that by reason of failing to keep his own obligations to himself he was entitled to invoke the aid of the court to enforce his own obligations to himself by selling his own property to discharge them. Is it reasonable to say that Smith was put on inquiry to ascertain whether such an absurd state of affairs existed? The writer can recall only one instance where any person has been said to have actually pursued so cautious a policy, and that is the case of the worthy Lord Chancellor, immortalized by Gilbert & Sullivan, who considered seriously whether he should fine himself for contempt of his own court in marrying his own ward without his own consent.

By our statute all deeds, mortgages, and other instruments which are required to be recorded are void as to subsequent purchasers without notice whose deeds,

mortgages, or other instruments shall be first recorded. (Compiled Statutes, ch. 73, sec. 16.) Here Smith's deed was recorded before the assignment of the mortgage was recorded. By section 1 of the same chapter "deeds of real estate" shall be recorded. Section 46 provides: "The term 'deed,' as used in this chapter, shall be construed to embrace every instrument in writing, by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except last wills, and leases for one year or for a less time." Certainly assignments of mortgages are within this provision. This court has gone to perhaps an extreme in protecting secret assignments of mortgages, but in no case have we repealed the recording act by giving effect to an unrecorded assignment, as against a purchaser without notice whose muniments of title were actually recorded before the assignment. True, the lien of an attachment extends only to the interest of the defendant in attachment, but the cases where that principle is announced state as a qualification that for its application the deed under the attachment sale must not be recorded before that creating the secret equity. (*Mansfield v. Gregory*, 8 Neb. 432; *Harral v. Gray*, 10 Neb. 186; *Mansfield v. Gregory*, 11 Neb. 297; *Hargreaves v. Menken*, 45 Neb. 668; *Sheasley v. Keens*, 48 Neb. 57.) *Per contra*, a purchaser at such sale, if he buy without notice of the outstanding equity and place his deed on record prior to the record of the instrument creating such equity, is entitled to the protection of the recording act. (*Uhl v. May*, 5 Neb. 157; *Hubbart v. Walker*, 19 Neb. 94.) Tested by these principles Smith acquired a good title, except for the notice imparted by and the legal effect of, the deduction of plaintiff's mortgage in appraising the land for sale under the attachment.

SULLIVAN, J., and RYAN, C., concur in the foregoing opinion of IRVINE, C.

# STATE OF NEBRASKA V. BANK OF COMMERCE ET AL., APPELLEES, AND JOHN HENDRICKSON ET AL., APPELLANTS.

FILED APRIL 21, 1898. No. 9915.

1. **Insolvent Trustee:** PREFERRED CLAIM. The beneficiary of a trust fund, solely because of the character of his claim, is not entitled to the payment of the same in full, to the exclusion of the other creditors, out of the assets of the insolvent trustee's estate.

2. **Trusts:** CONVERSION: RIGHTS OF BENEFICIARY. When trust funds are wrongfully converted, the beneficiary is entitled to the funds themselves, or the proceeds of the investment of them, so long as he can definitely trace them, and before they reach the hands of an innocent holder.

3. ———: TRACING FUNDS. When a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money.

4. ———: ———: CONVERSION: BENEFICIARIES. When trust funds are wrongfully converted and not only do not remain in the hands of, and are not found among the assets of, the wrong-doer, but are actually traced out of his hands and shown to have been dissipated, then the beneficiary of the trust fund is not entitled to have his claim allowed as a preferred one against the estate of the insolvent wrong-doer.

5. ———: ———. If the trust property consisted of money, the claim of the beneficiary of the trust fund may be preferred to the extent of the cash found among the assets of the insolvent trustee at the time of his failure, unless it affirmatively appears that such cash assets are not part of the trust fund.

6. **County Treasurer:** WRONGFUL DEPOSIT OF FUNDS: LIEN OF COUNTY. A county treasurer is a trustee of moneys which come into his hands by virtue of his office, and if he wrongfully deposits them to his own credit in a bank aware of their character, which afterwards becomes insolvent, the county is entitled to have its claim decreed a first lien upon any asset of the insolvent which it shows is the product of its moneys.

7. ———: ———: ———. The county treasurer of Hall county wrongfully deposited to his own credit in the Bank of Commerce $15,860.18 of public funds, the bank being aware of their character. The bank failed, having in its vaults only $140 in cash. It had used the treasurer's deposit in paying off its other depositors. It was not shown that any part of this public money was represented by or embraced in any asset of the bank which came into

the possession of its receiver. *Held*, (1) That the county was entitled to reclaim the $140 as being part of the trust fund; (2) that it was not entitled to have its claim against the insolvent bank decreed a first lien upon the other assets thereof.

APPEAL from the district court of Hall county. Heard below before THOMPSON, J. *Reversed.*

See opinion for references to authorities cited.

*John L. Webster*, *W. A. Prince*, *W. H. Platte*, *James H. Wooley*, and *James H. McIntosh*, for appellants.

*Fred W. Ashton*, *R. R. Horth*, *Charles G. Ryan*, and *C. J. Smyth*, *contra.*

RAGAN, C.

To an understanding of this case the material and undisputed facts are: On January 9, 1896, William Thomssen was the county treasurer of Hall county, Nebraska. On that date and the 13th and 15th days of said month he made general deposits to his own credit in the Bank of Commerce of Grand Island, in said county, aggregating $16,828.32. The moneys so deposited were public moneys rightfully in the hands of Thomssen as county treasurer of said county. The deposit so made was unlawful. The officers of the bank knew that the money so deposited by the treasurer was not his, but the money of the public, and that Thomssen held such money as the county's agent or trustee. On January 20 of said year the Bank of Commerce became insolvent, ceased to do business, and its assets were subsequently placed in the hands of a receiver. When the receiver took possession of the assets of the bank there were in its vaults in cash $140, and no more. Between January 9 and January 20 Thomssen drew checks against the deposit made by him in said bank amounting to $968.14, so that, when the bank ceased to do business, it was indebted to Thomssen in the sum of $15,860.18. This money the bank used in paying off its depositors other than the county treasurer.

It was not shown that any part of this public money was represented by or embraced in any asset of the bank which came into the hands of the receiver. After the receiver was appointed the creditors of the bank filed with him their claims against the bank, and among the claimants was Hall county, by its treasurer, for the money which the bank at the time of its failure owed him. A dividend of fifteen per cent was afterwards paid by the receiver to each of the creditors, including the county treasurer. Subsequently the county filed a petition in equity and asked that its claim be decreed a preferred one, and be first paid out of the assets of the insolvent bank. The district court of Hall county entered a decree as prayed by the county, and the other creditors of the bank have appealed.

1. It is insisted by appellants that the county, by accepting the fifteen per cent dividend, has estopped itself from asserting that it is a preferred creditor. If the claim of a private individual had been allowed as that of a common creditor, and he had afterwards accepted a dividend paid thereon by the receiver, he would probably be in no position to afterwards maintain an action to have his claim decreed a preferred one, as he would be bound by the judgment or adjudication, unless appealed from, which recognized his claim as that of a common creditor, and estopped because of his acceptance of the dividend paid on such non-preferred claim. (*Anheuser-Busch Brewing Ass'n v. Morris*, 36 Neb. 31; *State v. Thomas*, 53 Neb. 464.) But the county is not estopped here from asserting that its claim is a preferred one because of the action of its county board and treasurer in the premises.

2. The treasurer was a trustee of the county for this money, and since the bank borrowed the money of the treasurer, knowing it was county money, it acquired no greater rights to the money than the treasurer himself had. It has sometimes been held that where a trustee of a trust fund, or one who has received that fund

from him, knowing it to be such, becomes insolvent, the claim of the beneficiary of the trust fund is to be preferred to that of all other creditors of such trustee. Such was the holding of the supreme court of Wisconsin in *McLeod v. Evans*, 28 N. W. Rep. 173, 66 Wis. 401. It was there ruled that in order to make the claim of the beneficiary of the trust fund a preferred one it was not necessary to show that any part of the trust fund was embraced in the assets which came into the hands of the receiver of the insolvent trustee. The ruling in this case was followed by that court in *Francis v. Evans*, 69 Wis. 115, 33 N. W. Rep. 93, and *Bowers v. Evans*, 71 Wis. 133, 36 N. W. Rep. 629; but in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. Rep. 383, the supreme court of Wisconsin repudiated the doctrine announced in *McLeod v. Evans, supra*, and overruled that case and the cases following it. The supreme court of Iowa seems also to have followed the rule announced by the supreme court of Wisconsin in *McLeod v. Evans, supra*. (See *Independent District of Boyer v. King*, 45 N. W. Rep. 908; *Davenport Plow Co. v. Lamp*, 45 N. W. Rep. 1049.) The doctrine of *McLeod v. Evans* seems also to have been followed by the supreme court of Kansas in *Myers v. Board of Education*, 51 Kan. 87. But we think the correct doctrine, and the one supported by the decided weight of authority, is that the beneficiary of a trust fund, solely because of the character of his claim, is not entitled to the payment of the same in full, to the exclusion of other creditors, out of the assets of the insolvent trustee's estate; that when trust funds are wrongfully converted, the beneficiary is entitled to the funds themselves, or to the proceeds of the investment of them, so long as he can definitely trace them and before they reach the hands of an innocent holder; that when a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money; that it will be presumed

the cash assets on hand when the trustee failed and the receiver took possession of his estate were part of the trust money; that when trust funds are wrongfully converted, and not only do not remain in the hands of, and are not found among the assets of, the wrong-doer, but are actually traced out of his hands and shown to have been dissipated, then the beneficiary of the trust fund is not entitled to have his claim allowed as a preferred one against the estate of the insolvent wrong-doer. If the trust property consisted of money, the claim of the beneficiary of the trust fund may be preferred to the claims of other creditors, to the extent of the cash found among the assets of the insolvent trustee at the time of his failure, unless it affirmatively appears that such cash assets were not part of the trust fund.

The foregoing propositions are sustained by the following authorities: 2 Story, Equity Jurisprudence [13th ed.] secs. 1258, 1259; *Thompson's Appeal*, 22 Pa. St. 16; *Sherwood v. Central Michigan Savings Bank*, 61 N. W. Rep. [Mich.] 352; *Neely v. Rood*, 54 Mich. 134, 19 N. W. Rep. 920; *Little v. Chadwick*, 151 Mass. 110, 23 N. E. Rep. 1005; *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. Rep. 205; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. Rep. 383; *National Bank v. Insurance Co.*, 104 U. S. 54; *Gianella v. Momsen*, 63 N. W. Rep. [Wis.] 1018; *Slater v. Oriental Mills*, 27 Atl. Rep. [R. I.] 443; *Freiberg v. Stoddart*, 28 Atl. Rep. [Pa.] 1111; *Englar v. Offutt*, 70 Md. 788; *Boone County Nat. Bank v. Latimer*, 67 Fed. Rep. 27; *In re Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. Rep. 504; *Northern Dakota Elevator Co. v. Clark*, 53 N. W. Rep. [N. Dak.] 175, and cases there cited.

In *State v. Foster*, 38 Pac. Rep. [Wyo.] 926, the state of Wyoming and the county of Laramie, in said state, sought to have a trust declared in their favor against the entire assets of an insolvent bank in which the treasurers of said county and state respectively had deposited the public moneys, and have their claims allowed as preferred ones. The opinion is an able and an exhaustive

one, and the court summed up its conclusion on the inquiry presented in the following language, found in the fourth and fifth paragraphs of the syllabus: "A state or county treasurer is merely custodian or trustee of public moneys coming into his hands by virtue of office, and if he deposits such funds with one who knows their trust character, and who afterwards becomes insolvent, the state or county may sue to impress a trust on the insolvent estate, if such funds can be identified, or traced to some particular fund or property of the estate. Where a banker takes on deposit trust funds, knowing their character, and, after mingling them with his own funds, draws on the whole in the usual course of business, it will be presumed that the money so withdrawn is that of the banker, and not the trust money."

From the admitted facts in this case our conclusion is that Hall county was not entitled to have its claim allowed as a preferred one against the estate of the Bank of Commerce, except to the extent of $140, the amount of cash in the vaults of the bank when it failed. As there is no evidence whence this cash was derived, the presumption is that it was a part of the county money. But counsel for both parties to this litigation have cited certain opinions of this court which each claims sustain his contention, and we now proceed to examine the cases cited.

In *Wilson v. Coburn*, 35 Neb. 530, a customer of a bank made a deposit therein after it had become insolvent, but without his knowledge. He then sought to have a trust impressed upon the assets of the bank in the hands of its assignee, or, in other words, to have his claim against the bank made a preferred one; but this court denied him relief, on the ground that he was unable to trace, distinguish, and identify the money deposited in the bank. This case then is an authority for the conclusion we have reached in the case under consideration.

In *Anheuser-Busch Brewing Ass'n v. Morris*, 36 Neb. 31,

a bank had collected and failed to remit certain moneys to the brewing association. Subsequently the bank failed and was placed in the hands of an assignee. The brewing association then filed its claim, and it was allowed to prorate with the claims of other creditors. Subsequently a dividend was paid by the assignee, which the brewing association accepted. On this state of facts we held that the allowance by the county court of the brewing association's claim to prorate with other creditors was an adjudication that the association was not entitled to have its claim preferred, and that, as it did not appeal from this adjudication, it was bound thereby, and, it having accepted the dividend paid by the assignee, had estopped itself from claiming to be a preferred creditor of the insolvent bank. The question of the right of the brewing association because it was the beneficiary of a trust fund to have that fund paid out of the assets of the insolvent bank as a preferred claim was not necessary to a decision of the case.

*Farwell v. Kloman*, 45 Neb. 424, is in line with the conclusion reached in the case at bar. In that case it was held that equity would award the beneficiary of the trust property any particular property which could be identified as having been purchased with the trust property. But such beneficiary was denied the right of preference, upon the ground that the trust property had been dissipated and mingled by the trustee with his own until it was incapable of identification, and that no part of the assets of the insolvent trustee's estate was shown to be the product of any part of the trust fund.

In *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, there were in the vaults of the insolvent trustee at the time of its failure $11,000 in cash. The trust fund amounted to $4,000, and we held that the beneficiary of the trust fund was entitled to have his claim preferred to that of other creditors of the insolvent trustee. This case, then, is in line with the conclusion reached

in the case at bar. Since the insolvent trustee had in its vaults $11,000 in cash when it failed and went into the hands of a receiver, the presumption arose that included in that $11,000 of cash were the $4,000 constituting the trust fund.

What has just been said of the *Capital National Bank Case* is also true of *State v. Midland State Bank*, 52 Neb. 1. As the record in that case discloses,—although the fact does not appear in the opinion,—the cash in the vaults of the bank at the time it became insolvent exceeded the amount of the trust fund; and again the presumption arose that in that cash was included the trust money of the school district.

The only case in this court which seems to be contrary to the conclusion we have reached in the case at bar is the *State v. State Bank of Wahoo*, 42 Neb. 896. In that case the trust property consisted of money, and the claim of the beneficiary of this fund was ordered paid as a preferred claim out of the assets of the insolvent trustee, a bank. The opinion does not disclose whether the cash in the vaults of the bank at the time of its failure was equal to or exceeded the amount of the trust fund, and I have not access to the record and cannot therefore say what the record did disclose in that respect; but it was never the writer's intention to hold that the beneficiary of a trust fund, simply because of the character of that fund, was entitled to a preference out of the assets of the estate of the insolvent trustee, and the case is not to be regarded as an authority for that doctrine. It was not the intention of the court or the writer of that opinion to adopt the doctrine of *McLeod v. Evans, supra;* nor was it the intention to depart from the principle announced in the case of *Wilson v. Coburn, supra.* The case, like every other, should rest upon some principle; and if it cannot be made to rest upon the principle of *Wilson v. Coburn*, then, like the Wandering Jew, it should not be allowed to rest at all, but move on forever. At all events, the

case must not be considered as an authority for the doctrine announced in *McLeod v. Evans, supra*, and the cases which follow that. The decree appealed from is reversed and the cause remanded, not for retrial, but with instructions to the district court to set aside its decree in favor of the county and to enter a new decree awarding the county of Hall a preference to the extent of $140, the remainder of its claim to be allowed so as to share in the proceeds of the insolvent estate in common with other creditors thereof, the county to be charged with the amount of the dividend received and retained by it.

REVERSED AND REMANDED.

HARRISON, C. J., not sitting.

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P. L. JOHNSON, APPELLEE, V. J. B. FINLEY, TRUSTEE, ET AL., APPELLANTS.

FILED APRIL 21, 1898. No. 8042.

1. **Tax Sales**: TREASURER'S RETURN. Until a county treasurer has made a return to the county clerk of his county of the public sale of lands for taxes held by him in pursuance of section 109, chapter 77, Compiled Statutes 1897, he cannot make a valid private sale of lands for the delinquent taxes due thereon.

2. ———: ———. Where a private tax sale of real estate is invalid because of the failure of the county treasurer to first make such return, the purchaser thereat is subrogated to the rights which the public had against such real estate, and entitled to enforce a lien against the same for the taxes paid at the sale and for all prior and subsequent taxes existing against the real estate and paid by him because of such purchase. *Adams v. Osgood*, 42 Neb. 450, followed.

3. **Taxes**: MISTAKE OF COLLECTOR: ACTION FOR DAMAGES. The public cannot be deprived of its revenue nor its lien for taxes against property because of the mistake of a tax collector in not collecting all that is due against such property.

4. ———: LEVY IN CITY: PUBLICATION OF ORDINANCE. The failure to publish an ordinance of a city of the metropolitan class—"An ordi-

nance making the annual levy of taxes for the city of Omaha for the year 1892"—in the official newspaper thereof, as required by section 133, chapter 12*a*, Compiled Statutes 1895, did not prevent such ordinance from becoming a law, it having been duly passed and approved, and signed by the mayor, and a section thereof providing that the ordinance should be in force from and after its passage.

5. **City Ordinance:** PROOF OF ENACTMENT. The method provided by section 124, chapter 12*a*, Compiled Statutes 1895, for proving the existence or enactment of an ordinance of a city of the metropolitan class is not exclusive, but one desiring to prove such an ordinance may pursue the statutory method or resort to common-law methods of proof.

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

*John T. Cathers*, for appellants.

*R. W. Breckenridge* and *Saunders, Macfarland & Dickey, contra.*

RAGAN, C.

P. L. Johnson brought this suit in the district court of Douglas county against J. B. Finley and others to foreclose a tax lien. He had a decree as prayed, and Finley and others have appealed.

1. The revenue law of the state provides that the county treasurer of each county shall, on the first Monday in November of each year, offer at public sale all lands on which the taxes levied for the previous year still remain unpaid (Compiled Statutes 1897, ch. 77, art. 1, sec. 109); that the treasurer shall keep a sale book showing the lands sold, to whom, and for what amounts, and, on or before the first Monday in December of each year, shall file in the office of the county clerk of his county a return of the sales made (section 112 of said chapter 77); and that after the public tax sale shall have closed, and after the treasurer has made his return thereon to the county clerk, as provided in said section 112, if any real estate remains unsold for want of bidders, the

county treasurer is authorized and required to sell the same at private sale (section 113 of said chapter 77). In the case at bar the county treasurer, on January 7, 1892, sold certain real estate at private tax sale for the delinquent taxes of the year 1890, having failed to make and file with the county clerk the report of the public tax sale held in 1891, as required by said section 112. The appellants now insist that the decree of the district court must be reversed for the reason that the purchaser at the private tax sale acquired no lien upon the real estate sold thereat.

The argument is that the provisions of the revenue law are mandatory, and that until the treasurer had made and filed with the county clerk the report of the public tax sale, he had no jurisdiction to sell real estate for taxes at a private sale; that such sale was consequently not voidable merely, but absolutely void. It is true that the county treasurer had no authority to sell real estate at private tax sale until the real estate had been first offered at public tax sale and he had made and filed with the county clerk his report of such public tax sale; and a private tax sale made without the treasurer having first complied with this requirement of the revenue law was an invalid sale, and the purchaser thereat, if he finally obtained a tax deed based on the certificate of purchase, would not acquire a legal title to the real estate if the deed was in all other respects valid. But notwithstanding the private tax sale was invalid because the treasurer had not filed his report of the public tax sale, the effect of the private tax sale was to transfer to the purchaser thereat the lien which the public had against the real estate for the taxes for which it was sold. By such sale the purchaser became subrogated to the rights and liens of the public against the real estate for the delinquent taxes thereon. (*Dillon v. Merriam*, 22 Neb. 151; *Adams v. Osgood*, 42 Neb. 450.)

2. A second argument of appellants is that the taxes for which the real estate was sold at private tax sale,

and the taxes subsequently paid thereon by the purchaser thereat, had been, at the time of such sale and payment, already paid by the appellants. This was one of the defenses interposed by appellants to this action, and the burden was upon them to establish this defense, and we think they failed to do so. It is not claimed by the appellants, as we understand it,—and if that is their claim the evidence does not sustain it,—that there were in fact no taxes due upon this real estate at the time it was sold, nor that the subsequent taxes, paid by the purchaser at the private tax sale, were not due against the property. But the claim of the appellants seems to be this: That in 1890, and again in 1892, they furnished to the tax collector a list of their property in Douglas county, requesting him to state what amount of money was necessary to pay the taxes thereon; that the tax collector did furnish them a statement showing what taxes were due upon the appellants' real estate, including the real estate involved in this action, and that the appellants then and there paid to the tax collector all that he claimed was due. The argument is that, if the treasurer, through neglect or mistake, failed to make a correct statement as to the amount of taxes due from the appellants on their property, and the appellants paid all the tax collector claimed, then the property could not afterwards be sold for unpaid taxes existing against it, which the treasurer had omitted from the statement of taxes furnished by him to the appellants. We do not think the public can be deprived of its revenue nor its lien for taxes against property because of the mistake of a tax collector in not collecting all that is due. If the property owner suffers any loss or damage by reason of the neglect of the tax collector in this respect, he may have a cause of action against the tax collector and his sureties for such damages. Taxes upon real estate are made a perpetual lien thereon, and the property cannot be relieved from this burden except by a payment of the taxes, or, in case it has been

sold, the neglect of the purchaser to bring an action to foreclose his lien until after the statute of limitations has run. (*Alexander v. Shaffer*, 38 Neb. 812; *Adams v. Osgood*, 42 Neb. 450; *Browne v. Finley*, 51 Neb. 465.) The failure then of the county treasurer to make to the appellants a correct statement of the amount of taxes due upon their real estate, coupled with the payment by the appellants of all taxes demanded by the tax collector, did not amount to a payment and discharge of the taxes for which the real estate was sold, but discharged the taxes on the appellants' property to the extent of money actually paid by them. (*Richards v. Hatfield*, 40 Neb. 879.)

3. A third argument is that the finding of the district court that the taxes for which the property was sold had been legally assessed and levied against the same is not sustained by sufficient evidence. We think it is.

4. Parts of the subsequent taxes paid by the purchaser at the private tax sale in 1893 were city of Omaha taxes for the year 1892. Another argument is that the finding of the district court that these city taxes of 1892 were legally assessed or levied against the property, and therefore a lien upon it, is unsupported by sufficient evidence. The appellee, to prove the legal levy and assessment of the 1892 city taxes, introduced in evidence an ordinance of the city of Omaha passed and approved February 9, 1892, and signed by the mayor February 10, 1892. This ordinance was entitled "An ordinance making the annual levy of taxes for the city of Omaha for the year 1892." The argument is that this ordinance did not prove anything, because it was not shown when or that the ordinance ever went into effect. The contention is that the ordinance, before it could take effect, must have been published in the official newspaper of the city of Omaha. Section 133, chapter 12*a*, Compiled Statutes 1895, the statute then in force governing the city of Omaha, is relied upon to sustain this contention. The section provides: "The council, at the commencement of each year, or as soon thereafter as may be, shall

designate some daily newspaper printed in the city as the official paper of the city, in which shall be published all general ordinances and all notices and other proceedings required by law or ordinance to be published." Conceding that the ordinance in question is a general ordinance, within the meaning of said statute, it is to be observed that the statute does not provide, either in express terms or by implication, that a general ordinance shall not be in force or take effect as such until it has been published in the official paper of the city; and it is not claimed that the ordinance in question, within the meaning of the statute just quoted, is a notice or proceeding required by any statute or ordinance to be published. Section 15 of said chapter confers power upon the mayor and council to pass, amend, or repeal any or all ordinances not repugnant to the constitution and laws of the state. And section 123 of said chapter provides: "All ordinances of the city shall be passed pursuant to such rules and regulations as the council may prescribe. * * * *Provided further*, That no ordinance granting any franchise shall be passed until at least two weeks shall have elapsed after its introduction, nor until after the same has been published in the official paper of the city." It would seem from this section that unless the ordinance passed grants a franchise, the city council might provide that it should take effect and be in force from and after its passage, and that the failure to publish a general ordinance in the official paper would not prevent such ordinance taking effect if it provided that it should be in force and take effect from and after its passage. By section 14 of the ordinance in question it was provided that this ordinance shall take effect and be in force from and after its passage. A second argument in support of the contention—the finding of the district court that the city taxes of 1892 had been legally assessed lacks sufficient evidence—is that the enactment of the ordinance in question was not proved. On the trial the appellee called the city

clerk as a witness, who testified, without objection, that the ordinance in question here was an ordinance making a levy of taxes for the city of Omaha for the year 1892, and that the ordinance was one or a part of the records of the office of the city clerk of the city of Omaha, and then introduced in evidence the original ordinance passed by the mayor and council of the city of Omaha. The argument of the appellants is that the enactment or existence of this ordinance could be proved, and proved only, in the manner provided by section 124 of said chapter 12*a*, which is as follows: "All ordinances of the city may be proven by the certificate of the clerk under the seal of the city, and when printed or published in a book or pamphlet form, and purporting to be published or printed by authority of the city council, shall be read and received in all courts and places without further proof." The ordinance in question, it appears, had not been printed or published in book or pamphlet form; at least there was no attempt to prove the ordinance by the introduction of such book or pamphlet. Nor was it attempted to prove the ordinance by the certificate of the city clerk under the seal of the city. But we do not understand that the existence or passage of an ordinance of a city of the metropolitan class can be proved only in the method provided by said section 124. Certainly, the original ordinance and the proceedings of the city council, showing its passage and approval, are as competent evidence that the ordinance was passed and approved as a certificate of the city clerk, under the seal of the city, that the ordinance attached to the certificate was a copy of the original ordinance on file in his office. We think that when a party desires to prove the existence of an ordinance of a city of the metropolitan class he may pursue the method pointed out by said section 124 or he may resort to common-law methods of proof. (*Clough v. State*, 7 Neb. 320.) The decree of the district court is

AFFIRMED.

# FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA V. HOME FIRE INSURANCE COMPANY OF OMAHA.

FILED APRIL 21, 1898. No. 8016.

1. **Insurance:** CANCELLATION OF POLICY: CONSTRUCTION OF STATUTE. Section 42, chapter 43, Compiled Statutes 1897, construed, and *held* to apply only to an insurance policy in force—a valid and subsisting contract between the insured and the insurer, and to have no reference to a contract of insurance which has ceased to exist by reason of the violation of the provisions thereof by the insured.
2. ———: ———: ACTION FOR UNEARNED PREMIUM. Where an insurer has rightfully declared an insurance contract at an end because of insured's obtaining additional insurance on the insured property without the consent of the first insurer, contrary to the provisions of the first policy, such insured has no cause of action against the insurer for the unearned premium.

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

*Lamb & Adams, A. W. Scott,* and *G. W. Shields,* for plaintiff in error.

*V. O. Strickler, contra.*

RAGAN, C.

From the pleadings in this case we ascertain the material facts thereof to be: In August, 1894, one Penner held an insurance policy issued by the Home Fire Insurance Company, hereinafter called the home company, agreeing to indemnify him for any loss that certain property described in the policy might sustain by reason of fire, lightning, or tornado prior to a specified date. This policy contained a provision that if Penner should thereafter procure any other insurance on the insured property without the knowledge and consent of the home company its contract of insurance should be void. Subsequently Penner, without the knowledge and consent of the home company, procured the Farmers Mutual

Insurance Company, hereinafter called the farmers company, to issue him a policy upon the same property insured by the home company, in and by which the farmers company agreed to indemnify him for any loss which the insured property might sustain by reason of fire, lightning, or tornado within a time specified. In payment, or in part payment, of the premium charged by the farmers company Penner assigned, or attempted to assign, to it the unearned premium which he claimed the home company owed him on the policy issued by it, and authorized the farmers company to obtain from the home company a cancellation of its policy and collect from it the unearned premium thereon. The home company refused to pay to the farmers company the unearned premium of the Penner policy, and thereupon the farmers company sued the home company in the district court of Douglas county to recover such premium. A motion for judgment on the pleadings was filed in the district court, by it sustained, and the farmers company's action dismissed, to reverse which it has filed here a petition in error.

At the time the Penner policy was issued section 42, chapter 43, Compiled Statutes 1897, was in force and that section provides that any insurance company transacting business in this state "shall cancel any policy of insurance hereafter issued or renewed, at any time, by request of the party insured, or his legal representative, and shall return to the said party, or his representative as aforesaid, the net amount of premium received by the company, after deducting the actual compensation of the agent or solicitor for securing the issue of said policy, and also deducting the customary short-rate premium for the expired time of the full term for which said policy was issued or renewed, anything in the policy to the contrary notwithstanding." This statute was as much a part of the Penner policy as if it had been actually written or incorporated therein. The farmers company, by taking an assignment from

Penner of the unearned premium of his policy issued by the home company, acquired the same right to collect from the home company such unearned premium as Penner himself had. The inquiry then is could Penner himself, under the facts of this case, have maintained this action against the home company and have recovered a judgment against it for the unearned premium on the policy issued by it? We do not think he could. The fact that Penner procured additional insurance upon the property insured by the home company, without the knowledge and consent of that company, did not render the home company's policy absolutely void, but voidable at its election. If it saw fit to do so, it might have waived its right to insist upon the forfeiture of the policy because of Penner's violation of its terms, and it might have ratified his taking out additional insurance. (*Billings v. German Ins. Co.*, 34 Neb. 502; *Hughes v. Insurance Co. of N. A.*, 40 Neb. 626; *Eagle Fire Co. of N. Y. v. Globe Loan & Trust Co.*, 44 Neb. 380; *Home Fire Ins. Co. of Omaha v. Hammang*, 44 Neb. 566.)

But the home company had the right, upon ascertaining that Penner had procured additional insurance upon the property which it had insured, to treat that policy as void because of Penner's violation of its provisions, and when it ascertained that Penner had procured additional insurance, it did exercise its right to consider the contract of insurance with Penner at an end; but Penner's violation of his insurance contract did not invest him with a right of action against the home company to recover the premium which he had paid the company therefor, or any part of that premium. The contract of insurance did not provide that if the insurer declared it to be at an end because of Penner's violation of its provisions in procuring additional insurance on the insured property without the consent of the home company that it would repay Penner the unearned premium; nor is this the meaning of the statute constructively incorporated into and made a part of the policy.

The statute indeed makes it the duty of an insurer, upon the request of the insured or his legal representative, to cancel an insurance policy and return to the insured the unearned premium, but the statute deals with a policy in force—a valid and subsisting contract between the insured and the insurer. It has no reference to a contract of insurance which has ceased to exist by reason of the violation of the provisions thereof by the insured. (*Colby v. Cedar Rapids Ins. Co.*, 66 Ia. 577, 24 N. W. Rep. 54.) Since Penner could not have maintained this action against the home company, the farmers company could not maintain it. The judgment of the district court is

AFFIRMED.

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## CHARTER GAS-ENGINE COMPANY V. COLERIDGE STATE BANK ET AL.

FILED APRIL 21, 1898. No. 8048.

1. **Conditional Sales**: WARRANTY. The contract between the parties, set out in the opinion, construed, and *held* not one of absolute sale of property accompanied by the warranty of the vendor as to the qualities of the property, but one of conditional sale, the qualities of the property being of the essence of the contract, and the establishment of their existence a condition precedent to the completion of the sale.
2. ——: ——: EVIDENCE: REVIEW. Evidence examined, and *held* to sustain the finding of the jury (1) that the conditions precedent provided for by the contract had never been fulfilled, and that the vendee refused to accept the property conditionally sold him for that reason; (2) that the vendee had not waived the performance of the conditions precedent provided for by the contract.

ERROR from the district court of Cedar county. Tried below before NORRIS, J. *Affirmed.*

*John Bridenbaugh*, for plaintiff in error.

*J. C. Engelman* and *Miller & Ready, contra.*

RAGAN, C.

The Charter Gas-Engine Company of Sterling, Illinois, wrote a letter to W. M. Shook at Coleridge, Nebraska, in which it stated: "We will furnish you a No. 6 Charter gas engine, thirty-six indicated, twenty-five actual, horse-power, for $1,250. * * * We guaranty that the Charter does not use to exceed one gallon of gasoline in ten hours to each indicated horse-power doing full work, and when part work is done the consumption is in proportion. No settlement is asked for from responsible parties until the engine is running and meets our claims." In response to this Shook sent the engine company the following letter: "You offer me No. 6 Charter gas engine for $1,250, and I now make you this proposition: I will give you $1,250 for a No. 6 Charter gas engine. You deliver it at Coleridge, Nebraska, and give me sixty days' trial. If at the end of sixty days it performs as you guaranty, I will pay cash. I deposit at the Coleridge State Bank the sum of $1,250 immediately on acceptance of this order, subject to your order, provided the engine comes up to guaranty." Under date of August 5, 1892, the engine company responded to Shook's letter as follows: "We accept your proposition of $1,250 for No. 6 Charter, thirty-six indicated, twenty-five actual, horse-power, on cars Coleridge, Nebraska. You to deposit at the Coleridge State Bank the sum of $1,250 on receipt of this acceptance of your order, and to have sixty days' trial of engine to see that it meets our guaranty." Shook deposited the $1,250 in the Coleridge State Bank, to be paid to the engine company in case it should fulfill the requirements of the contract, and the engine company shipped the engine to Coleridge. Shook took possession of it, put it up, and began using it about September 1, 1892. Shook retained possession of the engine for more than sixty days after he received it, and while it was in his possession it was destroyed by fire. The engine company brought this suit against the bank

in the district court of Cedar county to recover the price of the engine deposited with it by Shook. The bank, in its answer, interpleaded Shook, disclaimed any interest in the money in its hands, and offered to pay it to whomsoever the court should direct. Shook was brought into the case and filed an answer, in which he set out the contract between himself and the engine company under which he came into possession of the engine, and interposed as a defense to the action that the engine did not come up to the requirements of the contract, in that it did not furnish the horse-power it was guarantied to furnish; that it used more gasoline than it was warranted to use, and in consequence of the failure of the engine to meet the requirements of the contract he had never accepted the same. He admitted that he retained possession of the engine more than sixty days after receiving it, but that he did so at the request of the engine company for the purpose of continuing the trial of the engine and for the purpose of determining if it would finally meet the requirements of the contract, and that while it was thus in his possession it was destroyed by fire, without any fault or negligence on his part. The trial resulted in a judgment awarding Shook the money in the bank and a judgment against the engine company for the freight on the engine from Illinois to Nebraska, which Shook had advanced for the engine company at its request. To review this judgment the engine company has filed a petition in error in this court.

1. The first question presented by the record is: What is the proper construction of the contract between Shook and the engine company? Was the contract an actual sale and delivery of the engine, accompanied by the vendor's warranty that it would meet certain requirements, or was the contract one of conditional sale, the sale to become effective only if, after trial of the engine, it met the requirements of the vendor's warranty? We do not think this contract was one of an absolute sale and delivery of the engine, accompanied by the warranty

of the vendor that the engine would come up to certain requirements, and that in case it failed to do so, the vendee might rescind the contract and return the engine or retain it and sue the vendor for damages. This engine was ordered by Shook for a specific purpose to perform a specific work, namely, the operation of mill machinery. If the engine, after being tried, met the requirements of the contract under which it was delivered to Shook, then it was a sale; if not, it was no sale. These conditions of the contract, that the engine should develop a certain horse-power and in so doing consume a certain amount of specified fuel, were of the essence of the contract; were conditions precedent to the completion of the sale; and if the engine, upon trial, did not meet the conditions of the contract, Shook was under no obligation to accept the engine. (*Jones v. United States*, 96 U. S. 24; *Pope v. Allis*, 115 U. S. 363; Benjamin, Sales [2d ed.] sec. 565.)

2. The second question presented by the record is the sufficiency of the evidence to sustain the jury's finding that Shook's retention of the engine for more than sixty days after he received it was with the consent of the engine company and for the purpose of continuing the trial of the engine, endeavoring to make it come up to the requirements of the contract between Shook and the engine company; and that Shook had not waived the performance of the conditions precedent in pursuance of which the engine was delivered to him. We think the evidence shows beyond all question that this engine never developed twenty-five actual nor thirty-six indicated horse-power, and that it consumed more than one gallon of gasoline in ten hours to each indicated horse-power developed; and that Shook never accepted this engine and thus consummated the sale; and that he refused to accept it because the engine did not come up to the requirements of the contract. We think, also, that the evidence sustains the jury's finding, that Shook's possession of this engine for more than sixty days after he

received it was with the permission of the engine company and with its knowledge; that the engine had not met the requirements of the contract, and that Shook had not accepted it. After Shook had retained the engine for more than sixty days, and after the engine company knew that he had refused to accept it because of its failure to meet the requirements of the contract, the engine company sent an expert to Coleridge, who endeavored to make this engine do the work for which it was sold and which it was warranted to do. The evidence shows that he failed and that the engine failed at all times after that, although Shook seems to have been, in good faith and with the knowledge of the engine company, trying to make the engine meet the requirements of the contract. The finding of the jury that Shook, by retaining the engine more than sixty days, had not waived the conditions precedent and elected to accept the engine is sustained by the evidence. This case is distinguishable from *Moline, Milburn & Stoddard Co. v. Pereau*, 52 Neb. 577. In the Pereau case there was an absolute sale and delivery of the chattel accompanied by the vendor's warranty. In the case at bar the sale was to take effect—to be a sale—only if the engine on trial developed certain specified power and consumed only a certain amount of a specified fuel for each horse-power developed. These conditions precedent the engine did not meet; they were not waived by Shook and the sale never became absolute. The judgment of the district court is

AFFIRMED.

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## OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY V. MARILLA L. CROW, ADMINISTRATRIX.

FILED APRIL 21, 1898. No. 9365.

1. **Death by Wrongful Act: PETITION.** A petition under Lord Campbell's Act, which alleges that the deceased left a widow and next of kin, describing them, on whom the law confers the right to be

supported by the person killed, sufficiently avers pecuniary loss, and in that respect states a cause of action.

2. **Railroad Companies:** LIABILITY FOR NEGLIGENCE OF CONNECTING CARRIER. A railroad company which issues a through ticket, and so contracts to carry a passenger beyond its own terminus, constitutes the connecting carrier its agent for the purpose of performing the contract, and is liable for the negligence of such connecting carrier.

3. ———: DUTY TO SHIPPER WITH PASS: NEGLIGENCE. A shipper of live stock, who receives from the railroad company undertaking the transportation of such stock a free pass, to enable him to care for his stock in transit, assumes such risks and inconveniences as necessarily attend upon caring for such stock, and, modified accordingly, the liability of the railroad company to such shipper for personal injuries by him sustained by reason of the negligence of its employés is that of a common carrier for hire.

4. ———: ———: ———. Such a shipper does not assume the risk of negligence by the carrier, but only such dangers as result from his peculiar duties while the railroad is being carefully operated.

5. ———: ———: ———: FELLOW-SERVANTS. By accepting such a pass the shipper does not become the servant of the railroad company, and is not within the fellow-servant rule.

6. **Negligence:** PLEADING AND PROOF. A general averment of negligence is sufficient unless attacked by motion, and an issue framed by a traverse of such averment may be proved by evidence of any act within the general averment.

7. **Verdict for Plaintiff in Action for Death by Wrongful Act:** INSTRUCTIONS. Evidence *held* sufficient to sustain the verdict, and instructions found to have been correctly given and refused.

8. **Special Findings:** DISCRETION OF COURT. The submitting to the jury of special interrogatories is a matter resting in the discretion of the trial court.

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

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

*Reese & Gilkeson* and *Charles A. Munn, contra.*

IRVINE, C.

This was an action by Marilla L. Crow, administratrix of the estate of Jonathan S. Crow, deceased, against the

Omaha & Republican Valley Railway Company, to recover damages arising from the death of plaintiff's intestate alleged to have been caused by the negligence of the defendant. From an adverse judgment the defendant once before prosecuted error proceedings to this court, and the judgment was reversed for error in the instructions. (*Omaha & R. V. R. Co. v. Crow*, 47 Neb. 84.) Another trial resulted in another verdict for the plaintiff, and from a judgment thereon the defendant again prosecutes error. In the former opinion will be found a statement of facts, substantially in accordance with the facts elicited on the last trial. This time, however, the defendant introduced evidence in some respects contradicting or modifying the effect of plaintiff's evidence. Thus the evidence now makes it quite certain that a headlight was burning at the rear of the locomotive which ran over Crow, but the fact remains that the light therefrom emitted does not seem to have been sufficient to attract the attention of any of the witnesses. Moreover, the admissions of facts with reference to the capacity of the plaintiff and the measure of damages were not made at the last trial, and these were issues contested by proof and submitted to the jury. There are 111 assignments of error, most of which are separately discussed in the very voluminous briefs. In several instances a group of these assignments really presents a single question of law. In a few instances the assignment receives no support from the record; in others the question presented is a subordinate question of fact, of no general interest or importance, or the ruling complained of, if erroneous, was clearly not prejudicial. In order to avoid an unjustifiable expansion of the opinion it is necessary to pass over many of these assignments without special reference thereto. They have all, nevertheless, been considered.

At the beginning of the trial the defendant objected to the introduction of any evidence, on the ground that the petition did not state a cause of action. The over-

ruling of this objection is assigned as error. The specific objection made to the petition is that it does not show that the next of kin sustained any pecuniary injury from Crow's death. The petition alleges that Crow left a widow and several children, naming them and stating their ages. Six of them are minors. Since the filing of the briefs in this case the court has had occasion to investigate the question thus presented and to review the former decisions on the subject; and it has been held that when the petition discloses that the deceased left a widow, or next of kin, as minor children, in whose favor the law devolved upon him a legal obligation for their support, such facts are sufficient to raise a presumption of pecuniary loss because of his death, and it is not, in such case, necessary to plead any facts showing special damage. (*City of Friend v. Burleigh*, 53 Neb. 674.) It is true that it is not alleged in this petition, as it was in the case cited, that the deceased was of ability to perform that duty, but it will be presumed that a man will to the extent of his ability perform a duty of that character; it will be presumed that he has some ability to work; and the extent to which he does or can perform the duty is not a matter going to the sufficiency of the petition but to the proof of damages.

For several reasons it is urged that the evidence does not sustain the verdict, and the arguments under this head are of such a character that their discussion disposes of most of the assignments of error relating to the instructions and to rulings on the admission of evidence. We shall, therefore, ask counsel to accept what is said under this head, so far as applicable, as deciding these more special assignments, without always referring to them specifically.

It is said that the evidence conclusively shows that the injury occurred on the line of a connecting carrier, after the deceased had reached the terminus of defendant's road, and if it was caused by the negligence of any one, it was that of the servants of the connecting car-

rier. The evidence discloses on this subject that the defendant company was operating a line of railroad from Ord, where the deceased began his journey, to Grand Island, where it connected with the lines of the Union Pacific Railway Company. The two roads were owned by different companies, and, according to witnesses for the defendant, they were operated separately, with no relationship closer than an arrangement for the interchange of business. The ticket issued to Crow was headed "Union Pacific System and branches" and in no other way indicated by what corporation it was issued. The same was true of the written contract for the transportation of the live stock which Crow was accompanying. The ticket was for a continuous passage from Ord to South Omaha, and the contract was for the transportation of the stock to South Omaha. In no way was the contract restricted to the transportation of either passenger or cattle to the end of defendant's line. It was a through contract. Under the facts the case was essentially like that of *Chollette v. Omaha & R. V. R. Co.*, 26 Neb. 169, and *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578, holding the initial carrier liable for the negligence of a connecting carrier through whose agency the contract for through transportation is being performed. In *Fremont, E. & M. V. R. Co. v. Waters*, 50 Neb. 592, cited by the defendant, the carrier had carefully restricted itself to agreeing to carry the goods to the end of its own line and there deliver to a connecting carrier named in the contract. There was no contract to carry the goods to their destination and no through consignment. That case is, therefore, in no sense applicable. The instruction on this point, bitterly assailed in the brief, is in accordance with the law as just stated, but includes the additional statement to the jury that if the deceased procured the ticket at the station of the defendant company, and if the contract was for carriage over the defendant's road and connecting lines, then the contract would be as binding on the defendant as if made in its

name. As the ticket was not issued in the name of the defendant company, and especially as there was evidence to show that "Union Pacific System" was merely a sort of trade mark, to indicate a congeries of roads having joint traffic arrangements, this part of the instruction was eminently proper.

It is next argued that there was no evidence of negligence on the part either of the defendant or the connecting carrier, and that the evidence of contributory negligence was conclusive. This presents also a question argued more specifically with reference to certain instructions—that is, the measure of the defendant's duty. On the former hearing it was held that one who is being transported over a line of railroad on what has been called a "shipper's ticket" is not a passenger in such sense as to render applicable to him all the rules governing the transportation of passengers on passenger trains. Such a person is charged with the care of his live stock while in transit. He must ride on the train with the animals. He must care for them en route, and in various ways subject himself to perils not incident to ordinary travel. To the extent that such requirements interfere with the operation of ordinary rules of liability, the duty of the carrier is accordingly modified, and no further. (*Omaha & R. V. R. Co. v. Crow*, 47 Neb. 84; *Missouri P. R. Co. v. Tietken*, 49 Neb. 130.) The statute fixing the liability of carriers to ordinary passengers is, from the nature of the case, not applicable; but, subject to the different conditions reasonably arising from the special arrangements and duties created by such a contract, the common law as to carriers of passengers applies. The carrier, subject to such modifications, is still bound to the exercise of the highest degree of care of which human foresight is capable; and contributory negligence is a defense. The difference between such a case and the ordinary one of a passenger affects also the latter question. The duties imposed on the passenger, of riding on a freight train and caring for his stock, excuse conduct

which would be grossly negligent on the part of a passenger on a passenger train. The evidence tends to show that no arrangements were made by the railroad company for notifying shippers when the trains were about to start. It was necessary, therefore, for the shippers to remain close to the trains while they were at rest; and this train was standing in a large railroad yard with many tracks therein, lying close together. The deceased, with three other shippers, was standing beside the rear car of their train, where the caboose was about to be attached, and which caboose they expected to board as soon as it should be attached. No other place was provided for them, and no other place was available without their incurring the danger of having the train leave before they could board it. The employés in the yard knew that such was the condition of affairs when stock trains were being made up, and they knew this particular train was being made up. The engineer testified that there were from four to fifteen stockmen alongside the trains every night. The yardmaster was aboard the switch engine which ran over Crow and actually saw these four men standing beside the track before the accident happened. The tracks were only eight feet apart. The stock cars extended at least twenty inches beyond the rail, and the foot-board on the tender which struck Crow extended still farther. This left very little space where men could stand with safety. The night was wet and dark. The engine, after pushing a way car upon a side-track east of where the men were standing, ran toward the west and a short distance beyond them. It then stopped and immediately backed to the eastward again, neither sounding the whistle nor ringing the bell before or while so doing. Negligence was pleaded generally, and that is sufficient unless the petition be attacked on that ground by motion. (*Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456.) Therefore, instead of plaintiff's not being permitted to prove any negligence, as defendant argues, she was, on the contrary, entitled to

prove every act of negligence which would fall within the general averment. We think that in the manner of handling these trains and compelling the shippers to stand in the open yards, and in the backing of the engine without any warning, with knowledge that shippers customarily stood at that point, and with actual knowledge by the man in charge of the movements that these men were there, there is found ample to sustain the finding. It is said that there was no street crossing near and that there was, therefore, no duty imposed upon the railroad of ringing a bell or sounding a whistle; but the statute on that subject is not the only law. The bell and whistle are not designed solely for use at road crossings. It was a question of fact whether one or both of them should have been used as a warning under the circumstances of this case. It is also said that the engineer in quickly reversing his engine could not sound the whistle, and that the fireman was engaged in shoveling coal and could not ring the bell. But if such a signal was demanded by prudence, time should have been taken to give the signal. Again it is said that it is not customary to give a signal under such circumstances; but a custom to be negligent is no defense. An effort was made to show whether or not the engineer knew of an ordinance of the city of Grand Island forbidding the sounding of whistles in the railroad yards. Error is assigned on the exclusion of that evidence, but no offer of proof was made, and in any event the engineer's knowledge of such an ordinance would be immaterial. No effort was made to prove such an ordinance, and if one existed and was valid, it would not excuse the failure to give some other warning, as by ringing the bell. It is also argued that the proof shows that an engine in stopping and in starting, as did this one, makes several varieties of noise of its own accord and that such noise was a sufficient warning. But it must be remembered that there is no question here of ignorance by the deceased of the presence of the engine.

He knew it had just passed him. What it seems that he did not know was that immediately thereafter it had been reversed and was again approaching. It is not shown that he was sufficiently familiar with locomotives to learn that fact from the noises it emitted. No such technical knowledge can be presumed.

What has been said in a manner answers the arguments as to the conclusive character of the evidence of contributory negligence. Crow was where he had a right to be and where duty compelled him to be. The night was dark, and the headlight on the tender attracted the attention of no living witness. It evidently did not attract his. The space was narrow. He did not step upon the track, but only so near it that he was struck by the projecting foot-board. He had no warning of the engine's approach. It was for the jury to say whether or not his conduct was negligent. A finding either way might be sustained.

The defendant contends that the danger Crow incurred was a risk assumed by the special circumstances of his journey. But that risk extended only to those dangers incident to the requirements of his duties while being transported in such a manner, and while the railroad was being operated with due care. He did not assume the dangers arising from the negligence of defendant's employés. The argument on this point, that by the requirement that he should care for his own stock in transit he became a *quasi*-servant of the defendant and subject to the fellow-servant rule, is obviously unsound. The special contract, by its terms, exempted the railroad from liability for the negligence of its servants. It was held on the former hearing that the contract was, in that respect, contrary to public policy, and we are entirely satisfied with that conclusion.

Complaint is made of some of the instructions as to negligence and contributory negligence on the ground that they group certain facts and omit others essential to a proper consideration of the issues. This method

of charging the jury has been frequently criticised, and in the former opinion herein it was said that the utmost to be permitted in that line is to state what facts may be considered in determining the issue. Even then there is danger of omitting some essential consideration. Here, however, the danger was avoided by adding to the specified facts that all other facts in evidence throwing light on the issue should be regarded. There was nothing in the instructions on this point that can be deemed prejudicial to the defendant.

It was charged that the deceased was bound to the exercise of ordinary care, and that was defined as such care as "an ordinarily prudent and cautious person would have exercised under like circumstances." Complaint is made of this because of the use of an adverb instead of an adjective. It is said that the rule should have been stated with reference to the conduct of a "person of ordinary prudence;" that an "ordinarily prudent" man may at times be very negligent, and that the jury might have thought that this was such an occasion. We hardly think that the jury was composed of such purists. To the "ordinary mind," acting "ordinarily," the two phrases convey the same meaning.

The court refused to give forty instructions asked by the defendant. These stated many correct principles of law, but these were given in substance by the court of its own motion. They also stated other rules inconsistent with the doctrines we have just announced in dealing with the evidence. These were properly refused for that reason. Some stating correct principles were properly refused because of their exceedingly argumentative character, and their infringing upon the jury's right to determine the facts.

The defendant requested the court to submit to the jury fifty-five special interrogatories. It has often been held that the submitting of such interrogatories for a special verdict is in the discretion of the trial court. There was certainly no abuse of discretion in refusing this request.

For reasons stated at the commencement it is not practicable to discuss every assignment of error. The foregoing covers the more salient points of the argument. We find no prejudicial error in the record.

AFFIRMED.

HARRISON, C. J., not sitting.

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AUGUST SUCKSTORF ET AL. V. WILLIAM H. BUTTERFIELD.

FILED APRIL 21, 1898. No. 8003.

1. **Replevin:** PLEADING AND PROOF. A plaintiff in replevin who pleads only a special ownership must prove such title as he pleads it, and cannot recover on proof of general ownership.
2. ——: ——. Therefore, where plaintiff asserts only such special ownership, the defendant may, to defeat the action, show that plaintiff's title is of a different character.

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

*Brome, Burnett & Jones* and *Douglas Cones*, for plaintiffs in error.

*Powers & Hays* and *W. W. Quivy, contra.*

IRVINE, C.

Butterfield, in October, 1891, sold 160 steers to one Perry, who gave his note for the purchase money, securing the same by chattel mortgage on the cattle. The cattle were bought in Knox county and were by Perry taken to Pierce county, where he contracted with one Tatgo to feed them during the winter. In the following spring Tatgo undertook to sell them in satisfaction of his lien as an agister. They were bought at the sale by one Dixon, and were then driven to the town of Pierce and a portion of them were placed in the pasture of

Suckstorf and Cones, in charge of the defendant Reimers. Butterfield had in the meantime appeared on the scene, and was asserting his right under the mortgage. Negotiations then took place which resulted in Butterfield's paying $750, Tatgo making some settlement with the purchaser, and agreeing to surrender the cattle to Butterfield. Accordingly an attempt was made to "cut out" from the herd of defendants the Tatgo cattle, and a number corresponding to the number placed there were delivered to Butterfield. Later Butterfield claimed that nineteen of his cattle remained in the defendant's possession, and brought this action in replevin to recover them. At the close of the evidence the court granted a peremptory instruction to find for the plaintiff. During the trial the defendants offered in evidence an affidavit and notice of sale, for the purpose of proving Tatgo's proceedings in enforcing his agister's lien. There was also offered a bill of sale purporting to convey the cattle from Dixon, the purchaser at the sale under the agister's lien, to Butterfield, together with proof that he had requested it to be executed and that it had been sent to him by mail. All this evidence was excluded. We think it should have been admitted. The petition asserted a special ownership in Butterfield by virtue of his chattel mortgage, and pleaded no other title. The evidence excluded tended to prove a sale under the agister's lien, which would have passed the mortgagor's interest at least, conceding that there was no evidence which tended to show that the interest of the mortgagee was subject to the lien of the agister. The further evidence offered tended to show that the mortgagee had purchased such interest as did pass under the sale, and that the title thus vested in him, he becoming the absolute owner, and ceasing to be merely the holder of a lien, the capacity in which he sought to recover. It has often been held that proof of a special interest under a chattel mortgage will not sustain a petition alleging a general ownership. (*Musser v. King*,

40 Neb. 892; *Randall v. Persons*, 42 Neb. 607; *Strahle v. First Nat. Bank*, 47 Neb. 319; *Robinson v. Kilpatrick-Koch Dry Goods Co.*, 50 Neb. 795.) In *Randall v. Persons, supra*, it was said: "A litigant cannot plead one thing and prove another. He cannot plead that he is the absolute owner of property, and satisfy such plea by proof that he simply has a lien upon it; nor can he plead that he is entitled to the possession of property by virtue of a lien upon it, and satisfy such plea by proving that he is the absolute owner of the property." (See, too, *Hayes v. Slobodny*, 54 Neb. 511.) These cases are, it will be observed, based on the rule that the *allegata et probata* must correspond, and the statute requiring plaintiff to plead whether he is the general or a special owner, and if the latter, then the nature of his ownership, he must prove his case as he pleads it and not otherwise. The evidence offered was material as tending to show that plaintiff's title was not special, under the mortgage, as he had pleaded it, but that it was general, by virtue of a purchase from Dixon, who had acquired the interest of the mortgagor. The plaintiff answers this argument by saying that it would be hard to convince the non-professional mind that it states a correct principle of law. It is not necessary to convince the non-professional mind. The professional mind is driven to that conclusion. The point is somewhat technical, but it is only by adhering to technicalities, in the true sense of the word,—that is, those things peculiar to the science or profession,—that any stable principles of law can be maintained. Usually it will be found that such rules have a sound and just reason for their existence, and that justice and equity are in the end better administered by observing them, than by departing from them to meet the exigencies of the supposed equities of a particular case.

REVERSED AND REMANDED.

## EDWARD T. STAPLES ET AL. V. ARLINGTON STATE BANK.

FILED APRIL 21, 1898. No. 8035.

**Continuance:** EXCEPTION TO RULING: REVIEW. To review an order denying a continuance it is necessary to take an exception to the ruling in the trial court.

ERROR from the district court of Washington county. Tried below before KEYSOR, J. *Affirmed.*

*Davis & Howell*, for plaintiffs in error.

*W. S. Cook* and *Frick & Dolezal, contra.*

IRVINE, C.

The plaintiffs in error complain in their briefs of only one ruling of the district court—the overruling of an application for a continuance. No exception was taken to the order complained of and it cannot, therefore, be reviewed. (*Coad v. Home Cattle Co.*, 32 Neb. 761.)

AFFIRMED.

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## HENRY KELSEY ET AL. V. AUGUST KLABUNDE.

FILED APRIL 21, 1898. No. 8043.

1. **Judicial Officers:** LIABILITY. A judicial officer acting within his jurisdiction and in a judicial capacity is not liable for such acts.
2. **False Imprisonment:** MINISTERIAL OFFICERS. A ministerial officer is not liable in an action for false imprisonment for the arrest of a person under a warrant regular on its face and issued by proper authority, where there is no abuse thereof in the manner of its execution.
3. **Justice of the Peace:** ARREST OF GARNISHEE: WARRANT. A justice of the peace has jurisdiction to issue a warrant for the arrest of a garnishee who, having been summoned, refuses to appear and answer. The failure to tender the garnishee his fee, if such failure excuses his failure to appear, is merely a defense to the contempt proceedings and does not render the issuing of the warrant void, or the justice civilly liable for having issued it.

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

*John T. Cathers* and *J. O. Detweiler*, for plaintiffs in error.

*J. J. O'Connor, contra.*

IRVINE, C.

This was an action for false imprisonment against Henry Kelsey, a justice of the peace, William Poppenhagen, a constable, and the sureties on their respective bonds, by August Klabunde. The plaintiff had judgment by virtue of a peremptory instruction to the jury.

One Tittenbach recovered judgment against Bernhard Klabunde and Ernst Klabunde before Justice Kelsey. It is suggested that it is not shown that the justice had jurisdiction of the case, but the transcript in evidence discloses that there was personal service of summons on both defendants. An execution on this judgment having been returned unsatisfied, an affidavit for a writ of garnishment was filed and a summons in garnishment issued against August Klabunde, the plaintiff herein. It is not suggested that there was any defect in the procedure to this point. The writ was served, but no fee was tendered the garnishee. The evidence is conflicting as to whether a fee was demanded. The writ was regularly returned, but the garnishee failed to appear. The justice issued an attachment and delivered it to Poppenhagen, who arrested plaintiff and brought him before the justice. The justice adjudged him to be in contempt for his refusal to appear and answer, and imposed a fine of $45 and directed that he be imprisoned until the fine should be paid. He was accordingly committed to jail and there confined until released on habeas corpus the following day.

The district judge evidently took the view that because no fee had been tendered the garnishee, he was

not compelled to appear, and that it followed therefrom that the subsequent acts of the justice were *coram non judice*. Accordingly this instruction was given: "The court instructs the jury as a matter of law that upon the facts in this case the plaintiff was not required to appear before the defendant Kelsey, his fees not having been tendered him, and the justice had no jurisdiction, in the absence of proof that his fees had been tendered him, to issue a *capias* or attachment for the arrest and detention of the plaintiff, and the arrest and detention of the plaintiff were unlawful and wrongful, and the plaintiff is entitled to recover of the defendants in this action such sum as the jury shall find from the evidence will compensate him for such unlawful arrest and detention (limited to compensation for the disgrace and injury to his reputation which followed) until he was released by habeas corpus proceedings, not to exceed, however, the sum of $500." This instruction was erroneous, if for no other reason, because it permitted a recovery for the arrest and detention prior to the order of commitment. By section 938 of the Code of Civil Procedure a justice of the peace, if the garnishee fail to appear and answer, may proceed against him by attachment, as for a contempt. By section 1097 a warrant of arrest may be issued by a justice against one charged with contempt, on which the person so charged shall be brought before the justice for a hearing. The justice, therefore, in issuing the warrant was acting within his jurisdiction. If the plaintiff was excused from appearing because his fees were not tendered him, that was a defense to the charge of contempt. It was not a matter on which the jurisdiction of the justice to inquire into the contempt depended, and which he must decide at his peril in advance of the proceedings. *A fortiori*, the constable was protected in obeying this writ, which was certainly fair on its face. It is conceded that a judicial officer is not civilly liable for judicial acts when proceeding within his jurisdiction, and a constable is not

liable for executing a writ fair on its face unless he executes it in an unlawful manner. In this aspect the case is governed by *Atwood v. Atwater*, 43 Neb. 147. The arrest and detention prior to the commitment were not of such a character as to permit a recovery, and the judgment must be reversed because damages therefor were permitted.

The question most discussed is whether the justice was liable for the subsequent imprisonment, it being conceded that the fine, for the non-payment of which plaintiff was imprisoned, was in excess of that which the justice might lawfully impose. The liability of the constable for executing the mittimus would depend upon whether or not the sentence was absolutely void. The liability of the justice would not be concluded by an affirmance of that proposition, but there would then be suggested the further question, not free from difficulty, whether an act of a judicial character in excess of the powers conferred by law creates the same liability as an act wholly without jurisdiction. As the defendants joined in their answer and in all subsequent steps, including the petition in error, we cannot consider the question as to their several liabilities, and no opinion is, therefore, expressed thereon.

REVERSED AND REMANDED.

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## D. B. ARMAGOST, SHERIFF, v. SAMUEL W. RISING.

FILED MAY 4, 1898. No. 7916.

1. **Fraudulent Conveyances: EVIDENCE.** In the trial of an action in which the *bona fides* of a transfer of property is assailed by the creditors of the transferor, his statements in relation to the transaction made subsequent to it may be received in evidence on the issue of his intent which accompanied and moved the transfer, also to show the significance or reason of his retention of possession of the property after the conveyance.

2. ———: ———: CROSS-EXAMINATION. In the cross-examination of witnesses who were parties to an alleged fraudulent transfer of property, during a trial in which the character of such transaction is of the issues, a great latitude will generally be allowed. (*Altschuler v. Coburn*, 38 Neb. 881.)

3. ———: ———: ———: Limitations of a cross-examination of the nature of the one above indicated, if calculated to prejudice the rights of the party complainant, may furnish grounds for the reversal of an adverse judgment unless it appears that no prejudice resulted therefrom.

4. **Replevin**: DAMAGES: PLEADING. For the plaintiff to recover special damages in an action of replevin there must be special pleas thereof.

ERROR from the district court of Butler county. Tried below before WHEELER, J. *Reversed.*

*Steele Bros.*, *W. S. McCoy*, *L. S. Hastings*, and *T. W. Day*, for plaintiff in error.

*Arthur J. Evans* and *Sheesley & Aldrich*, *contra.*

HARRISON, C. J.

It appears herein that D. W. Rising, on a date during the month of December, 1888, purchased a stock of general merchandise and business of location in Rising City, this state. Subsequent to the purchase—probably within or near thirty days thereafter—his father, S. W. Rising, defendant in error, became at least a nominal partner in the business venture and so continued, as the business ran its course, until on or about January 10, 1893, when, it is asserted, S. W. Rising severed his connection with the business and D. W. Rising became again the sole proprietor thereof. On July 27, 1893, the stock of merchandise and the accounts of various parties due D. W. Rising for purchases of goods were by bill of sale conveyed to S. W. Rising; the consideration, it is asserted, was composed of sums then each existent as an indebtedness of D. W. Rising to his father. D. W. Rising, his wife, and son remained in the store and conducted the business after the transfer as they had prior

thereto. It was of the evidence that they so remained pursuant to an employment by the father. Within a few days subsequent to the execution and delivery of the bill of sale, possession of the stock of goods was taken by the officers of the law by virtue of levies of execution and writs of attachment issued at the instance of various creditors of D. W. Rising, of whom there seems to have been quite a number. On November 27, 1893, this, an action of replevin, was instituted in the district court of Butler county for S. W. Rising, and in which he asserted ownership and right to possession of the stock of goods and obtained possession thereof under the writ. In a trial of the issues he was successful, and for the officer error proceedings have been prosecuted to this court.

The first assignment of error to which our attention is directed in the argument is in relation to the actions of the trial court, by which there were sustained objections to designated questions put to D. W. Rising during his cross-examination. A consideration of the matters presented by this assignment convinces us that the interrogatories were open to the objections interposed, and the trial court's actions in regard thereto entirely proper. In accordance with such conclusion the assignment must be overruled.

The second branch of the argument in the brief of counsel for plaintiff in error is also of complaint that objections were sustained to certain interrogatories propounded to D. W. Rising during his cross-examination. What occurred during the portions of the trial to which direct reference is here involved, the pertinency of the objections, and the force of the argument will, to some, at least, if not to a very considerable, extent, be gathered from a perusal of the following excerpts from the bill of exceptions:

"Q. I will ask you, Mr. Rising, if, on the 6th day of August, 1893, you did not have a conversation with T. W. Day on the porch of the hotel at Rising, Nebraska,

nobody being present except you and Day, in which conversation you asked Day if he thought the bill of sale you had given to your father would stick, and also whether Day thought, or asked Day whether he thought, it would have been better for you if you had not filed the bill of sale, but let your father take the stock of goods on the chattel mortgage, and didn't you further state in that conversation, or rather ask said Day, if he thought the bill of sale would stick if you really owed your father the amount stated in the bill of sale, and that you gave the bill of sale to protect yourself and your father? Didn't you so state at the time and place above mentioned?

"Objected to; immaterial, irrelevant and not proper cross-examination. Sustained. Defendant excepts."

"1160 Q. I will ask if, on or about the 9th day of October, at Jacob Way's father's, and not anybody there except you and Yordee, if you did not have a conversation with John C. Yordee in which you demanded payment of an account for $18.60, which Yordee owed for goods sold by you to him, before you sold out to your father, and if at that time and place you did not tell Yordee that you had to have the money due you, as you needed the money, and that if he could not pay the money, then that you should get his promissory note due one day after date, you saying to him that your attorney had advised you to take notes from all persons owing you and who could not pay the money, and to make the notes payable one day after date, so as to balance the books, and then if your creditors should demand the books you could give them up and the books would be balanced, and you would have the notes, and would be that much ahead any way? Did you or did you not make any statement like that in substance to Yordee at such time and place?

"Objected to; incompetent, immaterial, not proper cross-examination, and not within the issues. Sustained. Defendant excepts."

We will state here that immediately after possession of the property was obtained by S. W. Rising by virtue of the writ, seizure thereof, and execution and delivery to the officer of the undertaking in replevin herein, D. W. Rising, his wife, and son went into the store and took possession of the stock of goods, etc., and managed and conducted the business. This, it was testified by them and S. W. Rising, was for him and as his employés. The transfer from D. W. Rising, the son, to S. W. Rising, the father, was attacked by the creditors through and in the defense interposed for the plaintiff in error, the sheriff, who may be styled as their representative herein, as fraudulent and void as to creditors of D. W. Rising, as the main or dominant element or act of a combination or concerted arrangement between the father and son with intent to hinder, delay, and defraud the creditors of their just dues and demands. "A wide latitude will be generally allowed in the cross-examination of witnesses where the issue is fraud, especially of witnesses who are parties to the alleged fraudulent transaction." (*Altschuler v. Coburn*, 38 Neb. 881.) "It is customary to allow great latitude in the cross-examination of witnesses who are charged with being parties to a fraudulent transaction which is the subject of investigation, since it is manifest that such witnesses are interested in concealing every fact which will tend to expose the fraudulent character of their dealings." (8 Ency. Pl. & Pr. 111.)

The testimony sought to be elicited was material and relevant, since it would have borne directly on the issue of fraud in the transfer of the property, at least to the extent any interest of the witness D. W. Rising was elemental thereof. It was also applicable to the subject of the character and significance of the possession of the goods by the witness D. W. Rising at all times after the transfer, except when they were in the custody of the law or its officer. That in a litigation of issues of the nature involved in the present suit and with similar

attendant concurrent facts and circumstances such testimony has been adjudged competent, material, and relevant, see *Sloan v. Coburn*, 26 Neb. 607; *McDonald v. Bowman*, 40 Neb. 269; *Murch v. Swenson*, 42 N. W. Rep. [Minn.] 290; *White v. Woodruff*, 25 Neb. 797; *Hamburg v. Wood*, 18 S. W. Rep. [Tex.] 623; *Benjamin v. McElwaine-Richards Co.*, 37 N. E. Rep. [Ind.] 362; Wait, Fraudulent Conveyances 279. The questions were proper in cross-examination of one of the parties to the transfer which was attacked as fraudulent. (*Altschuler v. Coburn*, 38 Neb. 881.) As the questions were of matters of testimony competent, material, and relevant under and to the issues on trial, they were proper in laying the foundation for impeachment of the witness, if for no other purpose. It is true, as is stated in the objection to interrogatory No. 1160, that the matter of the book accounts, or their transfer, was not within or of the issues herein or not directly so, but their transfer was effected or evidenced by the bill of sale or the same instrument as the stock of goods, and, under the same facts and circumstances and statements relative to their sale, bore directly on the question of the intent in the transfer considered as a whole or relative to any portion or item thereof; hence such statements were competent, material, and relevant to the issues. After a careful review of the entire record, we cannot say that the limitations of the cross-examination were not prejudicial to the rights of the plaintiff in error and to an extent or degree which calls for a reversal of the judgment.

The allegation in the petition herein in relation to damages was the general one of detention of the property to the plaintiff's damage. There was no plea of special damages. Testimony was received of, and the court charged the jury that they might consider and allow, if proven, damages for injury to the goods while in the possession and care of the officer under the levies of the writs of attachment, also damages caused by the interruption of the plaintiff's business. These were special

damages and not recoverable unless specially pleaded; hence it was error to allow their consideration (*Whitney v. Levon*, 34 Neb. 443), but it would probably but call for an order for the remittitur of such sum as may have been accorded to the defendant in error by the jury, for either or both. Such order is not necessary, as the judgment must for other sufficient reasons be reversed.

We do not deem it essential at this time to notice the other assignments of error, and certainly deem it best not to discuss or comment upon the question of the sufficiency of the evidence to sustain the verdict, since the cause must be remanded for another trial.

REVERSED AND REMANDED.

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## GEORGE W. SIMS V. JAMES B. JONES.

FILED MAY 4, 1898. No. 8081.

1. **Growing Crops**: LEVY OF EXECUTION. In this state growing crops are personal property and subject to levy and sale to satisfy the indebtedness of the owner.
2. ——: ——: LANDLORD AND TENANT. Where land is leased and rent reserved in kind or share of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops on such land during the life of the lease, and the interest of either party is a leviable one.

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

*John S. Kirkpatrick* and *L. E. Kirkpatrick*, for plaintiff in error.

*Sullivan & Gutterson, contra.*

HARRISON, C. J.

The plaintiff herein alleged for cause of action that in a suit instituted in the county court of Custer county

against his debtor, Thompson Sims, the plaintiff procured to be issued a writ of attachment, which was delivered to the defendant in this cause, the sheriff of Custer county, who levied the writ on certain property of the said debtor of plaintiff of sufficient value to satisfy the claim of plaintiff as stated in the writ, and that through the subsequent abandonment of the levy by the officer the plaintiff was damaged in the amount sought to be recovered in the attachment suit. It appeared that the defendant in the last mentioned case was the owner of land in Custer county, which had been leased, the owner to receive as rent the one-third of the crops raised during the year, and that on about twenty-five acres of the land oats were sown and on ninety acres corn was planted and grown. The levy of the writ of attachment was alleged to have been on any interest the landlord possessed at the time in the crops. The oat crop had been cut and almost, if not all, stacked, but none threshed. The corn was standing in the field ungathered, whether matured or not does not appear, but the time of the levy would raise the presumption that the corn had not then ripened. The one-third of the oats were to be delivered to the owner of the land after threshing, and the one-third of the corn in the crib. In the district court a jury was waived, and of the issues there was a trial to the court, which resulted in a determination that the defendant in the attachment suit had no attachable interest in the crops at the time the levy was made, and judgment was rendered in favor of defendant in the case at bar.

Many cases hold that under such a contract as we have herein before outlined the tenant is the owner of the crops until the division is made, and the owner of the land acquires and has no interest therein until his stipulated portion is set apart to him. (*Rees v. Baker*, 4 G. Greene [Ia.] 461; *Alwood v. Ruckman*, 21 Ill. 200; *Woodruff v. Adams*, 5 Blackf. [Ind.] 318. See, also, portion of note to *Putnam v. Wise*, 37 Am. Dec. [N. Y.] 319.) And it has been held that the landlord of such a lease has no leviable

interest in the crops. (*Waltson v. Bryan*, 64 N. Car. 764; Shinn, Attachment & Garnishment sec. 32; *Howard County v. Kyte*, 69 Ia. 307.) On the other hand, it has been concluded that a landlord and tenant of a letting of land as herein involved are tenants in common of the crops. (See *Putnam v. Wise*, 1 Hill [N. Y.] 234, 37 Am. Dec. 309, and note thereto on pages 317, 318.) The interest of a tenant in common may be levied on and sold. (*Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Veach v. Adams*, 51 Cal. 611; *Branch v. Wiseman*, 51 Ind. 3.) That growing annual crops are personal property and subject to levy and sale as such for the satisfaction of the indebtedness of an owner has been recognized in this state, see *Johnson v. Walker*, 23 Neb. 736. (See, also, generally, 1 Freeman, Executions sec. 113, and citations in support of the text.) It also seems to be indicated by the section 530 of the Code of Civil Procedure in relation to exemptions, wherein it states: "No property hereinafter mentioned shall be liable to attachment, execution, or sale, on any final process issued from any court in this state, against any person being a resident of this state and the head of a family. * * * The provisions for the debtor and his family necessary for six months' support, either provided or growing, or both, and fuel necessary for six months." In the chapter of the Code of Civil Procedure relative to executions for the enforcement of judgments rendered by a justice of the peace is the following: "In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied on or attached, by virtue of any execution, attachment, or other process against the landlord or tenant, the interest of such landlord or tenant, against whom such process did not issue, shall not be affected thereby." (Code of Civil Procedure, sec. 1073.) This seems to be a direct recognition by the legislature of the doctrine that a landlord and tenant are tenants in common of growing crops where rent is reserved in a share of the crops and the

interest of either subject to levy and sale for the payment of debts of the respective parties.

The supreme court of Kansas, in an opinion in the case of *Polley v. Johnson*, 23 L. R. A. [Kan.] 258, quote paragraph 5008 of the Code of that state (part of procedure applicable in actions before justices of the peace), as follows: "In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied on or attached by virtue of any execution, attachment, or other process against the landlord or tenant, the interest of such landlord or tenant, against whom such process was not issued, shall not be affected thereby; but the same may be sold, subject to the claim or interest of the landlord or tenant against whom such process did not issue;" and observe in relation to this and some other paragraphs considered in the same connection that "While these sections do not reach the case we have under consideration, we think they show a recognition of what we regard as the settled doctrine of the common law,—that such growing crops are personal property, subject to sale on execution for the debts of the owner; and were we to hold a different rule to apply in this case, the only class of debtors benefited thereby would be those owning both the soil and the crop, for the section of the justice's act just quoted renders the shares of landlord and tenant, where that relation exists, both subject to levy and sale." The question of a levy on the interest of a landlord or tenant in growing crops where rent is reserved in kind was not directly in issue, but the foregoing statement furnishes a very strong indication of what might be the conclusion of the court on the subject should it be presented. We feel bound to follow the very evident intention of the legislators, and must conclude that the landlord's interest in the crops was a leviable one; and it results that the judgment of the trial court must be reversed and the cause remanded.

REVERSED AND REMANDED.

# FIRST NATIONAL BANK OF SUTTON, APPELLEE, v. JOHANNA GROSSHANS ET AL., APPELLANTS.

FILED MAY 4, 1898. No. 8082.

1. Married Women: ACTION ON CONTRACT: BURDEN OF PROOF. In an action on the contract of a married woman, when the coverture is established, the burden is on the asserting party to show the liability of the wife—that the contract was with reference to or with intent to bind her separate property.
2. ———: SEPARATE PROPERTY. The evidence in the case at bar adjudged insufficient to show a contract effective in relation to the separate property of a married woman.

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

*Thomas Ryan* and *L. P. Crouch*, for appellants.

*Thomas H. Matters, contra.*

HARRISON, C. J.

In this action instituted in the district court of Clay county for the appellee, the bank, it was sought to obtain a decree that an instrument which was in form a deed of conveyance of real estate was in effect a mortgage. Its foreclosure was also prayed, that thereby satisfaction might be had of an indebtedness evidenced by a promissory note, the payment of which, it was asserted, was secured by what was pleaded as a mortgage. It was alleged of the note and its origin that the Grosshans had become indebted to one Peter Greiss in sums aggregating $800, and on September 1, 1893, executed and delivered to him the note pleaded in the action, as showing the indebtedness, the enforcement of the payment of which was sought herein. It was also stated that on September 1, 1893, "The said Peter Greiss, applied to this plaintiff for the purpose of discounting said note, and the defendants Johanna Grosshans, William Grosshans, Peter

Greiss, and Sophia Greiss, for the purpose of securing the payment of said note, at the request of the plaintiff, the defendant Johanna Grosshans then being the owner of lots 22, 23, and 24, in block 15, in the first addition to Sutton, Clay county, Nebraska, her husband, William Grosshans, defendant, made, acknowledged, and delivered to one M. L. Leubben, who was then and still is the cashier of the plaintiff, a deed conveying said lots to said M. L. Leubben, but in fact for and in behalf of the plaintiff and for the purpose of securing the indebtedness represented by said note, and the said Peter Greiss there and then, for the further purpose of further securing said note, together with his wife, Sophia Greiss, signed said deed of conveyance above described, and the said Peter Greiss there and then guarantied the payment of said note, as shown by the true and certified copy thereof, in words and figures following:

" 'For value received I hereby guaranty the payment of the within note, and waive demand, protest, and notice of non-payment thereof. PETER GREISS.'

"Fifth—And in consideration of the foregoing the plaintiff then and there discounted said note for said Peter Greiss, loaning him money thereon and extending him credit to the amount set forth in said note."

The property described in the deed was of record, and, in fact, of the estate of Henry and Elizabeth Hoffman, deceased, of whom Johanna Grosshans was one of the heirs. The estate was in process of administration, and the property was in possession of the administrator, and no distribution had been made at the time of the execution of the deed nor the commencement of this suit. The pleas for Johanna Grosshans were coverture, that the note was evidence of a debt of the husband, for the payment of which she was in no manner or degree liable; that for her signature to the note there was an entire lack of consideration; that it was not made with reference to her separate property, trade, or business, and neither she nor her separate property derived any benefit

therefrom. There was in each of the answers denials that the deed had been given as, or was in fact, a mortgage. In the district court there was a decree in favor of the bank, of which the following is an excerpt: "That on the 1st day of September, 1893, the said Johanna Grosshans and William Grosshans made, executed, and delivered to Peter Greiss their said promissory note for $800, as described in said plaintiff's petition, and that on the same day the said Peter Greiss discounted the said note and sold the same to the said plaintiff, and that the said Johanna Grosshans, being then the owner of lots 22, 23, and 24, in block 15, in the first addition to Sutton, Clay county, Nebraska, she, together with her husband, William Grosshans, for the purpose of aiding in the negotiation of said notes and to secure the said debt when it should become due, made, acknowledged, and delivered to M. L. Leubben, who was then the cashier of the bank of the plaintiff, a certain deed conveying the said lots above mentioned to the said M. L. Leubben, and while said deed was absolute in form it was made for the purpose of securing the indebtedness above stated and to be and operate as a mortgage for said purpose, and that for further securing said note the said Peter Greiss and Sophia Greiss, his wife, signed said deed of conveyance, above described, and the said Peter Greiss then and there guarantied the payment of said note as stated in said plaintiff's petition."

From the foregoing it is apparent that the decree was predicated on a finding of the truth of the facts alleged in the petition relative to the execution and delivery of the instrument in suit, the purposes of its creation, and the consideration therefor. It will no doubt have been noticed that the note was in terms payable to Peter Greiss, and the grantee named in the deed in question was M. L. Leubben, and there was no apparent connection between the two instruments. A careful examination of the evidence convinces us that it is wholly insufficient to sustain the finding to the extent it involves and ap-

plies to Johanna Grosshans, that she executed the deed as a mortgage to aid in the negotiation or sale of the note to the bank, or to secure the payment of the note to Peter Greiss, or to establish that the deed was executed by her as or for other than was disclosed by its face. After her coverture was shown, the burden was on the appellee to show the liability of the married woman—that the contract was entered into by her with the intention to bind her separate estate. (*Grand Island Banking Co. v. Wright*, 53 Neb. 574; *Stenger Benevolent Ass'n v. Stenger*, 54 Neb. 427; *State Nat. Bank of Lincoln v. Smith*, 55 Neb. 54.) This burden was not borne; the proof was not produced; hence the finding was erroneous and the decree based thereon must be reversed. With the issues as presented by the pleadings the evidence was insufficient to support the decree.

REVERSED AND REMANDED.

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## SARAH F. HEFFLEY V. ERNEST HUNGER.

FILED MAY 4, 1898. No. 8068.

1. **Fraudulent Conveyances:** BURDEN OF PROOF. If a mortgage of chattel property executed and delivered by one relative to another, ostensibly to secure the payment of a past due indebtedness, which, if effectual, will deprive creditors of the mortgagor of satisfaction of their just dues and claims, is attacked as fraudulent, it devolves upon the party who seeks to assert rights under and by virtue of it to establish the *bona fides* of the transaction evidenced by the instrument—not only that the debt alleged to have been secured was a true one, but that the other parts of the transaction were with an honest intent and in good faith.

2. **Review of Instructions:** HARMLESS ERROR. Objections to instructions considered, and *held* not available. If any errors were indicated, they were without prejudice to the rights of the complainant.

3. **Replevin:** VERDICT. The verdict in this, a replevin action, *held* sufficient.

4. **Fraudulent Chattel Mortgage.** Evidence determined sufficient to sustain the verdict.

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

The facts are stated in the opinion.

*M. M. Starr* and *Lamb, Adams & Scott*, for plaintiff in error:

When the existence of the debt was shown, and it was shown that the mortgage was given to secure that debt, then the burden was upon the defendant to show that the mortgage was fraudulent; and it was error to instruct the jury that that burden was upon the plaintiff. (*Hoey v. Pierron*, 30 N. W. Rep. [Wis.] 692.)

*Harwood, Ames & Pettis, contra.*

HARRISON, C. J.

Clarence I. Heffley was engaged in business as a merchant tailor in the city of Lincoln, and on August 11, 1893, executed in favor of his mother a chattel mortgage on all his business stock, fixtures, and tools, and two or three days subsequent to the execution of the mortgage delivered it to the attorney or agent for his mother in the city to which we have referred, she then being in another state. At a later date writs of attachment were obtained to issue by some creditors of the son and were placed in the hands of the defendant in error, then a constable, for service and were by him levied on the property described in the mortgage or a portion thereof. The plaintiff in error brought this, an action of replevin, to recover the possession of the property, and the main issue litigated was of the mortgage to the mother, whether it was *bona fide* or fraudulent. The jury by its verdict determined it to be the latter, and the judgment of the court was in accord with the verdict.

It is urged for plaintiff in error that the trial court

erred in paragraphs numbered 3 and 4 of its charge to the jury in its statements therein that it devolved on the plaintiff to show that the transaction of mortgage by the son to her was of honest intent and purpose and in all respects in good faith; and it is argued in this connection that the debt or a portion of it, for the payment of which the mortgage was in terms a security, was shown to have been a true indebtedness; that when this was done the burden of proof or the good-faith character of the transaction was no longer with the plaintiff, but shifted to the defendant, and it was then for him to establish by a preponderance of evidence that it was fraudulent. In support of the doctrine to which we have just referred, an opinion of the highest court of another state than this is cited, in which it is announced, but this we cannot follow. It is the rule of this court on this subject, in regard to transactions between relatives of the nature and effect as to creditors of the party whose conveyance is attacked, of the one herein in question, that it devolves on the party who asserts and relies thereon to establish the *bona fides* of the transaction in all particulars and elements inclusive of the indebtedness. (*Bartlett v. Cheesebrough*, 23 Neb. 767; *Plummer v. Rummel*, 26 Neb. 147; *Carson v. Stevens*, 40 Neb. 112; *Fisher v. Herron*, 22 Neb. 185; *White v. Woodruff*, 25 Neb. 803; *Steinkraus v. Korth*, 44 Neb. 777.) The paragraphs of the instructions were not open to objections but stated the proper rule; hence the assignments of error as to them must be overruled.

It is contended that the trial court erred in instruction numbered 7, or in a portion of it which contained the statement, "In this case it appears from the evidence and admissions of the plaintiff in open court that the mortgage under which the plaintiff claims was of a much greater amount than that actually due plaintiff from the mortgagor;" that this was not warranted by the testimony on the subject of the indebtedness of the son to the mother. While it possibly might have been better

to have avoided a positive assertion, such as the court made, yet it embodied the only reasonable conclusion which could be drawn from the entire evidence in regard to the matter of which the statement was made, and that it was so stated we cannot believe was prejudicial to the rights of the complainant.

Paragraph 6 of the charge to the jury was pertinent and applicable to the issues in view of the evidence adduced, and when read and construed in connection with the other instructions.

Of instruction numbered 8 it is complained that it was improper, in that it informed the jury that there was testimony which tended to show a certain designated fact. There was testimony of the nature and effect indicated by the statement, and there was no error in the use of the language employed in the connection in which it was used by the court.

Instruction numbered 11, of which complaint is made, was proper in view of all the testimony on the subject to which it related—the authority of the party therein named to act for the plaintiff in error in the transaction involved in this litigation.

It is contended that instruction 13 was erroneous. This instruction was one in relation to the form and substance of the verdict for defendant. It is also urged that the verdict was not in conformity to the requirements of the law. The verdict was as follows: "We, the jury, duly impaneled and sworn in the above entitled cause, do find that the right of property and right of possession of the property in controversy herein, at the time of the commencement of this action, was in the defendant, and we assess the present value of the defendant's interest in said property at the sum of $586.15. We also assess the damages sustained by said defendant by reason of the wrongful detention of said property at the sum of one cent." Whether paragraph 13 of the instructions was in all its statements and directions technically correct, we need not decide. It submitted to the jury the

question of the value of the property in controversy. It is true it told the jury to determine the present value, and it is insisted it should have been the value at the commencement of this action; but, if an error, this could not have prejudiced the rights of plaintiff in error, as it was established and undisputed that the value was considerably less at the time of the trial than at the commencement of the action; and, if the jury was influenced to any extent by this portion of the instruction, it must have resulted favorably to plaintiff in error. The jury returned a verdict in which the right of possession was determined in the defendant, and fixed the value of his interest at a stated sum which it is not contended was, and was not, in fact, in excess of the value of defendant's interest in the property. The verdict was in form and substance sufficient. (*Connelly v. Edgerton*, 22 Neb. 82; *Earle v. Burch*, 21 Neb. 711.) The value of defendant's interest as fixed by the jury did not exceed what that body was sustained, by the evidence, in finding was the value of the property.

It is also argued that the verdict was not supported by sufficient evidence. We do not deem it necessary to enter upon a discussion of the evidence in detail herein. We have examined it and must conclude that while a contrary verdict might not have been disturbed as without support in the evidence, there was sufficient thereof to sustain the one rendered, and it will be allowed to stand. The judgment of the district court is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE, V. JACOB KLEIN, TREASURER OF GAGE COUNTY, APPELLANT.

FILED MAY 4, 1898. NO. 9160.

**Counties:** TAXATION: LIMITATION. Approval of and adherence to the views expressed in a former opinion in this cause announced, the decree of the trial court reversed, and the action dismissed. (For prior decision see *Chicago, B. & Q. R. Co. v. Klein*, 52 Neb. 258.)

REHEARING of case reported in 52 Neb. 258. *Former decision sustained.*

*Samuel Rinaker*, *R. W. Sabin*, and *R. S. Bibb*, for appellant.

*Charles F. Manderson*, *E. R. Duffie*, *J. W. Deweese*, *James E. Kelby*, and *A. Hazlett*, *contra.*

HARRISON, C. J.

After the county of Gage had adopted and perfected township organization, in the regular course of affairs of the county and township governments, there were assessed by the county authorities on the property of the railway company certain taxes for county purposes, not in excess in the aggregate of fifteen mills on the dollar, or the maximum which they could assess. There had been for and in each of the townships in which there was situated property of the company an assessment, in the manner prescribed by law, of taxes on such property, not to exceed seven mills on the dollar of valuation, the limit provided by law. Aggregated, however, the township assessment and the county assessment exceeded fifteen mills on the dollar. The company denied the right of collection of the amount in excess of fifteen mills and instituted and prosecuted to a successful termination this action in the district court of said county

to restrain the county treasurer from the collection of such excess. The cause was by the treasurer appealed to this court, and, as the result of a hearing, the decree of the district court was reversed and the cause dismissed. (See opinion reported in 52 Neb. 258.) A motion for a rehearing on the part of the company was sustained and there have been a reargument and a second submission. We have again carefully examined and considered the points in controversy and are satisfied that the determinations of them announced in the former decision have in their support the sounder reasons than have or can be urged in favor of the contrary ones which we have been asked to adopt, and that the conclusions of the opinion to which we have referred were correct and right. The subjects involved and presented were so thoroughly reviewed in the prior decision that we deem it wholly unnecessary to again discuss them here. We approve and adhere to the views there expressed. It follows that the decree of the lower court is reversed and the action dismissed.

JUDGMENT ACCORDINGLY.

NORVAL, J., dissenting.

I dissent from the foregoing opinion. I adopt the views expressed by Brace, J., in delivering the judgment of the court in *State v. Missouri P. R. Co.*, 123 Mo. 72.

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FARMERS & MERCHANTS STATE BANK OF BEATRICE, APPELLEE, V. JAMES THORNBURG, APPELLANT, ET AL.

FILED MAY 4, 1898. NO. 8083.

**Vendor and Vendee:** CONTRACTS: STRICT FORECLOSURE. A decree of strict foreclosure of contracts of sale and purchase of real estate or forfeiture of the vendee's rights thereunder will be accorded only by reason of the existence of peculiar and special facts and circumstances. Applications for relief of the nature just indi-

cated are addressed to the sound legal discretion of the court and will be granted if it would be inequitable and unjust to refuse them. The rule announced in *Harrington v. Birdsall*, 38 Neb. 176, approved and applied.

APPEAL from the district court of Gage county. Heard below before BABCOCK, J. *Reversed.*

*E. O. Kretsinger*, for appellant.

*L. W. Colby* and *George A. Murphy, contra.*

HARRISON, C. J.

On June 6, 1892, the appellant James Thornburg purchased of J. R. Sherman a lot in the city of Beatrice and agreed to pay therefor the sum of $2,000, of which he then paid $200, and contracted to pay of the principal the sum of $15 on the first of each and every succeeding month thereafter and $6 as interest, which made the total of the amounts to be paid monthly $21, this to continue until the payments should operate an extinguishment of one-half the agreed indebtedness and the interest, when a deed was to be executed and delivered to the purchaser, he to execute and deliver to the grantor a mortgage on the real estate to secure the payment of the balance of the purchase price. The contract of sale and purchase was evidenced by a written instrument in which the terms were fully stated, and it was further provided that the purchaser should pay all taxes assessed against the lot subsequent to the date of the contract of sale, and that insurance should be obtained on any buildings on the premises and continued during the existence of the agreement of purchase, the same to be for the benefit of the vendor, such fact to appear by clause in the policy to that effect. It was also of the agreement that time as to its stipulated payments was of its essence, and any default in them, or other conditions or requirements of performance of acts on the part of the purchaser, should work a forfeiture of all his rights in the premises; and

to further enforce the agreement the vendor, at his election, might proceed to recover possession of the property. On December 22, 1894, the appellee filed its petition in the district court of Gage county, in which it pleaded that, as assignee of the vendor, it was owner of the contract between James Thornburg and J. R. Sherman and entitled to demand its enforcement, and also that the legal title to the real estate had been duly conveyed to the appellee; that there had been paid by the vendee, in accordance with the terms of the agreement, the cash payment of $200 at the inception of the sale and the required monthly installments from July 1, 1892 to June 19, 1894, inclusive, and the interest payments for the months of July, August, and September, 1894, and a failure to pay any other or further of the installments of principal or interest. It was further alleged that there had been a failure on the part of the vendee to comply with the provisions of the contract relative to insurance and payment of taxes. A forfeiture of appellant's rights under the contract was demanded, and that appellee be placed in possession of the property involved; or within the view of such an action as is frequently taken—that it is one of foreclosure as of a mortgage—the relief herein sought and accorded (for appellee was successful) may not inaptly be denominated a "strict foreclosure." The appellant admitted the contract and its provisions as pleaded by appellee, except in relation to insurance and taxes; as to these, and a failure to perform as alleged in the petition, there were on his part denials. He also pleaded and established by undisputed testimony that for the times of his delinquency in payments demanded by the letter of the contract occurrences which he was unable to control or shape differently had made it impossible for him to meet the demands of the agreement in accordance with its exact requirements; that any default on his part in a strict performance of the contract was not intentional, but could not have been otherwise. These matters, while probably not in and of themselves suffi-

cient to move a court to refuse the enforcement literally of the agreement, were to be considered in connection with other facts, if any proved, which were to be influential in the final adjudication of the questions in litigation. It was also pleaded for appellant that the property was of the value of at least $2,000.

In the opinion in the case of *Harrington v. Birdsall*, 38 Neb. 176, wherein a decree of strict foreclosure or of forfeiture of right under a contract of sale of land was affirmed, it was stated: "The remedy by strict foreclosure of land contracts cannot be resorted to in all cases. The remedy being a harsh one, courts of equity will decree a strict foreclosure only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable to refuse them. If the vendee or purchaser has not been guilty of gross laches, nor unreasonably negligent in performing the contract, a strict foreclosure should be refused on the ground that it would be unjust, even though the vendee may have been slightly in default in making of a payment. So, for the same reason, a strict foreclosure will be denied where the premises have greatly increased in value since the sale, or where the amount of unpaid purchase money is much less than the value of the property. On the other hand, if the vendee, without sufficient excuse, fails to make his payments according to the stipulations of his contract, and for an unreasonable time remains in default, the vendor may have a strict foreclosure of the contract for the sale and purchase of the land, unless some principle of equity would be thereby violated." In the syllabus this appears:

"Courts of equity will decree a strict foreclosure [of land contracts] only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable and unjust to refuse them."

Within a proper application of the foregoing doctrine, and to which we again give our unqualified approval, the decree herein was inequitable and not warranted by the facts. The appellant had paid at the execution of the contract $200 of the agreed purchase price of the property, and for each of twenty-four succeeding months had paid $15 on balance of the principal sum or price and $6 as interest, and for each of three more months had made the interest payment of $6; had paid of the principal $560 and of interest $162, or in the aggregate $722; had been but a very short time in default when this action was commenced, and this not intentionally, but unavoidably.

At the time of the trial some of the witnesses placed the value of the property at from $1,200 to $1,500, and one at about $2,000, from which it may be said that it had possibly depreciated in value considerably since the time of the sale, with a conflict of the testimony as to whether this was a fact or whether it was worth any appreciable sum less than when purchased by appellant. It is true that it was shown that the appellant had not paid the taxes and had not at all times kept the buildings of the property insured, but, all the facts and circumstances considered, and in this connection the reasons shown for the appellant's failure to strictly comply with the contract, there were not presented sufficient grounds for a decree of forfeiture or strict foreclosure. The decree of the district court is reversed and the cause remanded with leave to the appellee to amend the prayer of the petition to ask an ordinary foreclosure, which would have been and will be proper on the facts as shown. If this is not desired, then a dismissal of the action will be correct.

JUDGMENT ACCORDINGLY.

RODNEY K. JOHNSON V. JOSEPH B. BARTEK, SHERIFF.

FILED MAY 4, 1898. No. 8053.

1. **Executions: LEVY ON EXEMPT PROPERTY: APPRAISEMENT.** Where the sheriff makes a levy upon personal property, and the debtor files, under oath, the inventory required by section 522 of the Code of Civil Procedure, it is the duty of such officer to call to his assistance three disinterested freeholders of the county where the property is situate, who, after being sworn by said officer, shall determine the cash value of the property.

2. ———: ———: ———. Where the officer calls two appraisers only, the appraisement made by them is of no validity, and affords the officer no protection in releasing and surrendering the property to the judgment debtor.

ERROR from the district court of Saunders county. Tried below before WHEELER, J. *Reversed.*

*Clark & Allen*, for plaintiff in error.

*Good & Good, contra.*

NORVAL, J.

This action was brought against the sheriff of Saunders county to recover damages for the alleged wrongful releasing of certain property seized by his deputy under an order of attachment. A verdict, under the directions of the court below, was returned in favor of the defendant, and the plaintiff seeks a reversal of the judgment entered thereon.

The facts are as follows: On August 10, 1893, plaintiff instituted an action on a promissory note against George B. Scott, before a justice of the peace of Saunders county, and at the same time sued out an order of attachment on the ground that Scott was a non-resident of the state. The attachment writ was levied by the officer upon certain personalty belonging to Scott, and the latter, on August 17, 1893, filed with the justice an inventory of all his personal property. Subsequently he filed a motion

to dissolve the attachment on two grounds: First, the attachment affidavit was untrue; second, that the goods were not liable to attachment, being specifically exempt by statute. This motion was overruled, and the main case was continued until November 4, when plaintiff recovered judgment against Scott, and the attached property was ordered sold. On the same day the attachment debtor filed with the justice, and also with the sheriff, a schedule of all of his personal estate, together with a sworn statement that the same was complete and correct, and that he was then a resident of the state, the head of a family, and did not possess town lots or houses subject to exemption as a homestead under the laws of this state. The sheriff called to his assistance two freeholders of the county, who appraised the property described in the schedule at $74, whereupon the attached goods were released by the officer, and delivered to Scott.

Section 522 of the Code of Civil Procedure provides: "Any person desiring to avail himself of the exemption as provided for in the preceding section, must file an inventory under oath, in the court where the judgment is obtained, or with the officer holding the execution, of the whole of the personal property owned by him or them at any time before the sale of the property; and it shall be the duty of the officer to whom the execution is directed to call to his assistance three disinterested freeholders of the county where the property may be, who, after being duly sworn by said officer, shall appraise said property at its cash value." The defendant did not comply with the foregoing provision in appraising the property mentioned in the inventory, since he only called to his assistance two freeholders of the county, instead of three as required by said section of the Code. If a lawful appraisement could be made with the aid of two freeholders of the county, the sheriff could likewise dispense with the calling of any appraisers and make the appraisement himself. This he cannot do. The provision of the statute is mandatory, and the officer, in

protected, must comply therewith. It is very evident that the action of the sheriff in releasing and returning the attached property to Scott was wrongful and wholly unauthorized. The officer had no right to release the property as exempt without causing an appraisement to be made in the mode provided by law.

The conclusion reached makes unnecessary an examination of the questions discussed by counsel. The trial court erred in directing a verdict in favor of the defendant, and the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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MARSHALL FIELD ET AL. V. S. P. MORSE & COMPANY ET AL.

FILED MAY 4, 1898. No. 8054.

1. **Sales:** FALSE REPRESENTATIONS: RESCISSION: EVIDENCE. To entitle one to rescind a contract of sale on the ground that he was induced to enter into the same through the false representations of the other party it is unnecessary to establish that the party making the representations at the time knew they were false and untrue.
2. ——: ——: ——: REPLEVIN. Where goods are sold upon credit obtained by the fraudulent representations of the vendee as to a past or existing fact, the vendor may rescind the sale and replevy the goods within a reasonable time after the fraud is discovered.

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

*Montgomery & Hall,* for plaintiffs in error.

*Parke Godwin* and *E. R. Duffie, contra.*

NORVAL, J.

In the latter part of March, 1893, plaintiffs sold and delivered to S. P. Morse & Co. a quantity of merchandise. In April following plaintiffs instituted this action of

replevin in the court below to recover the goods so sold. There was a trial to a jury, which resulted in a verdict and judgment for the defendants, and plaintiffs have prosecuted a petition in error.

Plaintiffs are partners engaged in the wholesale business in Chicago under the name and style of Marshall Field & Co. They predicate the right to maintain this suit upon the ground that they were induced to make the sale of the goods in controversy by reason of certain false representations of the defendants, which, it is insisted, gave the plaintiffs the right to rescind the sale and recover the goods. The defendants deny that they made any false representations to the plaintiffs. S. P. Morse had been for several years engaged in the dry goods business in the city of Omaha, but some time prior to 1893 he went out of business. In January of that year he attempted to organize a corporation in the name of S. P. Morse & Co. for the purpose of embarking in the dry goods business again in said city. Under date of January 11, 1893, articles of incorporation were prepared, which were signed by S. P. Morse, Richard T. Allen, and John M. Daugherty, published, and filed for record in the office of the county clerk of Douglas county. The authorized capital stock of the company was stated in the articles to be $40,000, in shares of $100 each. No part of the capital stock of the proposed corporation was subscribed or paid, and the officers for which provision was made in the articles of incorporation were never chosen. In March, 1893, S. P. Morse went East, where he purchased goods on credit aggregating in value more than $30,000, of which goods to the value of more than $3,500 were obtained on time from plaintiffs. Evidence was introduced tending to show that prior to the sale of the goods here in dispute Mr. Morse, for the purpose of obtaining credit, made statements to L. W. McConnell, credit-man for the plaintiffs, substantially as follows: That S. P. Morse & Co. was a corporation to be composed of S. P. Morse, J. M. Daugherty, and Robert

T. Allen; that the capital of the company was $40,000; that for the present there would be paid in $25,000; that the contribution of Morse and Allen was merely nominal; that the money was to be supplied by Mr. Creighton, connected with the First National Bank of Omaha, but as Mr. Creighton did not wish to be known in a mercantile connection, the stock would be taken in the name of his private secretary, Mr. Daugherty; that Mr. Creighton was a great friend of Mr. Morse and had arranged the lease of the building that he was going to occupy and desired him to take the adjoining building, in which case Mr. Creighton would put in more money; that his rental of the building which he had leased was $2,700 a year for three years; that he had leased part of the second floor to one Bliss at $150, and that he had leased a glove privilege on the first floor to another person at $100 a month, making an income from the subleases of $3,000, with free steam heat. There was also introduced on the part of plaintiffs evidence tending to show that they relied upon said representations, and had the same not been made, the goods in dispute would not have been sold; that while Daugherty signed the articles of incorporation he never agreed to subscribe or take any stock in the proposed incorporation, never paid any money into the concern, nor agreed so to do; that Mr. Creighton was not interested in the proposed corporation, and never promised or agreed to put any money into the business, and was not in any way associated with S. P. Morse & Co. or S. P. Morse; that, in fact, S. P. Morse & Co. had no legal corporate existence. The evidence on behalf of defendants tended to establish that no false representations of existing facts or conditions, or of past events, were made by Mr. Morse to plaintiffs, but that the statements were merely expressions of an opinion in regard to future events made in good faith. In this condition of the proofs the learned trial judge gave the following, among other instructions, to the jury upon his own motion:

"3. You are instructed that, before the plaintiffs can rescind the contract of sale and recover the goods in controversy herein, they must show you by a preponderance of the evidence the following facts: (1) That S. P. Morse, acting for the defendants S. P. Morse & Co., made the statements and representations concerning the financial condition of the defendants substantially as set out in the petition; (2) that these representations, or some one or more of them, were false; (3) that the said S. P. Morse knew them to be false at the time they were made; (4) that the plaintiffs were induced by said statements and representations to make a sale of the goods to the defendants, and would not have parted with the goods except for their belief in their truth.

"4. It is not enough for the plaintiffs to show that false statements regarding the financial condition of the defendants were made to them. They must go further and show that such statements were made fraudulently, —that is, that they, or some one or more of them, were untrue,—to the knowledge of Morse, and that he made such statements, or any of them, to induce the plaintiffs to make the sale of their goods. If Morse, whom it is claimed made the representations, did in fact make them, in form and substance as claimed by the plaintiffs, then it must further appear that he knew at the time that the facts were contrary to his statements. If he believed and had reason to believe that said representations were true, then no rescission of the contract can be had, and this action cannot be maintained.

"5. It is the theory of the law never to impute fraud where the facts and circumstances on which it is predicated may be consistent with honesty of intention. In this case, therefore, if, after a careful consideration of all the evidence, you can reasonably reconcile it with the theory of the defendant's innocence of an attempt to defraud, it will be your duty to adopt that theory rather than to impute to him an intent to wrong the plaintiffs. It is only when the acts and statements shown cannot

be reconciled with honesty of purpose on his part that you should impute to him a dishonest purpose.

"6. To constitute fraud in the purchase of goods there must be an intent on the part of the purchaser to cheat the vendor, or do some act the necessary result of which would be to cheat and defraud him. If, therefore, you find, from the evidence, that Morse did not intend by any statement made by him to the plaintiffs to cheat or defraud them, if he acted in good faith, believing what he said to be true, and in the honest conviction that the goods purchased could and would be paid for when the credit extended had expired, from the source represented, then and in such case no fraud can be imputed to him, and you must find for the defendants."

It is the settled law of this state that to entitle a party to relief on the ground of false representations it is not necessary for him to allege or prove that the party making them at the time knew they were false; in other words, whether the defendant acted in good faith or not is immaterial. (*Phillips v. Jones*, 12 Neb. 213; *Foley v. Holtry*, 43 Neb. 133; *Hoock v. Bowman*, 42 Neb. 80; *Johnson v. Gulick*, 46 Neb. 817.) Each of the foregoing paragraphs of the charge of the court was erroneous and violated the principle asserted in the foregoing cases, inasmuch as the plaintiffs' right to recover in this action was made to depend upon the question whether Morse made the representations relied upon for a rescission of the sale in good faith, believing them at the time to be true. The right to rescind in no manner depended upon the proof of scienter. The rule is that where goods are sold upon credit obtained by material fraudulent representations of the vendee, the vendor may rescind the sale and replevy the goods within a reasonable time after the discovery of the fraud. (*McKinney v. First Nat. Bank of Chadron*, 36 Neb. 629; *Work v. Jacobs*, 35 Neb. 772; *Farwell v. Kloman*, 45 Neb. 424; *First Nat. Bank of Chadron v. McKinney*, 47 Neb. 149.)

These instructions are conceded to be erroneous by

counsel for defendants, but it is argued that the judgment should not be reversed on account of the vice in the charge, for the reason that there was a complete failure to establish that Mr. Morse made any misrepresentations to plaintiffs, or to Mr. McConnell, their creditman, of a single fact or condition then existing. It is asserted that the statements of Mr. Morse were not of matters of fact, but were the mere expressions of opinion in regard to matters wholly in the future. It is true some of the representations imputed to Mr. Morse should be classed as mere expressions of opinion and are wanting in the essential element which constitutes a fraud. But there is evidence tending to show that some of the false representations related to a present or past state of facts and not to future events alone, as that the S. P. Morse & Co. was a legal, existing corporation, and that Mr. Morse had arranged with Mr. Creighton to supply the money necessary to carry on the venture. That Mr. Morse so represented to plaintiffs is a legitimate inference drawn from the evidence, and such statements were of matters material to the contract. There being sufficient evidence to justify the rescinding of the sale and the replevy of the goods, the giving of the instructions set out in this opinion was prejudicial error, for which the judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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## C. P. JACOBSON V. ROBERT LYNN.

FILED MAY 4, 1898. No. 8005.

1. **Trespass:** ACTION FOR DAMAGES: VENUE. An action to recover damages for trespass upon real estate can be brought alone in the county where the lands are situate.
2. **Appeal:** JURISDICTION. A district court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject-matter.

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

*J. C. Robinson*, for plaintiff in error.

*H. F. Barnhart* and *J. H. Berryman, contra.*

NORVAL, J.

Robert Lynn brought this suit before a justice of the peace in Knox county to recover damages alleged to have been sustained by reason of defendant's cattle trespassing upon plaintiff's lands described as being situate in Cedar county. The defendant appeared before the justice and objected to the jurisdiction of the court over the subject-matter of the action, which objection was overruled, and from a judgment rendered against the defendant in the sum of $35.75, damages and costs, he prosecuted an appeal to the district court. A petition was filed therein by the plaintiff praying judgment in the sum of $150, for damages to certain described real estate in Cedar county. The defendant moved to dismiss for the want of jurisdiction of the justice and district courts over the subject-matter, which motion was denied, and an exception was taken. A trial was had before a jury, resulting in a verdict and judgment in favor of plaintiff for $1, and to reverse which the defendant prosecutes a petition in error.

The sole proposition presented for consideration is whether either the justice of the peace or the district court acquired jurisdiction over the subject of the controversy. The question is one not difficult of solution. Section 51 of the Code of Civil Procedure declares: "All actions to recover damages for any trespass upon or any injury to real estate shall be brought only in the county where such real estate is situated," etc. This language is so plain, direct, and unambiguous as not to require judicial interpretation. The command of the legislature is imperative that an action for trespass upon

lands can be instituted alone in the county where they are situate. Such an action is not transitory in its nature, and the courts of one county have no jurisdiction to hear, try, and determine a suit to recover damages to real estate located in another county. If this is not so, the statute quoted is meaningless. The justice of the peace had no jurisdiction of the subject-matter of this suit, and the district court acquired none by reason of the appeal. (*Brondberg v. Babbott*, 14 Neb. 517.) The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

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## DIXON NATIONAL BANK ET AL. V. OMAHA NATIONAL BANK.

FILED MAY 4, 1898. No. 8056.

1. **Garnishment:** REVIEW OF PROCEEDINGS. Proceedings in garnishment after judgment are reviewable by petition in error, and not by appeal.
2. **Proceeding in Error:** TIME. A proceeding in error must be commenced in the supreme court within one year from the date of the judgment or final order sought to be reviewed.

ERROR AND APPEAL from the district court of Douglas county. Tried below before SCOTT, J. *Appellate proceedings dismissed.*

*Byron G. Burbank*, for plaintiffs in error.

*Paul Charlton, contra.*

NORVAL, J.

This was a proceeding in garnishment after judgment. From an order of the district court sustaining the garnishment proceedings on behalf of the Omaha National

Bank an appeal was prosecuted to this court by the garnishee, Frank E. Moores, and the interveners, the Dixon National Bank of Dixon, Illinois, the Thompson National Bank of Thompson, Connecticut, and the Middleborough National Bank of Middleborough, Massachusetts. Subsequently said garnishee and interveners filed a petition in error.

The order of the court below which is now assailed was made in a law action, and cannot be reviewed by appeal. (*Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co.* 53 Neb. 246; *Nebraska Wesleyan University v. Craig's Estate*, 54 Neb. 173; *Campbell v. Farmers & Merchants Bank of Elk Creek*, 49 Neb. 143.)

The petition in error must be dismissed, since the same was filed in this court more than one year subsequent to the making of the order sought to be reviewed. (*Rogers v. Redick*, 10 Neb. 332; *Patterson v. Woodland*, 28 Neb. 250; *Clark v. Morgan*, 21 Neb. 673; *Chapman v. Allen*, 33 Neb. 129; *Scarborough v. Myrick*, 47 Neb. 794; *Hansen v. Kinney*, 46 Neb. 207; *Record v. Butters*, 42 Neb. 786.)

DISMISSED.

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## PETER FARNEY V. HAMILTON COUNTY.

FILED MAY 4, 1898. No. 8953.

1. **Petition in Error:** PARTIES. It is a firmly established rule in this state that all the parties to a joint judgment must be made parties to a petition in error, as plaintiffs or defendants; and a failure in this respect, if seasonably urged, is sufficient ground for the dismissal of the proceeding.

2. **Joint Judgment:** FINDINGS. A judgment otherwise joint in form is not rendered several by a finding as to which of the defendants is the principal debtor, and which are the sureties.

3. **Petition in Error:** PARTIES: WAIVER OF DEFECT. The mere acceptance of service of briefs by a defendant to an error proceeding is not a waiver of the objection that there is a defect of parties.

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

*Whitmore & Stanley* and *Matt Miller*, for plaintiff in error.

*A. W. Agee, contra.*

NORVAL, J.

This suit was brought by the county of Hamilton against Peter Farney as principal and forty-eight others as sureties upon the official bond of said Farney as treasurer of said county. Upon the issues joined by the pleadings there was a trial to a jury, which resulted in a joint verdict against all the defendants in the sum of $1,128.89. The defendants filed a joint motion for a new trial, which the court overruled, and on May 4, 1896, judgment was rendered upon the verdict, in form joint against all the defendants, for the amount so found by the jury. To reverse this judgment the defendant Peter Farney alone prosecuted a petition in error to this court, he being the only plaintiff in error named; and his co-defendants were not made parties to the proceeding in this court, nor are their names mentioned in the petition in error. On March 11, 1898, the county filed a motion to dismiss the petition in error on the ground of defect of parties, since more than one year has elapsed after the rendition of the judgment, and none of the co-defendants of Farney have been made parties in this court. The motion has been submitted for consideration.

It is well settled that to obtain a review of a joint judgment by petition in error all persons shown by the record to be substantially interested must be made parties to the proceeding, as plaintiffs or defendants. (*Wolf v. Murphy*, 21 Neb. 472; *Hendrickson v. Sullivan*, 28 Neb. 790; *Andres v. Kridler*, 42 Neb. 784; *Polk v. Covell*, 43 Neb. 884; *Kuhl v. Pierce County*, 44 Neb. 584.) The doctrine

just stated is not assailed by counsel for plaintiff herein as being unsound, but it is argued that the rule cannot be invoked in the case in hand for reasons which will be hereafter stated.

It is insisted that the judgment here sought to be reviewed is not joint, but there is a special controversy between the county and Farney in which the other defendants below are not interested; hence it is unnecessary to bring them into this court. This argument is based upon the fact that the trial court found that Farney was the principal debtor and that his co-defendants were liable as sureties merely, and it was there determined that the judgment should be enforced against the principal first, and in the event the amount could not be collected from him, then from the sureties. This did not constitute separate and distinct judgments, one against the principal debtor, and the other against his sureties. The judgment as pronounced is joint in form and legal effect against all the defendants, in favor of the county, with an adjudication in accordance with the provisions of section 511 of the Code of Civil Procedure, determining which of the defendants is the principal debtor and which are the sureties. The judgment is as much joint, and all the defendants will be affected by the adjudication in the appellate court to the same extent, as though the defendants had all been principal debtors, and the trial court had so found.

It is urged that the motion should not be sustained, because Farney, it is alleged, has deposited with the clerk of the trial court $1,500 as a protection of the sureties in case the judgment should be affirmed. A short and complete answer to this is that there is no competent evidence that the alleged deposit was ever made. There is among the papers in the case a document purporting to be a receipt by one J. B. Cunningham, clerk of the district court, for $1,500; but it is in no manner authenticated by certificate of the clerk of the court

below as being either original or a copy; hence such paper cannot be considered. We must not be understood as intimating that a deposit of the amount of the judgment by Farney would give him the right to prosecute a petition in error without bringing before this court all the parties to the judgment.

It is also insisted that the county has waived its right to object to a hearing on the merits by accepting service of the briefs of the opposing party without then raising the point that there was a defect of parties. The doctrine has been more than once asserted that the submission of a cause on the merits in the appellate court, without objection that all the parties to a joint judgment had not been brought in by the petition in error, is a waiver of such defect. (*Consaul v. Sheldon*, 35 Neb. 247; *Curtin v. Atkinson*, 36 Neb. 110.) But in no case has this court held that the acceptance of service of briefs is a waiver of a defect of parties. It certainly could not have that effect. A defendant to a petition in error has the right to insist, on his first appearance in the appellate court, before the final submission is there taken on the merits of the cause, that all parties interested in either sustaining or reversing the judgment brought up for review must be made parties to the error proceeding, either as plaintiffs or defendants. It follows that the motion to dismiss must be sustained.

DISMISSED.

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## LEOPOLD JAEGGI ET AL. V. GEORGE W. GALLEY ET AL.

FILED MAY 4, 1898. No. 8028.

1. **Conflicting Evidence:** REVIEW. A question of fact determined on conflicting evidence will not be disturbed upon review.
2. **Rulings on Evidence:** ASSIGNMENTS OF ERROR. An assignment, "Errors of law at the trial excepted to at the time," is insufficient in a petition in error to present for review the rulings on the admission or exclusion of evidence.

3. Assignments of Error: NEW TRIAL. An assignment in a petition in error for the denial of a motion for a new trial is bad, which fails to specify to which of the several grounds of the motion the assignment applies.

ERROR from the district court of Platte county. Tried below before MARSHALL, J. *Affirmed.*

*McAllister & Cornelius*, for plaintiffs in error.

*Albert & Reeder, contra.*

NORVAL, J.

The Columbus Real Estate & Improvement Company is a corporation organized under the laws of this state for the purpose of buying, selling, and improving real estate in Platte county. Its capital stock consists of 292 shares of $100 each. Leopold Jaeggi and Charles Reinke, the plaintiffs herein, are stockholders in said corporation, and the latter is a creditor thereof. All of the defendants, excepting George Lehman, are the directors of the corporation, and the defendants George W. Galley and Ingevard Sibbernsen are, respectively, the president and secretary thereof. The corporation is the owner of the property known as the "Thurston Hotel," being lots 5 and 6, in block 59, in the city of Columbus. On June 4, 1894, the defendant George Lehman made a proposition to the board of directors to purchase said property for $19,000, payable as follows: $11,000 in the stock of the corporation, and the purchaser to assume a mortgage on the premises for $8,000. At a meeting of the stockholders held on June 11 a resolution was adopted by them on a majority vote to sell the property to Lehman on the said terms proposed by him, and the board of directors, at a meeting subsequently held, ratified said sale and ordered the president and secretary to issue a deed to Lehman for said lots upon his surrendering the $11,000 in stock and assuming the mortgage aforesaid. This action was instituted in the court below to enjoin the execution and delivery of the deed to Leh-

man, and to restrain the threatened cancellation of $11,000 of stock about to be received from him. The court below decreed that Lehman was entitled to a deed to the property, but restrained the board of directors from canceling and retiring the stock of the corporation received by it from Lehman. Plaintiffs have brought the record here for review.

The first argument is that the evidence is insufficient to sustain the finding and decree. Relief was sought upon the ground that a conspiracy was entered into between Lehman and certain of the stockholders and directors of the corporation which enabled Lehman to purchase the property at a sum much less than its value. It is true that the stock was turned in on the purchase at par, which cost Lehman a trifle over one-half its face value. The testimony, however, tends to show that while Lehman, before he submitted a proposition for the purchase of the premises, had been informed by a number of the stockholders that this stock could be obtained at fifty-five cents on the dollar, he acquired no option on any of the stock, nor did he contract for or purchase any portion thereof until after his proposition had been accepted by a vote of the stockholders and board of directors. The testimony is conflicting, but a perusal thereof satisfies us that it is ample to sustain the finding of the trial court that no conspiracy existed with respect to the purchase of the property in controversy.

It is insisted in the brief that the court erred in excluding the testimony of the witness Sibbernsen offered by plaintiffs. This ruling is not sufficiently presented for consideration by the petition in error. The errors assigned therein are as follows:

1. The judgment is contrary to the evidence.
2. The judgment is contrary to law.
3. Errors of law at the trial excepted to at the time.
4. The judgment should have been for the plaintiffs.
5. The court erred in overruling plaintiffs' motion for a new trial.

The first, second, and fourth assignments manifestly do not present for consideration alleged errors in the admission or exclusion of evidence. The third assignment is insufficient to present to this court for review the rulings on the exclusion of testimony. (*Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900; *Imhoff v. Richards*, 48 Neb. 590; *Houston v. City of Omaha*, 44 Neb. 63; *Murphy v. Gould*, 40 Neb. 728; *Wanzer v. State*, 41 Neb. 238.) The fifth assignment is too indefinite for consideration, since it fails to specify to which of the several grounds stated in the motion for a new trial the assignment applies. (*Glaze v. Parcel*, 40 Neb. 732; *Wiseman v. Zieyler*, 41 Neb. 886; *Wax v. State*, 43 Neb. 19; *City of Chadron v. Glover*, 43 Neb. 732; *Pearce v. McKay*, 45 Neb. 296; *Conger v. Dodd*, 45 Neb. 36; *Moore v. Hubbard*, 45 Neb. 612; *Sigler v. McConnell*, 45 Neb. 598.)

Plaintiffs cannot be heard to complain of that part of the finding which is in favor of Lehman and against the board of directors of the corporation. (*Burlington & M. R. R. Co. v. Martin*, 47 Neb. 56.) The decree is

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7. Defendant in error did not waive his right to move to quash the bill by appearing before the trial judge merely to object to its allowance, nor by failing to file the motion until after the time had expired within which the plaintiff in error was required to file his briefs to the merits, such briefs not having been filed. *Id.* ..... 589

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4. A shipper who cares for his live stock in transit and travels on a drover's free pass assumes such risks and inconveniences as necessarily attend upon caring for such stock, and, modified accordingly, the liability of the railroad company for negligently injuring him is that of a common carrier for hire. *Id.*

**Chattel Mortgages.** See REPLEVIN 7. TROVER AND CONVERSION, 3, 4.

*Conveyance to Relative.*

1. Where a chattel mortgage securing to a relative of mortgagor the latter's matured debt, and depriving his other creditors of their just dues, is assailed as fraudulent, persons claiming rights under the mortgage must show the *bona fides* of the transaction. *Heffley v. Hunger*..... 776

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3. A chattel mortgage remaining in possession of mortgagor without actual delivery may create a valid lien where the parties intend it shall have that effect; but such intention will not be presumed, and a finding on conflicting evidence that no lien was created will not be disturbed. *Western Assurance Co. v. Kilpatrick*..... 241
*British-American Assurance Co. v. Kilpatrick*..... 241

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7. One bestowing labor and skill on a chattel bailed to him for

**Chattel Mortgages**—*concluded.*

that purpose, thereby increasing its value, has a lien thereon superior to the lien of a prior chattel mortgage. *Drummond Carriage Co. v. Mills*..... 417

8. Lien for repairing a buggy *held* superior to a chattel mortgage executed before the repairs were made. *Id*..... 418

*Parol Release.*

9. Where the evidence in an action on a policy tended to show that release of a mortgage on the insured chattels had been expressed by parol before the fire, an instruction to the jury to find for insurer as to such property because of a provision in the policy rendering it void if the property became incumbered, *held* erroneous. *Johansen v. Home Fire Ins. Co.* ..... 549

*Possession by Mortgagor. Sales.*

10. A chattel mortgage providing that mortgagor may remain in possession and "sell any of the stock in trade in the regular course of business," but containing no provision for applying the proceeds to payment of the mortgage debt, *held* fraudulent as to mortgagor's creditors. *Buckstaff Bros. Mfg. Co. v. Snyder*..... 540

11. Where mortgagor remains in possession and sells mortgaged goods in the usual course of business pursuant to an agreement to apply the proceeds upon the debt secured, the court should not pronounce the transaction fraudulent as a matter of law, and in such a case it is prejudicial error to withdraw from the jury the question of fraud. *Lepin v. Coon* ..... 664

12. The intent with which a mortgagor is permitted to sell mortgaged goods, where it does not appear on the face of the mortgage, is a question for the jury. *Id.*

*Title.*

13. Mortgagor retains title to the chattels until foreclosure of the mortgage. *Drummond Carriage Co. v. Mills*..... 418

**Chose in Action.** See ASSIGNMENTS, 2.

**City Attorney.** See OFFICE AND OFFICERS.

**City Engineer.** See OFFICE AND OFFICERS.

**Civil Service.** See MUNICIPAL CORPORATIONS, 6-11.

**Clerk of Court.**

Authority of a clerk of the district court to settle a bill of exceptions may be exercised by his deputy. *Brownell v. Fuller*, 58.

**Collateral Security.** See PLEDGES. PRINCIPAL AND SURETY, 2.

**Commercial Agencies.** See SALES, 20.

**Common Carriers.** See CARRIERS. STREET RAILWAYS.

**Compounding Felony.** See CONTRACTS, 2.

**Compromise and Settlement.** See CRIMINAL CONVERSATION.

**Conditional Sales.** See SALES, 9-12.

**Confirmation.** See EXECUTIONS, 7-15.

**Constitutional Law.** See CORPORATIONS, 7. MUNICIPAL CORPORATIONS, 12. STATUTES.

1. Taxation in aid of internal improvements such as irrigating canals or ditches does not involve the taking of property for private use, or without due process of law. *Cummings v. Hyatt*..... 86

2. The constitutional provision that "the right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise," does not prevent the supreme court from prescribing such reasonable rules as are deemed essential to the prompt and orderly disposition of causes for review, nor is the refusal to permit oral arguments violative of the constitution. *Schmidt v. Boyle*..... 387

3. Property is not taken for a public use without due process of law when an opportunity is afforded the owner to have his damages ascertained by adequate and appropriate judicial proceedings, and provision is made for the payment of the amount thereof prior to the time the property is taken. *Howard v. Board of Supervisors*..... 443

4. Section 4, article 11, of the constitution (Miscellaneous Corporations), by fixing the liability of stockholders, limits such liability, and it is not within the power of the legislature to extend it. *Van Pelt v. Gardner*..... 702

**Construction.** See CONSTITUTIONAL LAW, 4. CONTRACTS, 7.

**Constructive Service.** See MORTGAGES, 14.

**Contempt.** See JUSTICE OF THE PEACE, 7.

1. In a proceeding for contempt the affidavit is jurisdictional. *Herdman v. State*..... 626

2. In an affidavit for contempt affiant must allege on personal knowledge the act of which complaint is made, statements made on information and belief being insufficient. *Id.*

3. An affidavit charging one with contempt must state the acts with as much certainty as is required in an information charging a crime. *Id.*

4. Rules of strict construction applicable in criminal cases govern proceedings for contempt. *Id.*

**Continuance.**

To review denial of a continuance it is necessary to take an exception to the ruling in the trial court. *Staples v. Arlington State Bank*..... 760

**Contracts.** See CARRIERS, 1. DOWER. GUARANTY. HUSBAND AND WIFE. INSURANCE. NEGOTIABLE INSTRUMENTS. REFORMATION OF INSTRUMENTS. SALES. VENDOR AND VENDEE.

*Evidence of Execution.*

1. In an action by the owner of a lot to recover from his lessee a sum paid by lessor to the owner of an abutting lot for erecting a party wall used by lessee, evidence *held* to sustain a finding that plaintiff and defendant entered into the contract pleaded as a defense. *Smith v. Kennard*..... 524

*Compounding Felony. Public Policy.*

2. A contract, the consideration of which, in whole or in part, is the compounding of a felony or the stifling of a criminal prosecution, is contrary to public policy, illegal, and void. *McCormick Harvesting Machine Co. v. Miller*..... 644

*Limitation of Action. Public Policy.*

3. A provision in a contract limiting the time for bringing suit thereon to a period different from that fixed by statute is against public policy and not enforceable. *Miller v. State Ins. Co*..... 121

*Ratification.*

4. The payment of money on an agreement to compound a felony cannot be considered as a ratification, since the contract was illegal and void and incapable of ratification. *McCormick Harvesting Machine Co. v. Miller*..... 644

*Duress.*

5. Contracts made under fear of unlawful arrest, and not those executed under threat of lawful imprisonment, can be avoided on the ground of duress. *Id.*

*Interpretation and Enforcement.*

6. The interpretation of a written contract is for the court and not for the jury, when it is capable of being construed by its terms alone, unaided by extrinsic facts. *Western Mfg. Co. v. Rogers*..... 456

7. Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly. *Clark v. Hall*..... 479

*Rights of Third Persons.*

8. In a contract between a county and a person contracting with it for the erection of a court house, a provision imposing on the contractor the duty of paying for materials used in the building is valid; and one who furnished material may maintain an action on the contractor's bond given to secure performance of the contract. *Pickle Marble & Granite Co. v. McClay*..... 661

9. One not a party to a contractor's bond may maintain an action thereon, where such bond was executed for his benefit. *Id.*..... 663

**Contribution.** See CORPORATIONS, 11.

**Conversion.** See TROVER AND CONVERSION.

**Conveyances.** See CHATTEL MORTGAGES. FRAUDULENT CONVEYANCES. MORTGAGES. SALES. VENDOR AND VENDEE.

**Corporations.** See JUDGMENTS, 5. USURY.

*Borrowed Money.*

1. Where money is borrowed by stockholders of a corporation for its benefit, and actually used in its business, the corporation is legally liable for the repayment of such money. *Stough v. Ponca Mill Co*..... 500

*Insolvency. Assets.*

2. The assets of an insolvent corporation constitute a trust fund in the hands of its directors to be used by them in paying corporate debts. *Id.*

*Liability of Stockholders. Enforcement.*

3. Outline of general relief to be afforded in an action to enforce individual liability of stockholders, for corporate debts. *German Nat. Bank v. Farmers & Merchants Bank*..... 593

4. An action to enforce individual liability of stockholders, for corporate debts, should be for the benefit of all the creditors of the corporation. *Id.*

5. In an action to enforce individual liability of stockholders, for corporate debts, the corporation is not a necessary party. *Van Pelt v. Gardner*..... 702

6. Petition to enforce individual liability of stockholders, for corporate debts, *held* to allege that the amount due the creditor from the corporation had been ascertained and that the corporate property had been exhausted. *German Nat. Bank v. Farmers & Merchants Bank*..... 593

7. The amount due from a corporation must be ascertained by a court's finding and judgment before creditors can enforce against individual stockholders a liability created by section 4, article 11, of the constitution (Miscellaneous Corporations), and this rule applies to liability of stockholders of a bank under section 7 of said article. *Id.*

8. A provision in the charter of a corporation providing that the private property of a stockholder shall not be liable for the debts of the corporation is void, in so far as it attempts to exempt the stockholder from liability—for his unpaid stock subscription—for the payment of corporate debts. *Van Pelt v. Gardner*..... 702

9. The liability of a stock subscriber, for corporate debts, except he be a stock subscriber of a banking corporation, is limited to the amount of his unpaid stock subscription. *Id.*

10. Section 4, article 11, of the constitution (Miscellaneous Corporations), not only determines what the liability of

**Corporations**—*continued.*

a stockholder in a corporation, for the corporate debts thereof, shall be, but it limits this liability, and it is not within the power of the legislature to extend it. *Id.*

**11.** As between the stock subscribers and the creditors of a corporation, each stock subscriber is liable to the extent of his unpaid stock subscription; and as between themselves, each stock subscriber is liable for his proportionate share of the corporate debts, and one stock subscriber who has been compelled to pay more than his proportionate share may sue his co-subscribers for contribution. *Id.*

**12.** One creditor of a corporation cannot maintain an action in his own name and for his own benefit against the debtor stock subscribers of a corporation; but, to subject unpaid stock subscriptions to the payment of corporate debts, all debtor stock subscribers and all creditors of the corporation should be made parties, and a receiver appointed. *Id.*

**13.** Within the meaning of section 4, article 11, of the constitution (Miscellaneous Corporations), fixing liability of stockholders, the exact amount justly due has been ascertained when the creditor's claim against the corporation has been reduced to judgment; and the corporate property has been exhausted when execution issued on such judgment has been duly returned unsatisfied. *Id.* ..... 701

**14.** In an action to enforce individual liability of stockholders, for corporate debts, the decree should not be a joint one against all subscribers for the amount of the corporate debts, but a several judgment against each subscriber for the amount of his unpaid subscription. *Id.* ..... 702

**15.** In an action to enforce individual liability of stockholders, for corporate debts, the decree should provide for an execution against each subscriber for his proportionate share of the corporate debts, interest, and costs, and if any execution should not be collected in full, then for the issuance, upon order of the court, of additional executions from time to time against each solvent subscriber for his proportionate share of the corporate debt remaining unpaid. *Id.*

**16.** Section 2 of an act passed February 18, 1873, entitled "Homestead Associations," being section 146, chapter 16, Compiled Statutes, was repealed by section 4, article 11, of the constitution (Miscellaneous Corporations), fixing liability of stockholders. *Id.*

*Mortgages. Ultra Vires.*

**17.** Where a corporation borrows money and executes a mortgage on its real estate to secure the payment thereof, a third person cannot assail the transaction on the ground of *ultra vires*. *Beels v. North Nebraska Fair & Driving Park Ass'n* ..... 226

**Corporations**—*concluded.*

18. A mortgage executed by an insolvent corporation to a third person to secure a debt, for the payment of which one of its officers or directors is personally bound, is illegal and void. *Stough v. Ponca Mill Co*..... 500

19. A mortgage executed by an insolvent corporation to secure a debt due from it to one of its officers or directors is illegal and void. *Id.*

*Subscription for Stock.*

20. Evidence *held* to sustain a finding for defendant in an action on a subscription for stock. *Gretna State Bank v. Grabow* ..... 547

**Costs.** See INJUNCTION, 3.

**Counsel.** See ATTORNEYS AT LAW.

**Counter-Claim.** See NEGOTIABLE INSTRUMENTS, 15.

**Counties.** See DRAINAGE. TAXATION. TRUSTS, 6, 7.

*Appeal from County Board.*

1. Procedure on appeal from an order of a county board in passing upon a claim against the county. *Box Butte County v. Noleman*..... 239

*Fiscal Year.*

2. The words "fiscal year," as employed in section 20, chapter 28, Compiled Statutes, mean the fiscal year during which taxes are collected, and not the year in which they were levied. *State v. Cornell*..... 647

3. The fiscal year of a county is the calendar year. *Id.*

*Funding Bonds. Election.*

4. Under section 134, article 1, chapter 18, Compiled Statutes, a majority of all the votes cast at the election is sufficient for the adoption of a proposition to issue county funding bonds, where, by their issuance, the amount of the county indebtedness is not increased, and the rate of interest is reduced. *Id*..... 72

5. An instruction which withdrew from a jury the consideration of the necessity of employing brokers to refund county bonds, because in the contract, for the performance of which the recovery was sought against the county, its commissioners had assumed to determine the existence of such necessity, *held* erroneous. *Lancaster County v. Green*..... 99

*Funds.*

6. A county board cannot be compelled to provide, through a use of the county general fund, for the payment of a warrant which, upon its face, requires that payment thereof, when made, shall be charged to a certain designated ditch fund. *Hall v. State*..... 280

*Powers of County Board.*

7. A county board, in addition to the powers conferred by

**Counties**—*concluded.*

statute, has such other powers as are necessary to carry into effect the powers granted. *Lancaster County v. Green*.. 98

8. The word "necessary" as applied to implied powers of county boards means no more than the exercise of such powers are as reasonably required by the exigencies of each case as it arises. *Id.*

*Taxation.*

9. 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*..... 781

10. 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. *Id.*

*Treasurer's Fees.*

11. Chapter 52, Session Laws of 1893, takes from a county the right to maintain an action against its treasurer to recover illegal fees retained by him pursuant to a settlement with the county board, but does not satisfy or vacate a judgment already obtained against him by the county for the illegal fees thus retained. *Kearney County v. Taylor*..... 542

12. The auditor of public accounts is powerless to draw a warrant upon the treasury for commissions due a county treasurer upon moneys collected by him for the state and paid into the treasury, unless a specific appropriation has been made for that purpose by the legislature. *State v. Cornell*.. 648

**County Board.** See COUNTIES. HIGHWAYS, 2.

**County Superintendent.** See SCHOOLS AND SCHOOL DISTRICTS.

**County Treasurers.** See COUNTIES, 11, 12. DAMAGES, 4. TAXATION, 3, 4. TRUSTS, 6, 7.

**Courts.**

1. Litigants cannot trifle with the court, but must act with candor and in good faith. *Gilbert v. Marrow*..... 80

2. A judge, to be "interested" within the meaning of section 37, chapter 19, Compiled Statutes, and therefore disqualified, must be pecuniarily interested, or his interest in the litigation must be such that he will gain or lose something by the result. *Chicago, B. & Q. R. Co. v. Kellogg*..... 138

3. A judge who presided at the trial of an action and rendered judgment therein is not, from that fact, interested and disqualified, under the statutes (Compiled Statutes, ch. 19, sec. 37), to hear another suit to vacate such judgment. *Id.*

**Courts**—*concluded.*

4. A judicial officer acting within his jurisdiction in a judicial capacity is not liable in damages for his acts. *Kelsey v. Klabunde* ..... 760

**Covenants.** See VENDOR AND VENDEE, 2.

**Coverture.** See HUSBAND AND WIFE.

**Creditors' Bill.** See JUDGMENTS, 5. MORTGAGES, 1, 2.

In a suit to subject realty claimed by a wife to payment of judgments against her husband, where the decree in such suit was for plaintiff, ascertained the amounts due on the judgments, and directed the sheriff to sell the realty as upon execution, it was *held* that a sale under the decree, rather than upon executions, vested title in the purchaser. *Schott v. Machamer*..... 514

**Criminal Conversation.**

There exist in actions for criminal conversation the same rights to compromise and the same privilege with regard to offers to compromise as exist in other actions. *Smith v. Meyers* ..... 2

**Criminal Law.** See CONTEMPT. INSTRUCTIONS, 3, 4, 14, 16, 18.

*Alibi.*

1. Definition of "alibi." *Peyton v. State*..... 188
2. The distance of accused from the place of the crime is not the controlling fact under the defense of alibi. *Id.*
3. Under the defense of alibi accused is entitled to an acquittal whenever the jury, from a consideration of the evidence, have a reasonable doubt of his presence at the commission of the crime, and such doubt may arise from lack of proof on part of the state or from evidence adduced on behalf of accused. *Id.*

*Arraignment and Plea.*

4. A conviction under an amended information charging a felony will not be sustained where the record does not affirmatively disclose that the accused was arraigned, and that he pleaded before trial. *Barker v. State*..... 53
5. When it is discovered during the trial on the charge of a felony that there has been no arraignment and plea, the court should not proceed with the trial without arraigning the accused, entering his plea, and causing the jury to be resworn and the witnesses to be re-examined. *Browning v. State*..... 203
6. A judgment of conviction of felony cannot stand where there was no arraignment of, and plea by, the accused before the trial. *Id.*

*Burden of Proof.*

7. The burden of proof in a criminal action is on the state and does not shift to defendant. *Davis v. State*..... 177

**Criminal Law**—*concluded.*

8. The burden of proof is not on accused to establish an alibi. *Peyton v. State* ..... 188

*Evidence.*

9. The rule excluding evidence of a crime other than that for which accused is being tried *held* applicable to a prosecution for larceny as bailee. *Davis v. State* ..... 178

10. There are exceptions to the rule which excludes evidence of a crime other than that for which accused is being tried. *Id.*

*Information. Notice of Trial.*

11. In a prosecution for a felony the right of accused to a copy of the amended information, and one day to prepare for trial, may be waived. *Barker v. State* ..... 53

12. Transcript *held* to show that an information was filed against accused in the trial court during the term at which he was required to appear, and that the trial was had upon an amended information presented at a subsequent term of court. *Id.*

*Jurisdiction.*

13. The absence of jurisdiction of the district court will not be presumed, but must affirmatively appear from the face of the record. *Id.*

14. If the court has jurisdiction of the person of the accused and of the crime charged and does not exceed its lawful authority in passing sentence, its judgment is not void, whatever errors may have occurred during the trial. *In re Ream* ..... 667

*Sentence.*

15. If a single offense is charged in different counts of an information, and there is a conviction on each count, but one sentence can be imposed. *Barker v. State* ..... 53

**Crops.** See EXECUTIONS, 21, 22.

**Cross-Examination.** See WITNESSES, 7-9.

**Custom and Usage.**

1. A custom, to be binding, must be lawful and reasonable. *Dern v. Kellogg* ..... 561

2. A custom unknown to one who drew a draft and sent it for collection to a bank located in a distant city where such custom prevailed, *held* not binding on the drawer. *Id.*

3. A custom to be negligent *held* no defense in an action for injuries resulting from negligence. *Omaha & R. V. R. Co. v. Crow* ..... 748

**Damages.** See BANKS AND BANKING, 3. DEATH BY WRONGFUL ACT. EMINENT DOMAIN. INJUNCTION, 3. MASTER AND SERVANT. REPLEVIN, 6. SALES, 13. STREET RAILWAYS, 3.

1. A recovery may be had, under a general allegation of dam-

**Damages**—*concluded.*

ages, for all injuries which necessarily follow as results of the act complained of, including permanent effects of such injuries. *City of Harvard v. Stiles*..... 26

2. Judgment affirmed for $1,200 in favor of one who was injured on a defective sidewalk. *Id.*

3. Injury to a junior mortgagee's interest in chattels may be redressed in an action for damages founded on the facts showing the wrong and resulting injury. *Locke v. Shreck*... 475

4. A taxpayer damaged by neglect of a county treasurer who failed to furnish a correct statement of taxes, upon request, may maintain against the officer an action for the damages thus sustained. *Johnson v. Finley*..... 736

**Death by Wrongful Act.**

1. Evidence *held* sufficient to sustain a verdict for plaintiff. *Omaha & R. V. R. Co. v. Crow*..... 748

2. In a petition under Lord Campbell's Act averments of pecuniary loss *held* sufficient. *Id*..... 747

**Deceit.** See SALES, 18, 19.

**Declarations.** See EVIDENCE, 13.

**Decrees.** See JUDGMENTS.

**Dedication.**

Power of a city to change to a particular use land dedicated to the public for a different purpose. *Tukey v. City of Omaha.* 371, 372, 374

**Deeds.** See MORTGAGES. VENDOR AND VENDEE, 1.

**Deficiency Judgments.** See JUDGMENTS, 12.

**Delivery.** See SALES, 1-7.

**Demurrer.** See LIMITATION OF ACTIONS, 4.

**Deputy Clerk.** See CLERK OF COURT.

**Descent and Distribution.** See RES JUDICATA, 2.

Wife's rights in homestead after death of the husband. *Cooley v. Jansen*..... 33

**Discretion of Court.** See REVIEW, 23. TRIAL, 10. VENDOR AND VENDEE, 6.

**Dismissal.** See JUDGMENTS, 3. RES JUDICATA, 6. REVIEW, 24, 82.

**Ditches.** See DRAINAGE.

**Docket Entries.** See REVIEW, 77.

**Documents.** See INSURANCE, 8.

**Dormant Judgments.** See JUDGMENTS, 13, 14.

**Dower.**

1. The manner in which dower may be barred by an ante-

**Dower**—*concluded.*

nuptial arrangement is regulated by statute, and, in the absence of any contravening equitable considerations, that method is exclusive. *Fellers v. Fellers*..... 694

2. An antenuptial contract whereby each party agreed to claim no interest in the property of the other after marriage, and by which the proposed husband was required to make his will in such terms that his intended wife, thereunder, would be entitled to a certain estate in his realty, *held* to be an entirety; that the two provisions were interdependent; and that the antenuptial agreement was but an executory contract, which, in view of the statutory method of barring dower, is unenforceable. *Id.*

3. Antenuptial contract, and occupancy of dwelling-house as authorized by will of husband, *held* not to estop widow from claiming dower. *Id.*..... 700

**Draft.** See NEGOTIABLE INSTRUMENTS, 1.

**Drainage.**

Article 1, chapter 89, Compiled Statutes, *held* to require the formation of a special ditch fund, which alone is available for payments for improvements made entirely within a single county, under the provisions of said article, and that for the purpose of making such payments moneys can only be obtained from the county general fund by borrowing as provided by section 26 of said article. *Hall v. State*..... 280

**Due Process of Law.** See CONSTITUTIONAL LAW, 3.

**Duress.** See CONTRACTS, 5. HUSBAND AND WIFE, 9, 10.

**Ejectment.** See VENDOR AND VENDEE, 4.

Plaintiff cannot rely on the weakness of defendant's title. *Chicago, B. & Q. R. Co. v. Schalkopf*..... 450

**Election of Remedies.** See ACTIONS, 3.

**Elections.** See COUNTIES, 4. MUNICIPAL CORPORATIONS, 2, 3.

A married woman who holds lands in fee is a "freeholder" within the meaning of section 14, chapter 45, Compiled Statutes, providing that freeholders may petition for an election to vote bonds for internal improvements. *Cummings v. Hyatt*..... 35

**Eminent Domain.** See IRRIGATION.

Where land has been appropriated for a public highway, an instruction which directs the jury to allow the owner full compensation for land actually taken and such damages to the residue of the tract as are equivalent to the diminution of the value thereof is not unfavorable to him. *Howard v. Board of Supervisors*..... 444

**Equity.** See REVIEW, 62. VENDOR AND VENDEE, 6.

1. The test of equity jurisdiction is the absence of an ade-

**Equity**—*concluded.*

quate remedy at law; but an adequate remedy at law is one that is as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity. *Richardson Drug Co. v. Meyer*..... 319

2. An action to enforce individual liability of stockholders of a bank, for corporate debts, is within the equity jurisdiction of the court. *German Nat. Bank v. Farmers & Merchants Bank* ..... 593

**Error.** See REVIEW.

**Estates.** See MERGER.

**Estoppel.** See ACCOUNTING, 1. ACTIONS, 3. PARTNERSHIP, 5. TRIAL, 2.

1. An estoppel *in pais* well pleaded presents a question of fact, which, as such, should be submitted to the jury. *Gaylord v. Nebraska Savings & Exchange Bank*..... 104

2. Principal *held* estopped to deny the authority of an agent. *Continental Building & Loan Ass'n v. Aulgur*..... 120

3. In a suit for $3,000 insurance on the certificate of a fraternal benefit association to a member, defendant cannot urge that the certificate limits the amount payable to the proceeds of an assessment of $2 on each member, and that there is, therefore, a question whether thereby $3,000 could be realized, there being a statute forbidding such association from issuing a certificate of over $1,000 if it has not a membership of 2,000. *Modern Woodman Accident Ass'n v. Shryock* ..... 250

4. The signers of an injunction bond are estopped in a suit thereon from asserting as a defense that the injunction order was broader than the application. *Gibson v. Reed*..... 309

5. In a suit on a note transferred by indorsement to plaintiffs, it was *held* that defendant was not estopped to deny that plaintiffs were partners. *Hoyt v. Kountze*..... 370

6. Antenuptial contract, and occupancy of dwelling-house as authorized by will of husband, *held* not to estop widow from claiming dower. *Fellers v. Fellers*..... 700

7. Where, under a decree foreclosing one of two mortgages of equal priority given to plaintiff in one transaction and covering the same lands, the appraisers erroneously deducted from the value of the premises the amount of a judgment as a senior lien, plaintiff, being the purchaser at the foreclosure sale, cannot be heard, in a subsequent action by him to foreclose the other mortgage, to assert that such judgment was the junior lien. *Farmers Loan & Trust Co. v. Schwenk*..... 657
*Peterborough Savings Bank v. Pierce*..... 721

**Estoppel**—*concluded.*

8. Action of county board and county treasurer in accepting dividend on non-preferred claims against an insolvent bank, *held* not to estop the county from asserting its right to have its claim preferred. *State v. Bank of Commerce*..... 727

**Evidence.** See CRIMINAL LAW, 3. EXEMPTION, 2. INSURANCE, 4-6, 8, 11. MALICIOUS PROSECUTION. MECHANICS' LIENS, 6, 7, 8. PARTNERSHIP, 2. PRINCIPAL AND AGENT, 1, 5. RAPE. REVIEW, 25-32, 37, 62. SALES, 6. TRIAL, 2.

*Books of Account.*

1. Books of account, kept by one partner and showing his transactions with the other, to which accounts the other had access and which he from time to time examined, and which, after the business ceased, he admitted to be correct, are admissible on an accounting between them. *Morris v. Haas* ..... 579

2. Books of account are not admissible in evidence unless it affirmatively appears that there has been a compliance with the essential requirements of section 346 of the Code relating to admissibility of such books. *Atkins v. Seeley*.... 688

*City Ordinances.*

3. Where a city clerk's certificate showed that a city ordinance had not been published for the statutory time, the ordinance was *held* inadmissible in evidence without further proof. *Union P. R. Co. v. McNally*..... 112

4. The statutory method of proof of the existence of an ordinance of the city of Omaha is not exclusive, but such proof may be made by common-law methods. *Johnson v. Finley*.. 733

*Common Knowledge.*

5. That relations of trust and confidence arise and exist between husband and wife, and that the husband is, with possibly a few notable exceptions, the dominant personage, are matters of common knowledge and must be admitted. *Stenger Benevolent Ass'n v. Stenger*..... 433

*Crimes.*

6. The rule excluding evidence of a crime other than that for which accused is being tried *held* applicable to a prosecution for larceny as bailee. *Davis v. State*..... 178

*Court Records.*

7. To support a judgment of a justice of the peace the record must affirmatively show jurisdiction over the person of defendant. *Miller v. Meeker*..... 452

*Damages. Negligence.*

8. In an action against a city by a person who had a hand injured by falling upon a defective sidewalk, evidence relating to the condition of the arm *held* properly admitted. *City of Harvard v. Stiles*..... 26

**Evidence**—*continued.*

9. Evidence of contributory negligence in an action by an injured employé against a railroad company. *Chicago, R. I. & P. R. Co. v. Cowles*..... 269

10. Evidence *held* insufficient to show that a sheriff's seizure of chattels under writs of attachment resulted in injury to the interest of a junior mortgagee. *Locke v. Shreck*..... 475

11. Evidence as to damages for failure of a bank to collect a draft sent to it for collection, where it failed to perform its duties in good faith, neglected to communicate with the drawer, and took all the property of drawee to secure its own claims and those of others. *Dern v. Kellogg*..... 561

*Declaration and Statements.*

12. Where an accident insurance association introduced evidence of statements of a member with reference to an accident which had happened to him some hours before the time of making such statements, it cannot complain because the same statements, made to other witnesses, were proved by the adverse party. *Modern Woodman Accident Ass'n v. Shryock* ..... 250

13. A declaration, to be competent as *res gestæ*, must be made at such time and under such circumstances as to raise the presumption that it is the unpremeditated and spontaneous explanation of the matter about which it is made. *Union P. R. Co. v. Elliott*..... 299

14. Where the *bona fides* of a transfer is assailed by creditors of transferor, his subsequent statements in relation to the transaction may be admitted on the issue of intent and to show the reason of his retention of possession of the property after the conveyance. *Armagost v. Rising*..... 763

*Lease.*

15. Exclusion of lease *held* not reversible error in an action to recover a balance due plaintiff for repairing a hotel. *Herzke v. Blake*..... 465

*Motion in Appellate Court.*

16. On motion to quash a bill of exceptions the supreme court may receive in evidence a certified copy of an affidavit not included in the record for review. *Brownell v. Fuller*..... 587

*Notice.*

17. Evidence *held* insufficient to show that a creditor had not notice of the relationship of a debtor's sureties to one another. *Merriam v. Miles*..... 567

*Parol.*

18. A promissory note or contract cannot be varied, qualified, or contradicted by evidence of a prior or contemporaneous agreement resting in parol. *Western Mfg. Co. v. Rogers*..... 456

**Evidence**—*concluded.*

*Pleadings.*

19. A party's own pleading in a cause is not substantive evidence in his favor of the facts alleged in the pleading. *Stewart v. Demming* ..... 7

**Exceptions.** See BILL OF EXCEPTIONS. INSTRUCTIONS, 5, 6. REVIEW, 33.

**Executions.** See ATTACHMENT. ESTOPPEL, 7. JUDGMENTS, 22. MORTGAGES, 2.

1. Manner of executing decree in a suit to enforce individual liability of stockholder, for corporate debts. *Van Pelt v. Gardner* ..... 702

*Appraisement.*

2. After property has been sold under a decree, the appraisement can be assailed only for fraud. *Jarrett v. Hoover*..... 65

3. Action of appraisers of realty, under an order of sale, in returning the value of the property, in fixing the amount of prior liens at a greater sum, and in finding defendants' interest of no value, is a sufficient compliance with the Code (secs. 491*a*—491*c*) requiring the interest of defendants to be appraised at its real value in money. *Id.*

4. Where a sheriff levies on personalty and the debtor files the inventory required by section 522 of the Code, relating to exempt property, it is the duty of the officer to call to his assistance three disinterested freeholders to determine the cash value of the property. *Johnson v. Bartek*..... 787

5. Where a sheriff seizes personalty claimed to be exempt and calls two appraisers only, the appraisement made by them is void, and affords the officer no protection in surrendering the property to the judgment debtor. *Id.*

*Caveat Emptor.*

6. The doctrine of *caveat emptor* applies to purchasers of real estate at execution sales. *Peterborough Savings Bank v. Pierce* ..... 713

*Confirmation.*

7. A foreclosure sale will not be set aside merely because the order of sale was not returned within sixty days of its date. *Jarrett v. Hoover*..... 65

8. Failure of the sheriff to return within sixty days an order for a mortgage-foreclosure sale is not a valid objection to confirmation of the sale. *Clark & Leonard Investment Co. v. Hamilton* ..... 95

9. Questions of computation or elements of findings on which a decree foreclosing a mortgage, a mechanic's lien, or a contract of sale, is based, will not be reviewed on appeal from the order confirming the foreclosure sale. *Hampton Lumber Co. v. Van Ness*..... 185

**Executions**—*continued.*

10. It is the duty of the district court to confirm a judicial sale of mortgaged premises only upon being satisfied that the sale has been made in conformity with law. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co*..... 229
11. When the records of the court conclusively show that the sale was made by an unauthorized person the court may set such sale aside on its own motion; and this it may do though the officer's return does not disclose the irregularity and is not directly assailed. *Id.*
12. Refusal to confirm a sale made pursuant to a decree *held* not erroneous, where the court discovered it had no jurisdiction to enter the decree against the party resisting confirmation. *Baldwin v. Burt*..... 287
13. Evidence on application to confirm sale *held* to justify a decision sustaining the value fixed by the appraisers. *Murphy v. Gunn*..... 670
14. Where objections to confirmation do not specifically indicate the irregularities complained of, they will be disregarded on review. *Id.*
15. When it is claimed that the time limited to show cause against confirmation of a judicial sale is too short, the defendant should apply to the court for additional time and, if necessary, accompany his application with a proper showing. *Id.*

*Officers Making Sales.*

16. Judicial sales must be conducted by the sheriff or other person authorized by the court. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co*..... 228
17. One who is designated in a decree of foreclosure as a special master commissioner to make a sale of mortgaged premises cannot lawfully delegate his authority to another. *Id*.... 229

*Order of Sale.*

18. A decree of foreclosure may be executed without an order of sale. *Jarrett v. Hoover*..... 65
19. An order of sale cannot limit the power conferred by a decree of foreclosure. *Id.*
20. Section 510 of the Code, fixing the time within which an execution shall be made returnable, is not applicable to orders of sale issued on decrees of foreclosure. *Id.*

*Property Subject to Seizure. Crops.*

21. Growing crops are personalty and subject to seizure under execution. *Sims v. Jones*..... 769
22. Where land is leased for a share of the crops, the landlord and tenant are tenants in common of the growing crops, and the interest of either therein is a leviable one. *Id.*

*Purchaser's Title. Sheriff's Deed.*

23. In a suit to subject realty claimed by a wife to payment of

**Executions**—*concluded.*

judgments against her husband, where the decree in such suit was for plaintiff, ascertained the amounts due on the judgments, and directed the sheriff to sell the realty as upon execution, it was *held* that a sale under the decree, rather than upon executions, vested title in the purchaser. *Schott v. Machamer* ..... 514

24. Except when controlled by the registry acts, a purchaser of realty at execution sale acquires only the interest of the execution debtor at the time the lien under which it was sold attached. *Peterborough Savings Bank v. Pierce* ..... 713

25. Generally, a sheriff's deed conveys only the estate which a quitclaim deed from the execution debtor to the purchaser would have conveyed had it been made and delivered at the date when the lien, under which the judicial sale occurred, attached. *Id.*

**Executors and Administrators.** See RES JUDICATA, 2. REVIEW, 76.

1. The right of an administrator to possession of realty arises from its being subject to payment of decedent's debts, and does not apply to a homestead. *Cooley v. Jansen* ..... 33

2. Method of reviewing proceedings in the administration of estates. *Nebraska Wesleyan University v. Craig* ..... 173

**Exemption.** See EXECUTIONS, 4, 5.

1. Upon the filing of a proper inventory and affidavit an officer who attached personalty claimed by defendant to be exempt should cause it to be appraised. *First Nat. Bank of Neligh v. Lancaster* ..... 467

2. Where an officer who seized exempt personalty refuses to call appraisers, one applying for mandamus to enforce the performance of that duty must allege and prove that after the seizure and before the sale he filed with the officer, or in the court from which the process issued, a schedule of his entire personal estate, together with a sworn statement that such schedule is complete and correct and that the claimant is a resident of the state, the head of a family, and not possessed of lands, town lots, nor houses exempt as a homestead. *Id.* ..... 468

**Factors and Brokers.** See COUNTIES, 5. SALES, 16. VENDOR AND VENDEE, 4.

**False Imprisonment.**

A ministerial officer is not liable in an action for false imprisonment for the arrest of a person under a warrant regular on its face and issued by proper authority, where there was no abuse in the manner of its execution. *Kelsey v. Klabunde* ..... 760

**False Representations.** See SALES, 18, 19.

**Fees.** See STATUTES, 8.

**Fees of County Treasurer.** See TAXATION, 3, 4.

**Fellow-Servants.** See MASTER AND SERVANT, 10-15.

**Final Orders.** See REVIEW, 34, 35.

**Findings.** See JUDGMENT, 7.

**Fire and Police Commissioners.** See MUNICIPAL CORPORATIONS, 6-11.

**Foreclosure.** See EXECUTIONS, 9. MORTGAGES, 5. VENDOR AND VENDEE, 6.

**Forfeiture.** See INSURANCE, 3, 4.

**Fraternal Benefit Associations.** See ESTOPPEL, 3.

**Fraud.** See SALES, 18-20.

**Fraudulent Conveyances.** See MORTGAGES, 9, 10.

1. Sale *held* not fraudulent. *Richardson Drug Co. v. Meyer*..... 319

*Intent. Possession of Mortgaged Chattels.*

2. The question of fraudulent intent, when a conveyance is assailed on the ground that it is void as against creditors of the grantor, is one of fact. *Omaha Coal, Coke & Lime Co. v. Suess*..... 379

3. The intent with which a mortgagor is permitted to sell mortgaged goods, where it does not appear on the face of the mortgage, is a question for the jury. *Lepin v. Coon*.... 664

4. Where the *bona fides* of a transfer is assailed by creditors of transferor, his subsequent statements in relation to the transaction may be received in evidence on the issue of intent and to show the reason of his retention of possession of the property after the conveyance. *Armagost v. Rising*.. 763

5. A chattel mortgage providing that mortgagor may remain in possession and "sell any of the stock in trade in the regular course of business," but containing no provision for applying the proceeds to payment of the mortgage debt, *held* fraudulent as to mortgagor's creditors. *Buckstaff Bros. Mfg. Co. v. Snyder*..... 540

6. Where mortgagor remains in possession and sells mortgaged goods in the usual course of business pursuant to an agreement to apply the proceeds upon the debt secured, the court should not pronounce the transaction fraudulent as a matter of law, and in such a case it is prejudicial error to withdraw from the jury the question of fraud. *Lepin v. Coon*..... 664

*Transfers to Relatives.*

7. Where a chattel mortgage securing to a relative of mortgagor the latter's matured debt, and depriving his other creditors of their just dues, is assailed as fraudulent, persons claiming rights under the mortgage must establish the *bona fides* of the transaction. *Heffley v. Hunger*..... 776

**Fraudulent Conveyances**—*concluded.*

8. When the effect of a conveyance from one relative to another is to deprive the vendor's creditors of their just dues, the transaction will be closely scrutinized. *Schott v. Machamer* ..... 514

9. In a suit between a wife and a creditor of her husband concerning property transferred to her by him after he contracted the debt the burden of proof is on the wife to establish the *bona fides* of the transfer of the property to her. *Id.*

**Garnishment.** See JUSTICE OF THE PEACE, 7.

After judgment proceedings in garnishment are reviewable by petition in error and not by appeal. *Dixon Nat. Bank v. Omaha Nat. Bank*..... 796

**Guaranty.**

1. The liability of a guarantor must be found in the language of his agreement or it will not exist. *McCormick Harvesting Machine Co. v. Regier*..... 528

2. A guarantor is entitled to stand upon the letter of his contract, and his guaranty is not to be extended by a strained construction or an unnecessary implication from the language used. *Id.*

3. Evidence *held* to sustain a finding that goods delivered by plaintiff to its agent were not furnished under defendant's guaranty. *Id.*

**Habeas Corpus.**

Mere errors or irregularities in the proceedings or judgment of a court in a criminal case will not be examined or inquired into on an application for a writ of habeas corpus. *In re Ream*..... 667

**Highways.** See EMINENT DOMAIN.

1. Instruction relating to the duty of a railroad company to give highway signals *held* not erroneous. *Union P. R. Co. v. Elliott*..... 304

2. The propriety or necessity of opening and working a section-line road is committed to the discretion of the county board, and its decision is not subject to review. *Howard v. Board of Supervisors*..... 443

**Home for the Friendless.** See MANDAMUS, 1.

**Homestead.** See STATUTES, 13.

1. Wife's rights in homestead after death of the husband. *Cooley v. Jansen*..... 33

2. Under the homestead law of 1867 a judgment is a lien on the homestead, but such lien cannot be enforced by execution so long as the premises are owned and occupied by the judgment debtor. *Horbach v. Smiley*..... 217

**Homestead**—*concluded.*

3. The homestead law in force when the debt was created is applicable to proceedings to enforce the judgment rendered thereon. *Id.*

4. The existing homestead act exempts from forced sale upon execution or attachment a homestead not exceeding in value $2,000, and a judgment while the premises are impressed with the homestead character is not a lien thereon, even after their sale and abandonment by the debtor. *Id.*

5. A judgment is not a lien on lands occupied as a homestead, where the debtor's interest therein does not exceed $2,000. *Farmers Loan & Trust Co. v. Schwenk.*..... 657

**Husband and Wife.** See CRIMINAL CONVERSATION. FRAUDULENT CONVEYANCES, 9.

*Perjury.*

1. A married woman may be subject to the penalties of perjury, though testifying in presence of her husband. *Smith v. Meyers*..... 2

*Homestead.*

2. Wife's rights in homestead after death of the husband. *Cooley v. Jansen*..... 33

*Contracts of Married Women.*

3. The common-law disability of a married woman to make contracts is in force, except as abrogated by statute. *Stenger Benevolent Ass'n v. Stenger*..... 427

4. Whether a contract of a married woman was made with reference to her separate estate is a question of fact. *Id.*

5. A married woman may make contracts only in reference to her separate property, trade, or business, or upon the faith and credit thereof and with the intent on her part to charge her separate estate. *Id.*

6. Where coverture is pleaded as a defense and admitted or proved in a suit on a note executed by a wife and delivered to her husband, the burden is on plaintiff to show that the note was made with reference to, and upon the credit of, her separate property, and with the intent to bind the same. *Id.*

7. In a suit to enforce the contract of a married woman who establishes coverture the burden is on plaintiff to show that the contract was made with intent to bind her separate property. *First Nat. Bank of Sutton v. Grosshans*..... 773

8. In a suit to enforce a liability against a married woman, evidence *held* insufficient to show a contract effective in relation to her separate property. *Id.*

*Undue Influence.*

9. Where coverture and undue influence are interposed as defenses in a suit to enforce the wife's contract with her hus-

**Husband and Wife**—*concluded.*

band, the burden is on plaintiff to establish that no unfair advantage was taken or undue influence exercised by the husband. *Stenger Benevolent Ass'n v. Stenger*..... 428

10. That relations of trust and confidence arise and exist between husband and wife, and that the husband is, with possibly a few notable exceptions, the dominant personage, are matters of common knowledge and must be admitted. *Id.* ..... 433

**Implied Powers.** See COUNTIES, 8.

**Impounding Animals.** See ANIMALS, 2.

**Indictment and Information.** See CONTEMPT, 1-3. CRIMINAL LAW, 15.

**Indorsements.** See NEGOTIABLE INSTRUMENTS, 5-11.

**Injunction.** See JUDGMENT, 8.

1. An order dissolving an injunction and dismissing the proceeding is generally an adjudication that the injunction ought not to have been granted. *Gibson v. Reed*..... 309

2. The signers of an injunction bond are estopped in a suit thereon from asserting as a defense that the injunction order was broader than the application therefor. *Id.*

3. In a suit on an injunction bond given to procure an order restraining one from enforcing his judgment, he may recover all damages which he sustained by reason of the wrongful issuance of such order; and all reasonable and necessary counsel fees, expenses, and costs paid by him, or for which he became liable, by reason of the injunction, and depreciation in the value of property upon which the judgment was a lien during the time the injunction was in force, are elements of damage. *Id.*

4. A resident taxpayer, showing no private interest, may maintain a suit to restrain the governing body of a municipality from an illegal disposition of the public money, or the illegal creation of a debt which must be paid by taxation. *Tukey v. City of Omaha*..... 370

5. One who pollutes and renders unfit for use the waters of a running stream, or one who thus creates a nuisance, may be enjoined from committing such acts, at the suit of a person injured thereby. *Abraham v. City of Fremont*..... 395

**Insolvency.** See CORPORATIONS, 2-16. TRUSTS.

**Instructions.** See COUNTIES, 5. FRAUDULENT CONVEYANCES, 6. RAILROAD COMPANIES, 2. STREET RAILWAYS, 5.

1. Where, on the trial, the defendant admits on the record full liability on a cause of action set forth in the petition, it is error to refuse an instruction tendered to find for plaintiff as to such cause of action. *Western Mfg. Co. v. Rogers*..... 456

**Instructions**—*continued.*

2. Instructions disregarded in the brief of plaintiff in error will not be reviewed. *Herzke v. Blake*..... 465

*Alibi.*

3. It is improper to instruct a jury that under the defense of alibi it must appear that the distance was so great as to preclude the possibility that accused could have been at the scene of the crime. *Peyton v. State*..... 188

4. An instruction that the burden of proof is on accused to establish an alibi is erroneous. *Id.*

*Ambiguity.*

5. Instruction relating to the measure of damages caused by trespassing animals *held* erroneous for ambiguity. *Stewart v. Demming*..... 7

*Evidence.*

6. Where a fact is established by uncontroverted evidence, it is not reversible error for the trial court to so treat it in the instructions. *Wurdeman v. Schultz*..... 404

7. It is error to give to the jury an instruction assuming the existence of material facts unsupported by the evidence. *Chicago, B. & Q. R. Co. v. Schalkopf*..... 448

*Exceptions.*

8. Exceptions to rulings in giving and in refusing instructions came too late when noted two days after the rulings were made. *Smith v. Kennard*..... 523

9. The action of a district court in giving or in refusing instructions must be excepted to at the time or the exception will be unavailing. *Id.*

*Harmless Error.*

10. In an action by a station agent against a railroad company for injuries resulting from a defective brake, instructions *held* erroneous but not prejudicial. *Chicago, B. & Q. R. Co. v. Kellogg*..... 129

11. Where the verdict returned by the jury is the only one authorized by the pleadings and proof, the giving of an erroneous instruction is not prejudicial error. *Locke v. Shreck*..... 472

12. In a suit to recover life insurance instructions *held* not prejudicially erroneous. *Union Life Ins. Co. v. Haman*..... 600

13. Statement of a fact in issue *held* not prejudicial error. *Heffley v. Hunger*..... 776

*Larceny.*

14. Criticism of instructions in a prosecution for larceny as bailee. *Davis v. State*..... 178

*Negligence.*

15. Definition of ordinary care. *Omaha & R. V. R. Co. v. Crow*.. 748

**Instructions**—*concluded.*

*Reasonable Doubt.*

**16.** Instruction defining a reasonable doubt. *Maxfield v. State,* 44

*Repetitions.*

**17.** A cause will not be reversed for the refusal of a proper instruction where an instruction fully as favorable to the complaining party covering the same point has been given by the court on its own motion. *Howard v. Board of Supervisors* ..... 444

*Requests.*

**18.** Mere non-direction by the trial judge affords no ground for the reversal of a criminal cause, unless a proper instruction has been tendered and refused. *Maxfield v. State*..... 44

*Violation by Jury.*

**19.** Where the jury clearly violates the duty to find a verdict according to the law as given in the instructions of the court, the verdict should be set aside. *Standiford v. Green*.. 10

**20.** A verdict rendered in plain disregard of instructions is contrary to law, but the judgment will not for that reason be reversed when the instructions were erroneous and the verdict the only one which could properly be returned under the evidence. *Dern v. Kellogg*..... 560

**Insurance.**

*Accident. Applications.*

**1.** Statements in an application for insurance will not be construed as warranties unless the provisions of the application and policy taken together leave no room for any other construction. *Modern Woodman Accident Ass'n v. Shryock*... 250

*Cause of Death.*

**2.** Whether accident or disease caused the death of one insured against accident is a question for the jury unless the proofs are such that, by them, all reasonable men in the fair exercise of their judgment would be brought to adopt the same conclusion. *Id.*

*Life. Payment of Premium. Forfeiture.*

**3.** Waiver of forfeiture for assured's failure to pay the premium at the time and place specified may be inferred from the acts, declarations, or conduct of officers or agents of assurer. *Hartford Life & Annuity Ins. Co. v. Eastman*..... 90

**4.** Provisions for forfeiture of life insurance upon assured's failure to pay the premium at the time and place specified may be waived by the company. *Id.*

**5.** By habitually accepting good checks in lieu of cash an assurer waives a provision in a life-insurance policy requiring payment of assessments to be made in cash at assurer's office in a distant state. *Id.*

**6.** Conduct of assurer in inviting patrons to use the mails for

**Insurance**—*continued.*

transmitting premiums and in giving directions in relation thereto will warrant an inference that it intended to accept as payment funds thus sent in time to reach its office on or before maturity of the premiums. *Id.*

7. Question whether credit for the first premium had been given *held* within the issues, and a proper one to submit to the jury. *Union Life Ins. Co. v. Haman*..... 599

8. In a suit to recover life insurance where evidence tended to show that the policy was a decoy to be used only in procuring risks, and that the first premium had not been paid, rulings *held* not erroneous in admitting in evidence the policy, a premium receipt, and a statement that assurer's agent received a revolver from assured. *Id.*

9. A credit given by assurer for payment of the first premium validates a policy making the payment necessary to its validity. *Id.*

10. Instructions *held* not prejudicially erroneous in a suit for life insurance where assurer alleged that the policy was a decoy to be used only in procuring risks, and that the first premium had not been paid, plaintiff contending that the policy became effective and alleging payment of premium. *Id.*

11. Evidence *held* sufficient to sustain a verdict for plaintiff for life insurance in a suit where assurer alleged that the policy was a decoy to be used only in procuring risks, and that the first premium had not been paid, plaintiff contending that the policy became effective and alleging payment of the premium. *Id.*

12. Evidence *held* sufficient to sustain a finding that the general manager of a life insurance company extended credit for payment of the first premium. *Id.*

*Fire. Additional Insurance.*

13. In a suit for fire insurance evidence *held* not to support insurer's contention that insured procured additional insurance in violation of the policy, but to sustain a finding that no additional insurance had been placed on the property. *Home Fire Ins. Co. v. Deets*..... 620

*Breach of Contract.*

14. Where, in an action on a policy of fire insurance, the jury finds that certain facts are established by the evidence, it then becomes a question of law for the court to decide whether or not the facts so established warrant a conclusion that a condition of the policy was not violated. *Home Fire Ins. Co. v. Peyson*..... 495

*Classification of Property.*

15. A fire insurance policy which classifies the property insured and limits the amount of insurance on each class is divisible,

**Insurance**—*continued.*

and may be valid as to one class and void as to another. *Johansen v. Home Fire Ins. Co.* ..... 548

*Incumbrances.*

16. An insured who mortgaged his chattels in violation of the policy may recover for a loss occurring after he discharged the mortgage. *Id.*

17. Action of insured *held* to render a policy void where he changed and increased incumbrances on the insured property in violation of a provision that "the policy should become void if the property should be sold, transferred, or incumbered." *Id.* ..... 549

18. Where the evidence in an action on a policy tended to show that release of a mortgage on the insured chattels had been expressed by parol before the fire, an instruction to the jury to find for insurer as to such property because of a provision in the policy rendering it void if the property became incumbered, *held* erroneous. *Id.*

19. Direction to jury to find for defendant in an action on a fire insurance policy, *held* erroneous. *Id.*

*Limitation of Actions.*

20. A provision in a policy limiting the time for bringing suit thereon to a period different from that fixed by statute is against public policy and not enforceable. *Miller v. State.*. 121

21. Where an insurer, either before suit or by answer in an action, denies that the policy was in force when the loss occurred, it cannot avail itself of a provision in the policy that no action shall be brought until sixty days after receipt of proofs of loss and adjustment. *Omaha Fire Ins. Co. v. Hildebrand* ..... 306

*Proofs of Loss.*

22. An insurer may waive the provision of a policy requiring insured to furnish proofs of loss. *Id.*

23. By denying liability for a loss insurer may waive proofs of loss before institution of a suit. *Id.*

24. By interposing to an action for a loss the defense that the policy was not in force at the time of the fire the insurer may waive proofs of loss. *Id.*

*Occupancy.*

25. "Unoccupied," as used in a policy of fire insurance, should be given a fair and reasonable construction, such as was contemplated by the parties when the contract was made. *Home Fire Ins. Co. v. Peyson* ..... 491

26. Evidence *held* to warrant a finding that the insured premises did not become unoccupied within the meaning of the policy. *Id.*

27. Where a tenant removed only a portion of his furniture

**Insurance**—*concluded.*

from an insured tenement house before it was destroyed by fire, a finding adverse to insurer's contention that at the time of the loss the house was unoccupied, in violation of the policy, will not be disturbed as being without sufficient evidence to sustain it. *Omaha Fire Ins. Co. v. Sinnott*..... 523

*Return of Premium.*

28. An insured whose policy was rightfully canceled because of his violation of a provision against additional insurance cannot maintain an action against insurer for the unearned premium. *Farmers Mutual Ins. Co. v. Home Fire Ins. Co*.... 740

29. Section 42, chapter 43, Compiled Statutes, providing for cancellation of policies upon request of insured, and for return of unearned premiums, applies only to a policy in force, and has no reference to a contract which has ceased to exist because of insured's violation thereof. *Id.*

**Interest.** See MORTGAGES, 5.

Where a judgment debtor, to procure an extension of time for payment, agreed to pay lienor interest in addition to the rate fixed by the original contract, it was *held* that the additional interest was payable with the principal, and that the statute of limitations did not begin to run against the additional interest until the principal was paid. *Greenwood v. Fenton* ..... 573

**Internal Improvements.** See ELECTIONS.

**Intervention.** See MANDAMUS, 6.

**Irrigation.**

1. The use of water for the purpose of irrigation is a public use within the import of the constitution. *Cummings v. Hyatt* ..... 36

2. The nature of irrigation is such as to make it a subject of legislative control and to warrant the legislature in designating irrigation ditches or canals "works of internal improvement." *Id.*

**Joinder of Causes of Action.** See MANDAMUS, 3.

**Journal Entry.** See REVIEW, 44-46.

**Judges.** See COURTS.

A judge at chambers possesses no jurisdiction to vacate or modify orders or judgments of the district court. *Kime v. Fenner*..... 476

**Judgments.** See CRIMINAL LAW, 15. HOMESTEAD, 2-5. INJUNCTION, 3. INTEREST. JUSTICE OF THE PEACE, 5. MORTGAGES, 1, 2, 11, 15. RES JUDICATA. REVIEW, 34, 35. STATUTES, 8.

1. After an appeal perfected, an amendment of the record

**Judgments**—*continued.*

of the judgment appealed from to show certain facts and a subsequent amendment whereby such facts were eliminated from the record, *held* to have accomplished nothing by way of amendment. *Andresen v. Carson*..... 678

2. Where the record of a judgment, at the time of an appeal taken therefrom, recited that it had been rendered upon the consideration of agreement of parties, the appeal was unavailing and, on motion of appellee, was properly dismissed. *Id.*

3. The mere fact that in a journal entry a motion sustained was described as "a motion to dismiss an appeal because not taken in time," *held* not sufficient to prevent the appellate court from considering whether or not the ruling on said motion was proper, in view of grounds urged therein, but not recited in said journal entry. *Id.*

*Deficiency.*

4. Evidence *held* insufficient to sustain a deficiency judgment entered against the purchaser of mortgaged property on the theory that he assumed payment of the mortgage. *Mendelssohn v. Christie*..... 684

*Effect of Repeal of Statute.*

5. A judgment against stockholders for a liability arising under section 136, chapter 11, General Statutes 1873, rendered after the repeal of that statute, is erroneous but not void; and the repeal of the statute before judgment is no defense to a creditors' bill to enforce the judgment. *Omaha Coal, Coke & Lime Co. v. Suess*..... 379

*Form.*

6. Form of decree in a suit to enforce individual liability of stockholders, for corporate debts. *Van Pelt v. Gardner*.... 702

7. A judgment otherwise joint in form is not rendered several by a finding as to which of defendants is the principal debtor, and which are sureties. *Farney v. Hamilton County*.. 797

*Injunction.*

8. A court of equity will not enjoin the enforcement of a judgment of a justice of the peace where it appears that a plain and adequate remedy existed at law. *Mayer v. Nelson*..... 435

*Jurisdiction.*

9. Refusal to confirm a sale made pursuant to a decree *held* not erroneous where the court discovered it had no jurisdiction to enter the decree against the party resisting confirmation. *Baldwin v. Burt*..... 287

10. To support a judgment of a justice of the peace the record must affirmatively show jurisdiction over the person of defendant. *Miller v. Mecker*..... 452

11. The validity of a judgment or order does not depend on the

**Judgments**—*continued.*

reason for the action of the court, but upon lawful authority to hear and determine the matter before the court. *In re Ream* ..... 669

*Lien. Homestead.*

12. The general lien of a deficiency judgment rendered not by confession and at a term subsequent to the commencement of the foreclosure suit in which such judgment was rendered is superior to a mortgage or conveyance of the debtor's land executed after the commencement of that term, but before the actual rendition of the judgment. *Hoagland v. Green* ..... 164

13. A dormant judgment is not a lien upon the lands of the judgment debtor. *Horbach v. Smiley* ..... 217

14. A judgment revived is a lien from the date of the order of revivor. *Id.*

15. Under the present homestead law a judgment is a lien merely on the debtor's interest in lands occupied as a homestead in excess of $2,000. *Id.*

16. A judgment is not a lien on lands occupied as a homestead, where the debtor's interest therein does not exceed $2,000. *Farmers Loan & Trust Co. v. Schwenk* ..... 657

*Pleadings.*

17. Section 440 of the Code of Civil Procedure requires judgment to be rendered in favor of the party entitled thereto by the pleadings, notwithstanding a verdict has been returned against him. *Stewart v. American Exchange Nat. Bank* ..... 461

*Proceedings to Vacate.*

18. A party seeking to vacate a judgment after the term at which it was rendered must allege and prove that he has a valid cause of action or defense, and, to entitle him to relief, the court must adjudge that such cause of action or defense is *prima facie* valid. *Gilbert v. Marrow* ..... 77

19. The power of a district court to vacate or modify its own judgments after the term at which they were rendered is limited to the grounds enumerated in section 602 of the Code. *Hampton Lumber Co. v. Van Ness* ..... 185

20. Where a defendant against whom judgment has been irregularly entered moves for a vacation thereof under sections 602-611 of the Code, he must show that he has a defense to the action, but it need not be a complete and perfect defense to plaintiff's entire claim, a defense to any substantial part of it being sufficient to entitle defendant to relief. *Kime v. Fenner* ..... 476

21. Where a petition seeking the vacation of a judgment irregularly entered against a defendant has an answer attached

**Judgments**—*concluded.*

thereto presenting several defenses to the plaintiff's cause of action, the court cannot strike out such answer on the ground that all the defenses pleaded are not available, and then dismiss the proceeding because the defendant's petition does not exhibit a defense to the action. *Id.*

*Proceeds of Execution.*

22. Firm creditors holding a judgment against a firm, *held* not entitled to proceeds of firm assets sold on execution, where the proceeds were claimed under an execution on a former judgment rendered against the firm in a suit on a note not given with reference to firm business, but to which one partner had signed the firm name without authority from the other partner. *Werner v. Iler*..... 576

*Service of Summons.*

23. A party who did not appear in an action, but against whom judgment was rendered, may show in a proper proceeding, either as a cause of action or a defense, that recitals of the record that he was served with process were false. *Eayrs v. Nason*..... 143

24. A judgment against defendant is not void but erroneous and subject to reversal on review, where the summons was served upon him while he was in attendance upon court as a witness and, for that reason, exempt from service of process. *Mayer v. Nelson*..... 434

**Judicial Sales.** See ESTOPPEL, 7. EXECUTIONS.

**Jurisdiction.** See APPEARANCE. CONTEMPT, 1. CRIMINAL LAW, 13, 14. EQUITY. JUDGES. JUSTICE OF THE PEACE, 4. NUISANCE. REVIEW, 47-52.

**Jury.** See INSTRUCTIONS, 19, 20.

**Justice of the Peace.** See JUDGMENT, 8. RES JUDICATA, 6.

1. The district court upon the trial of an appeal from a justice of the peace is without jurisdiction to render against the sureties on the appeal bond the same judgment it enters against appellant. *Drummond Carriage Co. v. Mills*..... 417

2. When an action is properly brought before a justice of the peace of one county summons may issue to any other county to bring in other parties defendant. *Miller v. Meeker*, 452

3. In a personal action service of summons in a county where a suit is brought upon a nominal defendant merely, who has no substantial interest in the subject of the suit adverse to the plaintiff, does not confer authority upon the court to issue a summons to another county for a real defendant. *Id.*

4. The jurisdiction of a justice's court is inferior and limited, and to support a judgment of that court the record must

**Justice of the Peace—*concluded.***

affirmatively show jurisdiction over the person of defendant. *Id.*

5. In an error proceeding to reverse a judgment by default rendered against defendant by a justice of the peace, prejudicial error will not be presumed from an indorsement on the summons that, upon default, judgment would be rendered for a certain sum with interest, where the summons recited that interest was claimed at ten per cent, this rate with the principal justifying a judgment in excess of that rendered. *McKibben v. Harris*..... 520

6. In an error proceeding it will not be assumed that no bill of particulars had been filed with a justice of the peace before he rendered the judgment assailed, where, before judgment, no such question was raised. *Id.*

7. A justice of the peace has jurisdiction to issue a warrant for the arrest of a garnishee who, having been summoned, refuses to appear and answer; and the failure to tender the garnishee his fee, if such failure excuses his failure to appear, is merely a defense to the contempt proceedings and does not render the issuing of the warrant void, or the justice civilly liable for having issued it. *Kelsey v. Klabunde*... 760

8. Where a justice of the peace has no jurisdiction of the subject-matter of an action the district court cannot acquire jurisdiction by appeal. *Jacobson v. Lynn*..... 794

**Laches.** See BILL OF EXCEPTIONS, 3. NEW TRIAL, 1. REVIEW, 50.

**Land Contracts.** See VENDOR AND VENDEE, 6.

**Landlord and Tenant.** See PARTY WALLS, 2.

1. Evidence in an action for rent *held* insufficient to sustain a finding for defendant. *Benedict v. Citizens Bank of Plattsmouth* ..... 113

2. Exclusion of lease *held* not reversible error in an action to recover a balance due plaintiff for repairing a hotel. *Herzke v. Blake*..... 465

3. Where land is leased for a share of the crops, the landlord and tenant are tenants in common of the growing crops, and the interest of either may be seized on execution. *Sims v. Jones*..... 769

**Larceny.**

1. In a prosecution for larceny by a bailee the gravamen of the charge is the felonious conversion, and the intent may be shown to have been entertained as of the time of the reception of the possession of the property or to have arisen during the continuance of such possession. *Davis v. State*..... 177

2. Criticism of instructions in a prosecution for larceny as bailee. *Id.*..... 178

**Leading Questions.** See WITNESSES.

**Liens.** See ANIMALS, 2. BAILMENT, 2-5. CHATTEL MORTGAGES. JUDGMENTS. MORTGAGES. SUBROGATION. TAXATION, 7. TRUSTS, 6, 7.

**Life Insurance.** See INSURANCE, 3-12.

**Limitation of Actions.** See ADVERSE POSSESSION. INSURANCE, 21.

1. Where a statute confers a right of action not existing at common law, and limits the duration of that right, such limitation relates not only to the remedy, but extinguishes the right. *Goodwin v. Cunningham*..... 12
2. A provision in a contract limiting the time for bringing suit thereon to a period different from that fixed by statute is against public policy and not enforceable. *Miller v. State Ins. Co*..... 121
3. When it is not apparent from the face of a pleading that the action or defense is barred by the statute of limitations, then the bar must be raised by plea or it will be deemed waived. *Eayrs v. Nason*..... 143
4. When a pleading discloses upon its face that the action or defense is barred by the statute of limitations, then such bar may be raised by objection that the pleading does not state a cause of action or defense. *Id.*
5. In an action to quiet title the statute of limitations does not begin to run in favor of the defendant until some assertion of ownership or claim to the premises is made by him. *Id*, 144
6. So far as a petition to quiet title by cancellation of a sheriff's deed disclosed, *held* that plaintiff's cause of action accrued at the date the suit was brought. *Id.*
7. Where an original petition to foreclose tax liens was defective in omitting averments of levy and assessment, the filing of an amended petition supplying such averments *held* not to be the commencement of the action in such a sense as, meanwhile, to permit the running of the statute of limitations. *Merrill v. Wright*..... 517
8. Where a judgment debtor, to procure an extension of time for payment, agreed to pay lienor interest in addition to the rate fixed by the original contract, it was *held* that the additional interest was payable with the principal, and that the statute of limitations did not begin to run against the additional interest until the principal was paid. *Greenwood v. Fenton*..... 573
9. A cause of action against stockholders of a corporation, by a creditor, to subject their unpaid stock subscriptions to the payment of his debt, accrues when the exact amount justly due the creditors from the corporation has been ascertained and the corporate property exhausted, and is barred in four years thereafter. *Van Pelt v. Gardner*..... 701

**Lis Pendens.** See VENDOR AND VENDEE, 1.

**Lord Campbell's Act.** See DEATH BY WRONGFUL ACT.

**Malicious Prosecution.**

1. To sustain a judgment for plaintiff in an action for malicious prosecution he must show by a preponderance of evidence that such prosecution has been determined; that defendant had no reasonable or probable cause for believing plaintiff guilty of the offense charged; and that in instituting and carrying on the prosecution defendant was actuated by malice. *Hagelund v. Murphy*..... 545
2. Evidence *held* to sustain the action of the district court in taking the case from the jury and in dismissing plaintiff's action. *Id.*

**Mandamus.**

1. Mandamus to compel the superintendent appointed by the society of the home for the friendless to surrender possession of the home, denied. *State v. Williams*..... 154
2. In an application for a writ of mandamus the court will not try the title or right of possession to real or personal property, and by allowing the writ make it subserve the purpose of a writ of ejectment or replevin. *Id.*
3. In a single proceeding several writs of mandamus, directed to different respondents, requiring the performance of different acts, cannot be granted. *State v. Cornell*..... 158
4. A county board cannot be compelled to provide, through a use of the county general fund, for the payment of a warrant which, upon its face, requires that payment thereof, when made, shall be charged to a certain designated ditch fund. *Hall v. State*..... 280
5. When mandamus is the appropriate remedy the writ is issued on relation of a private suitor. *First Nat. Bank of Neligh v. Lancaster*..... 467
6. Where an officer who attached exempt personalty refuses to call appraisers after the proper inventory and affidavit have been filed, he may be directed by mandamus to perform that duty; and, pending the application for the writ, the attaching creditor may intervene and resist the application, but cannot put in issue the correctness of the inventory or the truth of the affidavit. *Id.*..... 468
7. Mandamus will not issue to compel the auditor to issue a warrant for a claim which he has disallowed, there being an adequate remedy by appeal. *State v. Cornell*..... 158
8. The auditor of public accounts will not be compelled to issue a warrant on the state treasury for payment of money, unless he has been authorized to do so by legislative appropriation. *Id.*..... 656

**Market House.** See MUNICIPAL CORPORATIONS, 3.

**Married Women.** See HUSBAND AND WIFE.

A married woman who holds lands in fee may sign a petition for an election to vote bonds for internal improvements where the statute provides that such a petition must be signed by freeholders. *Cummings v. Hyatt*..... 35

**Marshaling Liens.** See MORTGAGES, 12, 13.

**Master and Servant.** See CARRIERS, 2.

*Appliances. Repairs. Injury to Servant.*

1. In a suit against a railroad company for injuries resulting from a defective brake, that it became out of repair a short time before the accident, and that the company had no knowledge of the defect and could not by exercising ordinary care have discovered it before the accident, are matters of defense. *Chicago, B. & Q. R. Co. v. Kellogg*..... 127

2. In a suit by a station agent of a railroad company against it for injuries he had sustained while attempting to set a defective brake, the petition does not fail to state a cause of action because it does not aver that the company knew of the defective condition of the brake, or that the brake had been out of repair for such a length of time that the company, by the exercise of ordinary care, could have discovered the defect. *Id.*

3. It is the duty of a master to furnish the servant tools and appliances reasonably safe and fit for the purposes for which they are designed; and if the master neglects to do this, and the servant is injured without fault on his part, the defect in the instrument or appliance not being obvious, the master is liable. *Id*..... 128

4. Where it is the duty of a station agent to set car-brakes but not to inspect them, he has the right to presume that the brakes are in proper condition and reasonably fit for the purposes for which they were designed. *Id.*

5. If a car inspector, whose duty it is to keep the brakes in repair, neglects that duty, and his co-servant, for instance a station agent, is injured by that neglect, the railway company is liable for such injury. *Id.*

6. In an action by a station agent against a railroad company for injuries resulting from a defective brake, instructions *held* erroneous but not prejudicial. *Id*..... 129

*Negligence.*

7. In a suit by an injured employé against a railroad company, evidence *held* to disclose contributory negligence requiring the reversal of a judgment in favor of plaintiff. *Chicago, R. I. & P. R. Co. v. Cowles*..... 269

8. Evidence *held* to sustain a finding that negligence of a railroad company was the proximate cause of injury to an em-

**Master and Servant**—*concluded.*

ployé, and that the latter's contributory negligence was not the cause of the injury. *Union P. R. Co. v. Elliott*..... 299

9. Evidence *held* to sustain the jury's finding that the death of an employé was not caused by his own negligence. *Missouri P. R. Co. v. Lyons*..... 633

*Fellow-Servants.*

10. A station agent whose duty it is to set car-brakes, but not to inspect or repair them, *held* not a fellow-servant of a car inspector. *Chicago, B. & Q. R. Co. v. Kellogg*..... 128

11. It is not the law, except where made so by statute, that a master is liable to a servant for an injury which the latter has received through the negligence of a fellow-servant. *Id.*

12. In a suit against a railroad company by an employé who was injured through negligence of a co-employé, the defense that the employés were fellow-servants cannot be considered on review unless presented to the trial court by a pleading, an instruction, or in some other manner. *Union P. R. Co. v. Elliott*..... 299

13. Risks of employment may include a servant's liability to injury at the hands of a negligent fellow-servant. *Missouri P. R. Co. v. Lyons*..... 633

14. Where a master is not guilty of negligence in the selection or retention of servants, nor in furnishing them with suitable appliances, he is not answerable to one of them for an injury caused by the negligence of a fellow-servant while both are engaged in the same work in the same department of the master's business. *Id.*

15. Each member of a switching crew *held* a fellow-servant of each member of another switching crew employed by the same railway company. *Id.*

**Master Commissioner.** See EXECUTIONS, 10, 11, 16, 17.

**Mechanics' Liens.**

1. The lien of a mortgage taken while a building is in process of erection on the land is subject to mechanics' liens for work commenced, or for material the furnishing of which was begun, before the mortgage was recorded. *Goodwin v. Cunningham*..... 11

2. The statutory provision whereby the lien is limited to two years after the filing of the claim is a limitation upon the existence of the lien, and not merely upon the remedy to enforce it. *Id.*..... 12

3. A junior incumbrancer who was not a party to a suit to foreclose a mechanic's lien, will not, after extinction of that lien by lapse of time, be required to redeem from the pur-

**Mechanic's Liens**—*concluded.*
chaser at the void sale as a condition of enforcing his own incumbrance. *Id.*

4. A petition for foreclosure alleging that the materials were sold and delivered for use in the erection of a building but not charging they were thus used, that during the time the materials were being delivered the purchaser thereof sold the premises to his co-defendant who completed the building, using a small portion of the materials for that purpose, *held* to state a cause of action against both defendants. *Bogue v. Guthe*..... 236

5. The object of the statute in permitting a claimant for a lien to file an account in the register's office is to apprise persons dealing with the realty of the existence of the claim. *Portsmouth Savings Bank v. Riley*..... 531

6. That one has furnished labor or material in improving realty of another, and is therefore entitled to a lien, cannot be established solely by putting in evidence the verified account filed in the register's office for the purpose of obtaining the lien. *Id.*

7. A verified account filed in the register's office for the purpose of obtaining a lien is not even *prima facie* evidence that the labor or material was furnished, nor that claimant has a lien. *Id.*

8. In a mortgage-foreclosure suit it was *held* that priority of a mechanic's lien could not be established solely by introducing in evidence the decree rendered in a suit to foreclose the mechanic's lien. *Id.*

**Merger.**

1. It is a general rule that where two unequal estates vest in the same person at the same time, without an intervening estate, the smaller is thereupon merged in the greater; but merger does not always or necessarily result from such a coinciding of estates. *Peterborough Savings Bank v. Pierce*.. 712

2. Whether two estates will be held to have coalesced depends upon the facts and circumstances in the particular case, the intention of the party acquiring the two estates, and the equities of the parties to be affected. *Id.*

**Mistake.** See REFORMATION OF INSTRUMENTS.

**Money Paid.**

Evidence *held* insufficient to sustain the averments of a petition for money paid. *Penn Mutual Life Ins. Co. v. Conoughy*.. 124

**Mortgage Foreclosure.** See EXECUTIONS.

**Mortgages.** See CORPORATIONS. PRINCIPAL AND SURETY, 4. SUBROGATION. VENDOR AND VENDEE, 1.

1. A mortgage to secure future advances was made in the form

Mortgages—*continued.*

of a deed absolute. No obligation rested on the mortgagee to make any advances. Creditors of the mortgagor recovered judgments after the mortgage was recorded, and, after causing executions to be levied on the land mortgaged, brought a creditors' bill to subject it to the payment of their judgments. *Held*, That the mortgage was prior to their claims for all sums advanced before the mortgagee had knowledge thereof, but subject to their claims as to sums advanced after the mortgagee acquired knowledge of their rights. *Omaha Coal, Coke & Lime Co. v. Suess*..... 379

2. A deed absolute in form conveying the legal title, although intended as a mortgage to secure future advances, and the lien of a judgment not attaching to an equitable estate, the liens of other creditors of the grantor did not attach until the levy of execution at the earliest; and, in the absence of evidence that advances were made by the mortgagee between the levy and the commencement of a creditors' suit to subject the land to the payment of the judgments, the latter date was properly taken as marking the time after which advances on the mortgage were subordinate to the claims of such other creditors. *Id.*

*Assignments. Rights of Transferees.*

3. The rights of one who held an unrecorded assignment of a junior mortgage are not barred by a decree foreclosing the senior lien in a suit to which he was not a party, though the original mortgagee was a party. *Goodwin v. Cunningham* ..... 11

4. The transfer of a note secured by mortgage carries with it the mortgage and operates as a transfer thereof without a formal or written assignment. *Id.*

5. The holder of an unpaid, overdue, negotiable, interest coupon secured with the principal bond by a mortgage on land may maintain an action to foreclose the mortgage after a purchaser of the land paid the amount of the bond to the holder thereof and procured a release of the mortgage. *Griffith v. Salleng*..... 362

6. Within the meaning of the recording acts, one purchasing the legal title to realty from a mortgagee who registered his mortgage which secured an unmatured negotiable note, is not a purchaser without notice, nor entitled to protection against such mortgage, when in the hands of a *bona fide* purchaser, though the assignment was not recorded. *Peterborough Savings Bank v. Pierce*..... 713

*Deficiency Judgment.*

7. Evidence *held* insufficient to sustain a deficiency judgment entered against the purchaser of mortgaged property on the theory that he assumed payment of the mortgage. *Mendelssohn v. Christie*..... 684

**Mortgages**—*concluded.*

*Delivery.*

8. It cannot be inferred that a mortgage, although left in the custody of the mortgagee, was delivered as to one of two joint mortgagors upon the signing and acknowledgment by him, when it was the manifest intention of the parties that it should not take effect until execution by the other mortgagor. *Hoagland v. Green*..... 164

*Execution by Corporations.*

9. A mortgage executed by an insolvent corporation to secure a debt due from it to one of its officers or directors is illegal and void. *Stough v. Ponca Mill Co*..... 500

10. A mortgage executed by an insolvent corporation to a third person to secure a debt, for the payment of which one of its officers or directors is personally bound, is illegal and void. *Id.*

*Liens. Foreclosure. Estoppel.*

11. Where, under a decree foreclosing one of two mortgages of equal priority given to plaintiff in one transaction and covering the same lands, the appraisers erroneously deducted from the value of the premises the amount of a judgment as a senior lien, plaintiff, being the purchaser at the foreclosure sale, cannot be heard, in a subsequent action by him to foreclose the other mortgage, to assert that such judgment was the junior lien. *Farmers Loan & Trust Co. v. Schwenk* ..... 657
*Peterborough Savings Bank v. Pierce*..... 721

*Marshaling Liens.*

12. In marshaling liens in foreclosure proceedings, *held* that judgments should be given priority according to the date of the respective liens. *Horbach v. Smiley*..... 217

13. In a mortgage-foreclosure suit it was *held* that priority of a mechanic's lien could not be established solely by introducing in evidence the decree rendered in a suit to foreclose the mechanic's lien. *Portsmouth Savings Bank v. Riley*..... 531

*Right to Redeem.*

14. In a suit by mortgagor's heir against the purchaser at foreclosure sale to redeem the land and to quiet title, it was *held* proper for the heir to show the falsity of an affidavit for constructive service, in the foreclosure suit, averring that the ancestor was a non-resident and that he could not be served with summons in the state. *Eayrs v. Nason*..... 143

*Satisfaction.*

15. A false certificate of satisfaction issued by the clerk of the district court and recorded by the register of deeds does not suspend execution of a decree of foreclosure. *Clark & Leonard Investment Co. v. Hamilton*..... 95

**Motions.** See PLEADING, 9.

**Municipal Bonds.** See COUNTIES, 4. ELECTIONS. MUNICIPAL CORPORATIONS, 3.

**Municipal Corporations.** See ANIMALS, 2.

1. Power of a city to change to a particular use land dedicated to the public for a different purpose. *Tukey v. City of Omaha* .....371, 372, 374

*Bonds for Market House.*

2. When the governing body of a municipality is authorized by a vote of the people, and only thereby, to incur a debt for a particular purpose, such purpose must be strictly followed, and the terms of the authority granted must be strictly and fully performed. *Id.*..... 370

3. Where electors of a city by vote adopt a proposition to issue bonds for the purpose of securing a site for a market place and erecting a market house thereon, the erection of a market house on land already owned by the city, and used as a public park, *held* a substantial departure from the terms of the vote, and unauthorized. *Id.*

*Defective Sidewalks.*

4. Judgment affirmed for $1,200 in favor of one who was injured on a defective sidewalk. *City of Harvard v. Stiles*..... 26

*Officers. Removal. Right to Defense.*

5. The offices of city engineer, city attorney, and water commissioner of the city of Lincoln are elective, the statutory provision purporting to make them appointive offices being unconstitutional. *State v. Bowen*..... 211

6. By section 169, chapter 12*a*, Compiled Statutes, the power to appoint and remove officers and members of the fire and police departments in cities of the metropolitan class is vested in the fire and police commissioners. *Moores v. State.* 486

7. A member of the fire or police department in a metropolitan city cannot be discharged for political reasons. *Id.*

8. Removals deemed necessary for the proper management, discipline, or more effective service of either fire or police department in a metropolitan city must be made pursuant to such rules and regulations as may be adopted by the board of fire and police commissioners. *Id.*

9. Before an officer or member of either the police or fire department in a metropolitan city can be discharged for alleged misconduct, unfitness, dereliction of duty, or other cause affecting his character or standing as a public servant, charges must be filed against him and he must be afforded an opportunity to be heard in his defense. *Id.*

10. The right of an officer of the police force or member of the fire department in a metropolitan city to defend against formal charges is a right to vindicate himself from an unjust accusation; not a right to show that the public wel-

**Municipal Corporations**—*concluded.*

fare requires his retention or that the revenues are adequate for the payment of his salary. *Id.*

11. The membership of either the police or fire department of a metropolitan city may be reduced on economic grounds, and men may be dismissed from the service without a hearing and without an opportunity to show cause against the dismissal. *Id.*

*Taxation. Cost of Abating Nuisance.*

12. A statute authorizing a city to assess against a lot on which a nuisance exists the entire cost of abating the nuisance by improving the lot does not violate the constitutional provision relating to special taxation for local improvements, but is a proper exercise of police power. *Horbach v. City of Omaha* ..... 83

*Taxation. Injunction.*

13. A resident taxpayer, showing no private interest, may maintain a suit to restrain the governing body of a municipality from an illegal disposition of the public money, or the illegal creation of a debt which must be paid by taxation. *Tukey v. City of Omaha* ..... 370

*Ordinances. Proof.*

14. Where publication of an ordinance of the city of South Omaha is made in a daily paper, it must be inserted in each issue for a week, one insertion not being sufficient. *Union P. R. Co. v. McNally* ..... 112

15. Failure to publish in the official newspaper an ordinance making an annual levy of taxes for the city of Omaha did not prevent the ordinance from becoming a law, where it was duly passed, and approved by the mayor, and contained a section providing that it should be in force from and after its passage. *Johnson v. Finley* ..... 733

16. The statutory method of proof of the existence of an ordinance of the city of Omaha is not exclusive, but such proof may be made by common-law methods. *Id.*

**National Banks.** See USURY.

**Negligence.** See MASTER AND SERVANT, 7-9. RAILROAD COMPANIES. STREET RAILWAYS.

1. Where a party in good faith had endeavored to avoid injury attributable to the negligence of a common carrier, it cannot escape liability by showing that such endeavors might have been more judicious. *Western Union Telegraph Co. v. Cook* ..... 109

2. Instruction defining ordinary care. *Omaha & R. V. R. Co. v. Crow* ..... 748

3. A general averment of negligence is sufficient unless attacked by motion, and an issue framed by a traverse of

**Negligence**—*concluded.*

such averment may be proved by evidence of any act within the general averment. *Id.*

**Negotiable Instruments.** See ASSIGNMENTS, 2. HUSBAND AND WIFE, 6. MORTGAGES, 4, 5. PARTNERSHIP, 5.

1. Liability of a bank for failure to collect a draft sent to it for collection, where it failed to perform its duties in good faith. *Dern v. Kellogg*..... 561

2. One who buys a corporation note unlawfully issued is not an innocent purchaser where it appears on the face of the note that the payee therein named and the officer by whom it was executed is the same person. *Stough v. Ponca Mill Co.* 500

*Action on Note. Pleading.*

3. It is not essential that a petition in a suit on a note made part of the pleading should negative payment by a stranger. *Hartzell v. McClurg*..... 313

4. A petition in a suit on a note made part of the pleading states a cause of action, where it contains allegations that defendant executed and delivered the note to plaintiff, that such note is wholly due and payable, and that defendant wholly neglects to pay the same, or any part thereof. *Id.*

*Assignments, Indorsements, and Rights of Transferees.*

5. A negotiable promissory note may be transferred by a separate, distinct assignment thereof, but in such case the transferee will not be protected as against infirmities or defenses which might be shown as against the assignor. *Gaylord v. Nebraska Savings & Exchange Bank*..... 104

6. An indorsement of a negotiable promissory note, "Pay to the order of—Mary W. Gaylord," *held* not a general indorsement, nor such an indorsement as would transfer the legal title by a mere delivery of such note. *Id.*

7. Possession of a negotiable note, duly indorsed by the payee, creates a presumption of title thereto in the holder. *Saunders v. Bates*..... 209

8. In a suit on a note a petition, after an allegation of execution and delivery of the note by defendant to plaintiff, averring that "plaintiff sold and discounted said note, that the holder thereof, at maturity, presented it for payment, that it was dishonored, and that by reason of the neglect and refusal of defendant to pay said note, plaintiff was compelled to take up said note," *held* to mean that plaintiff, upon dishonor of the note, paid the amount due thereon to the holder and he thereupon surrendered the note to plaintiff. *Hartzell v. McClurg*..... 316

9. In a suit on a note it was *held* that money paid by plaintiff to an indorsee was not paid [illegible] the benefit of the maker, but to protect plaintiff's [illegible]ntract of indorsement; and

**Negotiable Instruments**—*concluded.*

that the effect of the payment and redelivery to plaintiff was to vest him with the equitable title to the note. *Id.*

10. The equitable owner of a negotiable promissory note in his possession may maintain an action thereon in his own name. *Id.*

11. Where defendant in his answer specially denies an allegation of the petition that plaintiffs are partners and denies their allegation that the note sued on has been by the payee indorsed and delivered to them, they cannot recover in absence of proof of the partnership. *Hoyt v. Kountze*..... 368

12. A memorandum indorsed on a promissory note, to the effect that the promise may be discharged by substitution of other obligations of the makers within a given time, is for the benefit of the makers, and if they fail to avail themselves of the privilege or option, within the prescribed period, the note becomes absolute, and a recovery may be had thereon, after maturity, according to its legal import. *Western Mfg. Co. v. Rogers*..... 456

*Consideration.*

13. Note sued on was executed upon a sufficient consideration. *Saunders v. Bates*..... 209

*Purchase Money Notes. Breach of Warranty.*

14. Evidence *held* to sustain a verdict for defendant in a suit on a note for the purchase price of a harvester, where the seller failed to deliver a bundle-carrier attachment pursuant to contract. *McCormick Harvesting Machine Co. v. Courtright* ..... 18

15. In a suit on notes where defendant answered they were given for a harvester, in place of which, if it did not work, plaintiff had agreed to furnish a new machine, it was *held* that proof by defendant that the machine had been made to work at one time but afterward failed to work, did not entitle him, under his answer, to establish a counter-claim for damages and thus cancel the notes. *McCormick Harvesting Machine Co. v. Gustafson*..... 276

**New Trial.** See INSTRUCTIONS, 19, 20.

1. Irregularity in granting defendant a new trial *held* waived where plaintiff did not complain of the ruling until after the second trial. *Gilbert v. Marrow*..... 77

2. That the verdict is not in accord with the issues tendered by the pleadings may be raised by the assignment of error, "The verdict is contrary to law." *Stewart v. American Exchange Nat. Bank*..... 464

**Notes.** See NEGOTIABLE INSTRUMENTS.

**Notice.** See VENDOR AND VENDEE, 5.

**Nuisance.** See INJUNCTION, 5.

Where, by the terms of a statute authorizing a city to assess against a lot on which a nuisance exists the entire cost of abating the nuisance by improving the lot, the owner is entitled to notice and to an opportunity to do the work himself, the city is without jurisdiction to proceed with the improvement until such notice and opportunity have been given. *Horbach v. City of Omaha*..... 83

**Oath.**

Validity of affidavit executed before an officer not permitted to take it. *Brownell v. Fuller*..... 587

**Office and Officers.** See DAMAGES, 4. MUNICIPAL CORPORATIONS, 5-11. STATUTES, 8.

The offices of city engineer, city attorney, and water commissioner of the city of Lincoln are elective, the statutory provision purporting to make them appointive offices being unconstitutional. *State v. Bowen*..... 211

**Opinions of the Court.** See REVIEW, 81.

**Order of Sale.** See EXECUTIONS, 8.

**Ordinances.** See MUNICIPAL CORPORATIONS, 14-16.

**Overruled Cases.** See REVIEW, 74. TABLE, *ante*, p. xlix.

**Parties.** See BANKS AND BANKING, 4. CORPORATIONS, 5, 12. INJUNCTION, 4. MANDAMUS, 3, 6. NEGOTIABLE INSTRUMENTS, 10. RES JUDICATA, 1, 4, 5. REVIEW, 1.

1. It is proper matter of defense that the alleged assignee of the claim in suit is not the owner thereof or the real party in interest. *Henley v. Evans*..... 187
2. The fact that plaintiffs in the district court are different from those named in the summons issued by the justice of the peace before whom the action was brought affords no reason for striking from the files the petition filed in the district court. *Hartzell v. McClurg*..... 313
3. When suit is properly brought before a justice of the peace of one county, summons may issue to any other county to bring in other defendants; but service upon a nominal defendant in the county where the suit is brought will not justify the issuance of a summons to another county for a real defendant. *Miller v. Meeker*..... 452
4. One not a party to a contractor's bond may maintain an action thereon where such bond was executed for his benefit. *Pioneer Fire-Proof & Construction Co. v. McClay*..... 663
5. All parties to a joint judgment must be made parties to a petition in error, and a failure to do so is ground for dismissal. *Farney v. Hamilton County*..... 797
6. The mere acceptance of service of briefs by defendant in error is not a waiver of the objection that there is a defect of parties. *Id.*

**Partnership.**

1. An undenied allegation of a petition that plaintiffs are partners need not be proved. *Hartzell v. McClurg*..... 315

2. Where defendant in his answer specially denies an allegation of the petition that plaintiffs are partners and denies their allegation that the note sued on has been by the payee indorsed and delivered to them, they cannot recover in absence of proof of the partnership. *Hoyt v. Kountze*..... 368

3. In a suit to dissolve a partnership and to require an accounting, no demand being made by any of the partners for a reformation of the partnership contract, the court cannot, on its own motion, reform such contract nor disregard it as the basis of the rights of the litigants. *Clark v. Hall*.... 479

4. One holding a claim against individual members of a partnership which had assumed the debt may recover judgment in a suit against such individuals and afterward intervene in an action to dissolve the partnership, and have the judgment satisfied out of the firm's assets. *Id.*

5. A partner, after permitting judgment to be entered against the firm on a note not relating to firm business, but to which the other partner signed the firm name, was precluded from asserting that the firm was not bound, and firm creditors, in absence of fraud, had no greater right. *Werner v. Iler*..... 576

6. Books of account, kept by one partner and showing his transactions with the other, to which accounts the other had access and which he from time to time examined, and which, after the business ceased, he admitted to be correct, are admissible in evidence on an accounting between them. *Morris v. Haas*..... 579

**Party Walls.**

1. Provisions of a party-wall contract and lease considered and the rights and liabilities of the parties thereunder determined. *Smith v. Kennard*..... 524

2. Answer *held* to state a defense to an action by the owner of a lot to recover from his lessee a sum paid by lessor to the owner of an abutting lot for erecting a party wall used by lessee. *Id.*

**Passes.** See CARRIERS, 4.

**Payment.** See CHATTEL MORTGAGES, 9. INSURANCE, 5, 6, 9. MORTGAGES, 5. NEGOTIABLE INSTRUMENTS, 9.

In an action by the owner of a lot to recover from his lessee a sum paid by lessor to the owner of an abutting lot for erecting a party wall used by lessee, the payment was *held* a voluntary one. *Smith v. Kennard*..... 524

**Perjury.** See WITNESSES, 1.

False testimony relating to three matters *held* to constitute a single offense where the witness took one oath only. *Barker v. State*..... 53

**Petition in Error.** See REVIEW, 55.

**Pleading.** See ACCOUNTING, 1. APPEARANCE. CORPORATIONS, 6. DAMAGES, 1. EVIDENCE, 19. EXEMPTION, 2. INSURANCE, 7. JUDGMENTS, 20, 21. LIMITATION OF ACTIONS, 3, 4, 7. MASTER AND SERVANT, 1, 2. MECHANICS' LIENS, 4. NEGLIGENCE, 3. NEGOTIABLE INSTRUMENTS, 3, 4, 8, 15. PARTIES. PARTNERSHIP, 2. PARTY WALLS, 2. REPLEVIN, 6, 7. REVIEW, 79, 80. TROVER AND CONVERSION, 3, 4.

*Allegations Undenied.*

1. Every allegation of a petition not denied by answer, except allegations of value or amount of damage, stands confessed by defendant and need not be proved by plaintiff. *Hartzell v. McClurg*..... 313

2. All material averments of new matter in an answer which are not denied by the reply will be taken as admitted, and need not be proved. *Stewart v. American Exchange Nat. Bank*..... 461

*Amendments.*

3. It is not an abuse of discretion for the district court to refuse to permit an amended answer, presenting a new defense, to be filed at the time a case is called for trial, where it appears that the facts embraced in the proposed amendment were known when the original answer was filed, and no excuse is offered for the delay in making the application for leave to amend. *Western Assurance Co. v. Kilpatrick*..... 241
*British-American Assurance Co. v. Kilpatrick*..... 241

4. Where, after reply, an amended answer is filed setting up the defense interposed in the original answer and, in addition, facts which constitute a new and distinct defense, the plaintiff may reply anew if he so elects, but if he does not, the reply to the original answer will not stand as a reply to such new or additional defense. *Stewart v. American Exchange Nat. Bank*..... 461

*Appeal.*

5. On appeal from an order of a county board in disallowing a claim the district court cannot render judgment against the county without pleadings. *Box Butte County v. Noleman*, 239

*Construction.*

6. Allegations of every pleading should be liberally construed. *Hartzell v. McClurg*..... 313

*Demurrer.*

7. A demurrer to an answer searches the whole record, and judgment thereon should go against the party whose pleading was first defective in substance. *Barr v. Little*..... 556

**Pleading**—*concluded.*

*Language. Common Count.*

8. A pleader should state in ordinary and concise language the facts constituting his cause of action or defense; and the practice of adding a common count is not contemplated by the Code. *Penn Mutual Life Ins. Co. v. Conoughy*..... 124

*Motion to Strike Out Matter.*

9. Where a motion to strike matter from a pleading cannot be sustained as made, it is not error to overrule it, though a narrower motion might have been well taken. *Smith v. Meyers* ..... 1

10. A defendant pleading new matter which the court refuses to strike out of the answer as immaterial cannot be heard to complain that the court erred in refusing to strike from the reply allegations traversing those of the answer. *Id.*

*Pecuniary Loss.*

11. In a petition under Lord Campbell's Act averments of pecuniary loss *held* sufficient. *Omaha & R. V. R. Co. v. Crow*.... 747

**Pledges.** See PRINCIPAL AND SURETY, 2.

1. Immediate delivery of the property to pledgee and actual and continued change of possession are essential to the validity of a debtor's oral pledge to a creditor. *Buckstaff Bros. Mfg. Co. v. Snyder*..... 538

2. Evidence *held* not to show that a debtor made an oral pledge of his property to secure the claim of creditor. *Id.*.. 540

**Police.** See MUNICIPAL CORPORATIONS, 6-12.

**Police Power.** See MUNICIPAL CORPORATIONS, 12.

**Practice.** See CRIMINAL LAW, 5. EXECUTIONS, 15.

When an order has been irregularly obtained against a party, it is his duty to bring the matter to the attention of the court before proceeding to a trial of the cause. *Gilbert v. Marrow*..... 77

**Preferred Claims.** See TRUSTS.

**Principal and Agent.** See CARRIERS, 1. SALES, 15, 16.

1. Receipt *held* properly admitted in evidence, where it was given to plaintiff by a witness who was a director of defendant building and loan association and tended to contradict the evidence of the witness that he acted in his own behalf and not as defendant's agent. *Continental Building & Loan Ass'n v. Aulgur*..... 115

2. In an action on a check drawn by an alleged agent, it was *held* that the petition did not state a cause of action against the principal. *Penn Mutual Life Ins. Co. v. Conoughy*..... 123

3. In construing a contract between a harvesting machine company and agents authorized to make sales it was *held* that the machines were to be tried after they had been

**Principal and Agent**—*concluded.*

paid for or notes given for the purchase money, and that the agents were liable for the price of machines delivered for such trials without first taking the purchase money or notes. *Unland v. McCormick Harvesting Machine Co*..... 364

4. One should not deal with himself in acting as the agent of another. *Stough v. Ponca Mill Co*..... 502

5. Statements of an agent acting within his authority, when made concerning the business in hand at the time of the transaction, are admissible in evidence against his principal; but such statements, when made subsequent to the transaction, not connected therewith, and not specially authorized by his principal, cannot be received in evidence against the latter. *Union Life Ins. Co. v. Haman*..... 599

**Principal and Surety**. See GUARANTY. INJUNCTION, 2. REVIEW, 1, 75, 76.

1. Mere forbearance by a creditor does not release sureties, although, by lapse of time, the remedy is lost against the principal. *Bell v. Walker*..... 222

2. A creditor who, without the consent of the surety, voluntarily parts with security thereby releases the surety to the extent he has been thereby damaged. *Stewart v. American Exchange Nat. Bank*..... 461

3. One purchasing notes secured by mortgage and agreeing to extend the time of payment for the benefit of a person who has become the principal debtor, *held* to have released the latter's sureties. *Merriam v. Miles*..... 567

4. A co-tenant of mortgaged land who buys the interest of his co-tenants in the land and assumes the mortgage debt, becomes, as among the parties to that contract, the principal debtor, and the vendors become his sureties; and while, by such a transaction, the rights of the mortgagee cannot be changed without his consent, and he may enforce his original contract according to its terms, still, if he makes new contracts with the parties to the agreement, with knowledge thereof, he must do so with regard to the rights of those who are, among the mortgagors, sureties. *Id*..... 566

5. Evidence *held* insufficient to show that a creditor had not notice of the relationship of the debtor's sureties to one another. *Id*..... 567

6. On a contract between a county and a person contracting with it for the erection of a court house, his sureties may be held liable under a provision imposing on the contractor the duty of paying for materials used in the building. *Pickle Marble & Granite Co. v. McClay*..... 661

**Priority**. See JUDGMENTS, 22. MORTGAGES, 1, 2, 11, 13.

**Privity**. See RES JUDICATA, 2.

**Proceedings in Error.** See REVIEW.

**Process.** See JUDGMENTS, 23. SHERIFFS AND CONSTABLES, 1. SUMMONS.

**Proofs of Loss.** See INSURANCE, 21-24.

**Property.**

Growing crops are personalty and subject to seizure under execution. *Sims v. Jones*..... 769

**Public Funds.** See TRUSTS, 5-7.

**Public Policy.** See CONTRACTS, 2, 3.

**Questions for Court.** See INSURANCE, 14.

**Questions for Jury.** See COUNTIES, 5. ESTOPPEL, 1. FRAUDULENT CONVEYANCES, 3, 6. INSURANCE, 2, 7.

**Questions of Fact.** See HUSBAND AND WIFE, 4. SUMMONS, 3.

**Quieting Title.** See LIMITATION OF ACTIONS, 5, 6.

1. A void tax assessed against a lot for the cost of abating a nuisance thereon may be canceled as a cloud on the owner's title. *Horbach v. City of Omaha*..... 83
2. Under the Code a party may maintain an action to quiet his title to real estate whether he be in or out of possession and whether his title be a legal or an equitable one. *Eayrs v. Nason*..... 144

**Railroad Companies.** See CARRIERS. MASTER AND SERVANT. STREET RAILWAYS.

1. The starting or running of a switch engine in a switch yard, filled with a network of tracks upon which cars are constantly moving and in which yardmen are at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence. *Union P. R. Co. v. Elliott*..... 299
2. Instruction relating to the duty of a railroad company to give highway-signals *held* not erroneous. *Id*..... 304

**Rape.**

1. To justify a conviction of rape, the proof must reach such a degree of certainty as to exclude a reasonable doubt. *Maxfield v. State*..... 44
2. A conviction of rape will not be sustained where the testimony of the prosecutrix as to the principal fact relied upon to sustain the charge is not only uncorroborated, but is so contradictory as to be self-destructive. *Id*..... 45
3. Under section 12, Criminal Code, it is not necessary to show want of consent on the part of the female to sustain a conviction for rape, or for an offense the elements of which are included within such charge of rape. *Myers v. State*..... 297

**Ratification.** See CONTRACTS, 4.

**Real Estate.** See VENDOR AND VENDEE.

**Reasonable Doubt.**

Instruction defining a reasonable doubt. *Maxfield v. State*.... 44

**Receivers.** See CORPORATIONS, 12.

Necessity of appointing a receiver in an action to enforce individual liability of stockholders, for corporate debts. *German Nat. Bank v. Farmers & Merchants Bank*..... 598

**Records.** See JUDGMENTS, 23. REVIEW, 77. VENDOR AND VENDEE, 5.

**Reference.**

One who consents to an order of reference directing the referee to report his "conclusions" and then proceeds before the referee, after the expiration of the time limited in the order, participating in the production of evidence and asking the referee to pass upon questions of law and fact, and who, after the evidence has been taken, stipulates for an extension of time for the referee to file his "decision," cannot, after the filing of an adverse report, be heard to say that the referee did not proceed within the time first fixed, or that he was not authorized to find the facts. *Morris v. Haas* ..... 579

**Reformation of Instruments.** See PARTNERSHIP, 3.

1. An instrument will not be corrected for mistake unless, as reformed, it expresses the intent and agreement of the parties when executed. *Nebraska Loan & Trust Co. v. Ignowski* ..... 398
2. A mistake in the terms of a written instrument, if mutual, will be reformed to express the intention and agreement of the parties and thus enforced. *Id.*

**Registration.** See MORTGAGES, 6.

**Remedy at Law.** See EQUITY, 1.

**Repeal.** See STATUTES, 13.

**Replevin.** See SALES, 9, 18, 19.

*Evidence.*

1. Evidence *held* insufficient to sustain a verdict in favor of the seller of goods in an action by him to recover them from a sheriff who had seized them on executions against the purchaser. *Bennett v. Apsley Rubber Co*..... 553

*Instructions.*

2. Discussion of instructions where a chattel mortgage was assailed for fraud as to plaintiff in replevin. *Heffley v. Hunger* ..... 776

*Judgment.*

3. Where plaintiff has taken the property and the verdict is for defendant, the judgment must be in the alternative for a return of the property or its value if a return cannot be had. *Martin v. Foltz*..... 162

**Replevin**—*concluded.*

*Pleading and Proof.*

4. Where plaintiff pleads only a special ownership, he must prove such title as he pleads it, and cannot recover on proof of general ownership. *Suckstorf v. Butterfield*..... 757

5. Where plaintiff asserts only a special ownership, defendant, to defeat the action, may show that plaintiff's title is of a different character. *Id.*

6. Special plea for special damages is necessary to a recovery therefor. *Armagost v. Rising*..... 764

*Verdict. Pleading. Variance.*

7. A verdict that the right of property and right of possession were in plaintiff *held* a material variance from an affidavit wherein plaintiff merely claimed the right of present possession by virtue of a chattel mortgage. *Hayes v. Slobodny*.. 511

8. Evidence *held* to sustain the action of the trial court in directing a verdict for defendant. *Buckstaff Bros. Mfg. Co. v. Snyder*..... 538

9. Verdict set out in opinion *held* sufficient. *Heffley v. Hunger*, 776

**Reply**. See PLEADING, 10.

**Rescission.** See SALES, 17-20. VENDOR AND VENDEE, 2.

**Res Gestae.** See EVIDENCE, 13.

**Res Judicata.**

1. The rights of one who held an unrecorded assignment of a junior mortgage are not barred by a decree foreclosing the senior lien in a suit to which he was not a party, though the original mortgagee was a party. *Goodwin v. Cunningham* ..... 11

2. There is no privity between an administrator and an heir so far as regards the decedent's real estate, and a judgment dismissing an administrator's action to quiet title is not a bar to a subsequent action, by the heir against the defendant in the administrator's suit, to quiet title to the same real estate, which has descended to the heir from the administrator's intestate. *Eayrs v. Nason*..... 143

3. An order dissolving an injunction and dismissing the proceeding is generally an adjudication that the injunction ought not to have been granted. *Gibson v. Reed*..... 309

4. Foreclosure of a mechanic's lien is not an action *in rem* in such a sense that the disposition of the realty involved therein is binding upon persons not parties to such suit, who have unrecorded liens acquired prior to the pendency of the foreclosure suit. *Portsmouth Savings Bank v. Riley*.... 531

5. A judgment is a binding adjudication upon all parties to the suit in which it is rendered, and upon all persons who claim an interest in the property involved therein through

**Res Judicata**—*concluded.*

any party to that suit acquired after the action was pending. *Id.* ..... 532

6. An appeal from a justice of the peace presents the case for trial *de novo*, and a dismissal invited by plaintiff in the district court before the case is heard on the merits is not a bar to another action on the same cause. *Home Fire Ins. Co. v. Deets* ..... 620

**Revenue.** See TAXATION.

**Review.** See BILL OF EXCEPTIONS. INSTRUCTIONS.

*Appeal Bond.*

1. The district court upon the trial of an appeal from an inferior court is without jurisdiction to render against the sureties on the appeal bond the same judgment it enters against appellant. *Drummond Carriage Co. v. Mills* ..... 417

*Assignments of Error.*

2. Errors in giving or in refusing to give instructions should be separately assigned in the motion for a new trial and in the petition in error. *McCormick Harvesting Machine Co. v. Courtright* ..... 18

3. 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. *Unland v. McCormick Harvesting Machine Co* ..... 365
*Albion Nat. Bank v. Montgomery* ..... 682

4. An assignment, in a petition in error, of "errors of law occurring at the trial," is insufficient to present for review the rulings of the court below on the admission or exclusion of testimony. *Blodgett v. McMurtry* ..... 69

5. An assignment, "Errors of law at the trial excepted to at the time," is insufficient in a petition in error to present for review the rulings on the admission or exclusion of evidence. *Jaeggi v. Galley* ..... 800

6. Alleged errors argued in the brief which are not assigned in the petition in error are unavailing. *Phœnix Ins. Co. v. King* ..... 630

7. To obtain a review of the rulings of the trial court on the admission or exclusion of testimony each ruling must be specifically assigned in the petition in error. *Id.*

8. An assignment in a petition in error that the court erred in rejecting evidence, "as appears at record, pages 209, * * * 243," is too general for consideration. *Id.*

9. Assignments of error relating to rulings on the admission of evidence will be disregarded on review in absence of a properly authenticated bill of exceptions. *Cole v. Arlington State Bank* ..... 632

**Review**—*continued.*

10. The action of a district court in admitting or excluding evidence cannot be reviewed by the supreme court unless such action is specifically assigned in the petition in error. *Smith v. Kennard*..... 523

11. The assignment, "Errors of law occurring at the trial duly excepted to," is not sufficiently definite to challenge attention to any particular part of the trial. *Albion Nat. Bank v. Montgomery*..... 682

12. An assignment of error assailing the denial of a new trial is insufficient where it fails to specify to which of several grounds it applies. *Jaeggi v. Galley*..... 800

*Bill of Exceptions.*

13. A bill of exceptions not authenticated by the clerk of the district court will be disregarded. *Henley v. Evans*..... 187
*Beatrice Savings Bank v. Beatrice Chautauqua Assembly*..... 592

14. An unauthenticated bill of exceptions will be disregarded in the supreme court. *Coy v. Miller*..... 499

15. Questions requiring the examination of an unauthenticated bill of exceptions should be disregarded, and where the pleadings in such a case are sufficient the judgment may be affirmed. *Beatrice Savings Bank v. Beatrice Chautauqua Assembly*..... 592

16. Questions requiring the examination of a bill of exceptions which has been quashed will be disregarded. *German Nat. Bank v. Farmers & Merchants Bank*..... 593

17. Questions requiring an examination of a bill of exceptions will not be considered where there is no proper bill in the record. *Andrews v. Kerr*..... 618

*Briefs.*

18. Alleged errors, not referred to or argued in the briefs, are waived. *Blodgett v. McMurtry*..... 70

19. Instructions not argued in the brief of plaintiff in error will not be reviewed. *Herzke v. Blake*..... 465

20. Violation by plaintiff in error of the rule requiring him to file briefs *held* not to justify a dismissal where the briefs were filed more than two years before the case was submitted to the court. *Pickle Marble & Granite Co. v. McClay*.. 661

*Discretion of Court Below.*

21. A ruling in respect to leading questions will not be disturbed in absence of an abuse of discretion on part of the trial court. *City of Harvard v. Stiles*..... 26

22. An order excluding unexamined witnesses from court during examination of the witness on the stand will not be reversed except for an abuse of discretion. *Chicago B. & Q. R. Co. v. Kellogg*..... 139

23. In a prosecution for bastardy the amount defendant, upon

**Review**—*continued.*

conviction, shall be required to pay is to some extent within the discretion of the trial court, and its judgment will not be held excessive upon review, in absence of an abuse of discretion. *Wurdeman v. Schultz*..... 404

*Dismissal.*

24. The dismissal of a petition in error from an appellate court, without an examination of the merits of the assignments, operates as an affirmance of the judgment sought to be reviewed. *Bell v. Walker*..... 222

*Evidence.*

25. Findings of court or jury will not be disturbed where the evidence is conflicting. *Walker v. Smith*..... 31
*Western Assurance Co. v. Kilpatrick*..... 241
*Abraham v. City of Fremont*..... 391
*Wurdeman v. Schultz*..... 404
*Herzke v. Blake* ..... 465
*Union Life Ins. Co. v. Haman*..... 599
*Stevens v. Kirk* ..... 669
*Jaeggi v. Galley*..... 800

26. Upon a record presenting no question of law a judgment sustained by the evidence will be affirmed. *Mains v. Boyd*... 170
*Gretna State Bank v. Grabow*..... 547

27. The exclusion of testimony which does not tend to establish either a cause of action or defense is not ground for reversal. *Blodgett v. McMurtry*..... 69

28. The supreme court cannot assume that the rejection of written evidence was prejudicially erroneous when there is in the record before it no showing as to the nature of the evidence rejected. *Modern Woodman Accident Ass'n v. Shryock* ..... 250

29. Where a fact is established by uncontroverted evidence, it is not reversible error for the trial court to so treat it in the instructions. *Wurdeman v. Schultz*..... 404

30. Where there is a conflict in the evidence as to the amount of damages sustained by a landowner by reason of the appropriation of his land for a public road, the supreme court will not interfere with the verdict on the ground that the damages awarded by the jury are inadequate. *Howard v. Board of Supervisors*..... 444

31. A finding that an insured building was not unoccupied, within the meaning of an insurance policy, *held* sustained by sufficient evidence. *Omaha Fire Ins. Co. v. Sinnott*..... 522

32. In reviewing a judgment on appeal the supreme court will not presume that the district court considered incompetent evidence. *Portsmouth Savings Bank v. Riley*..... 531

*Exceptions.*

33. To review denial of a continuance it is necessary to take an

**Review**—*continued.*

exception to the ruling below. *Staples v. Arlington State Bank* ..... 760

*Final Order.*

34. An order overruling a plea in abatement is not a final order. *Bartels v. Sonnenschein* ..... 68

35. To obtain a review there must be a final order or judgment on the merits of the action in the court below. *Id.*

*Harmless Error.*

36. The admission of improper evidence, in a case tried without the assistance of a jury, is not of itself a ground for reversal. *Bell v. Walker* ..... 222

37. In a trial to the court the admission of incompetent testimony is not ground for reversal where the judgment should be affirmed regardless of the evidence erroneously admitted. *Stenger Benevolent Ass'n v. Stenger* ..... 428

38. Harmless error is not ground for reversing a judgment. *Union Life Ins. Co. v. Haman* ..... 600

39. To warrant a reversal, error prejudicial to the party complaining must affirmatively appear of record. *Andrews v. Kerr* ..... 618

40. A judgment should not be reversed for the admission of immaterial evidence which was not prejudicial. *Atkins v. Seeley* ..... 688

*Issues.*

41. In a case appealed from an order of a county board issues should be joined in the district court as in cases appealed from justices of the peace. *Box Butte County v. Noleman* ... 239

42. An appeal from an order of a county board, allowing a claim against the county, brings the matter to the district court for trial *de novo*. *Id.*

43. An appeal from a justice of the peace presents the case in the district court for trial *de novo*. *Home Fire Ins. Co. v. Deets* ..... 620

*Journal Entries.*

44. The mere fact that in a journal entry a motion sustained was described as "a motion to dismiss an appeal because not taken in time" *held* not sufficient to prevent the appellate court from considering whether or not the ruling on said motion was proper, in view of grounds urged therein, but not recited in said journal entry. *Andresen v. Carson* ..... 678

45. Where the record of a judgment, at the time of an appeal taken therefrom, recited that it had been rendered upon the consideration of agreement of parties, the appeal was unavailing and, on motion of appellee, was properly dismissed. *Id.*

**Review**—*continued.*

46. After an appeal perfected, an amendment of the record of the judgment appealed from to show certain facts and a subsequent amendment whereby such facts were eliminated from the record, *held* to have accomplished nothing by way of amendment. *Id.*

*Jurisdiction.*

47. The absence of jurisdiction of the district court will not be presumed, but must affirmatively appear from the face of the record. *Barker v. State*..... 53

48. Objections to jurisdiction of the person, not appearing on the face of the record, may be raised by answer, and the prosecution of appeal or error is not a waiver of such jurisdictional defense. *Mayer v. Nelson*..... 434

49. The filing of a transcript in the supreme court within one year after rendition of judgment below is essential to jurisdiction of appellate court. *Forbes v. Morearty*..... 505

50. A proceeding in error in the supreme court must be commenced within a year from the date of the judgment below. *Dixon Nat. Bank v. Omaha Nat. Bank*..... 796

51. The validity of a judgment or order does not depend on the reason for the action of the court, but upon lawful authority to hear and determine the matter before the court. *In re Ream*..... 669

52. A district court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject-matter. *Jacobson v. Lynn*..... 794

*Parties.*

53. The fact that plaintiffs in the district court are different from those named in the summons issued by the justice of the peace affords no reason for striking from the files the petition filed in the district court. *Hartzell v. McClurg*..... 313

54. Where there is presented no question on appeal but the sufficiency of the evidence to sustain the judgment as to one of three defendants, and the rights of the sole appellant are dependent upon those of defendants who have not appealed, the judgment may be affirmed. *Barnes v. George*.... 504

55. All parties to a joint judgment must be made parties to a petition in error, and a failure to do so is ground for dismissal. *Farney v. Hamilton County*..... 797

56. The mere acceptance of service of briefs by defendant in error is not a waiver of the objection that there is a defect of parties. *Id.*

*Pleadings.*

57. In a case appealed from an order of a county board disallowing a claim the district court cannot lawfully render judgment against the county without pleadings being filed or a trial had. *Box Butte County v. Noleman*..... 239

**Review**—*continued.*

*Presumptions.*

58. On appeal from an order sustaining the validity of bonds voted for internal improvements, it was presumed, in absence of a showing to the contrary, that petitioners for the election at which the bonds were voted were freeholders and qualified to sign the petition. *Cummings v. Hyatt*..... 36

59. In an error proceeding to reverse a judgment by default rendered against defendant by a justice of the peace, prejudicial error will not be presumed from an indorsement on the summons that, upon default, judgment would be rendered for a certain sum with interest, where the summons recited that interest was claimed at ten per cent, this rate with the principal justifying a judgment in excess of that rendered. *McKibben v. Harris*..... 520

*Questions Not Raised Below.*

60. In a suit against a railroad company by an employé who was injured through negligence of a co-employé, the defense that the employés were fellow-servants cannot be raised for the first time in the supreme court. *Union P. R. Co. v. Elliott* ..... 299

61. In an error proceeding it will not be assumed that no bill of particulars had been filed with a justice of the peace before he rendered the judgment assailed, where, before judgment, no such question was raised. *McKibben v. Harris*, 520

*Remedies. Error and Appeal.*

62. In an equity case an appeal under section 675 of the Code relating to appeals in equity does not present for review the correctness of a ruling of the trial court in excluding evidence, but such a ruling may be presented under sections 584 *et seq.* of the Code providing for review by proceedings in error. *Walker v. Smith*..... 31

63. One desiring to review rulings as to misconduct of counsel must call such conduct to the attention of the trial court at the time, ask protection therefrom, preserve it in a bill of exceptions with rulings and exceptions, and present the record in the supreme court under an assignment of error. *Chicago, B. & Q. R. Co. v. Kellogg*..... 128

64. Rulings of the court as to misconduct of counsel during a trial may be reviewed, but such misconduct is not reviewable on error. *Id.*

65. For the disallowance of a claim against the state by the auditor the law furnishes an adequate remedy by appeal. *State v. Cornell*..... 158

66. An appeal will not lie from an order of a county superintendent changing the boundaries of school districts or creating new districts, the method of reviewing such proceedings being by petition in error. *Pollock v. School District* ..... 171

**Review**—*continued.*

67. An appeal, as distinguishable from a proceeding in error, will not generally lie from an inferior court in a law action. *Nebraska Wesleyan University v. Craig*..... 173

68. Questions of computation or elements of findings on which a decree foreclosing a mortgage, a mechanic's lien, or a contract of sale, is based, will not be reviewed on appeal from the order confirming the foreclosure sale. *Hampton Lumber Co. v. Van Ness*..... 185

69. The constitutional provision that "the right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise, shall not be denied," does not prevent the supreme court from prescribing such reasonable rules as are deemed essential to the prompt and orderly disposition of causes for review, nor is the refusal to permit oral arguments violative of the constitution. *Schmidt v. Boyle*..... 387

70. A defendant to an action in which an accounting is prayed, who consents to an order of reference and proceeds according to the analogies of a suit in equity, cannot on appeal be heard to say that the action was essentially of a legal character, and should have been so treated. *Morris v. Haas* ..... 579

71. Errors in proceedings or judgment in a criminal case are not reviewable on application for a writ of habeas corpus. *In re Ream*..... 667

72. After judgment proceedings in garnishment are reviewable by petition in error and not by appeal. *Dixon Nat. Bank v. Omaha Nat. Bank*..... 796

*Reversal. Practice.*

73. Where the trial court erroneously disposed of a case on the theory that a contract involved did not express the agreement of the parties and was, therefore, unenforceable, the supreme court may eliminate from the findings below the errors resulting from the failure to construe and enforce the contract, and order the judgment below to be modified accordingly. *Clark v. Hall*..... 479

*Stare Decisis.*

74. On review the rule stated in an overruled case *held* not to control a judgment following it, though the judgment was rendered before the case was overruled. *Mayer v. Nelson*.... 437

*Supersedeas.*

75. The death of the principal in a supersedeas bond, while the cause is pending in the appellate court, does not release the surety from liability, nor is he discharged by the failure to have the action revived. *Bell v. Walker*..... 222

76. The liability of a surety in a supersedeas bond is not affected by the failure to present a claim against the estate of his principal. *Id.*

**Review—*concluded.***

*Transcripts.*

77. Entries made upon the trial docket of the district court cannot be considered on review for the purpose of ascertaining what were the proceedings in that court. *Barker v. State* ..... 53

78. Transcript *held* to show that an information was filed against accused in the court below during the term at which he was required to appear, and that the trial was had upon an amended information presented at a subsequent term of court. *Id.*

79. When there is filed in the supreme court on appeal no pleading but a supplemental petition, and the decree discloses that it was rendered upon consideration of a petition and supplemental petition, the decree may be affirmed. *Calmelet v. Sichl* ..... 97

80. A second appeal to the supreme court is so far independent of a former appeal that pleadings filed in the original appeal cannot be referred to in that subsequently taken, for the purpose of ascertaining what issues had been originally joined and presumably were tried, when there was entered the decree sought to be reversed. *Id.*

81. Quotations in briefs from a written opinion of the trial judge may be considered on review, though neither the original opinion nor a copy thereof is in the transcript. *Abraham v. City of Fremont* ..... 397

82. In absence of an authenticated transcript of the proceedings below the petition in error may be dismissed. *Bailey v. Eastman* ..... 416

83. A transcript for review should contain only so much of the record below as is essential to a correct understanding of the case. *Moores v. State* ..... 486

84. An order not embodied in a certified transcript cannot be reviewed. *Forbes v. Morearty* ..... 505

**Revivor.** See JUDGMENTS, 13, 14.

**Roads.** See HIGHWAYS.

**Rules of Court.** See REVIEW, 69.

**Sales.** See FRAUDULENT CONVEYANCES. NEGOTIABLE INSTRUMENTS. 15. VENDOR AND VENDEE.

*Carriers. Place of Delivery. Title.*

1. The place of delivery should be determined by the contract between buyer and seller. *Neimeyer Lumber Co. v. Burlington & M. R. R. Co* ..... 321

2. Where the contract between the parties provides that delivery shall be made at a certain place, the seller's title to the property is not divested until delivery is so made. *Id.*

**Sales**—*continued.*

3. Where the contract is silent as to place of delivery, the seller's delivery of the property to a carrier, consigned to the buyer, divests the seller's title, and the buyer's title attaches upon such delivery to the carrier. *Id.*

4. Where the contract is silent as to place of delivery, and the seller delivers the goods to a carrier, consigned to buyer, the carrier is the bailee of the person to whom, and not by whom, the goods are consigned. *Id.*..... 322

5. Where a seller delivers the goods to a carrier for transit to the buyer, and causes them to be consigned in the bill of lading to himself, his agent, or his order, the presumption arises that he thereby intended to retain the title in himself. *Id.*

6. Seller's prepayment of freight on goods sold and shipped to the buyer is *prima facie* evidence of an intention on part of the seller to retain title to the goods while in transit. *Id.*

7. In construing the contract of sale set out in the opinion it was *held* that delivery of the property sold was made at the place of shipment, and that the title to the property vested in the buyer on its delivery by the seller to the carrier for transit to the buyer. *Id.*

8. Meaning of f. o. b. in contract of sale. *Id.*...326, 327, 346, 349, 351

*Conditional Sales.*

9. A conditional seller, where there has been no compliance with section 26, chapter 32, Compiled Statutes, as to recording the contract, does not retain such an interest in the goods that he can maintain replevin against one who, without knowledge of the conditions of the sale, purchased the goods from the conditional buyer who was in possession thereof. *Regier v. Craver*..... 507

10. In a suit on a contract of conditional sale for the price of an engine, evidence *held* to sustain the finding that conditions precedent to completion of the sale had not been fulfilled by plaintiff, and that defendant, for that reason, refused to accept the engine. *Charter Gas-Engine Co. v. Coleridge State Bank*..... 743

11. Contract set out in opinion *held* not one of absolute sale accompanied by the warranty of seller as to the qualities of the property, but one of conditional sale, the qualities of the property being of the essence of the contract, and the establishment of their existence a condition precedent to the completion of the sale. *Id.*

12. In a suit on a contract of conditional sale for the price of an engine, evidence *held* to sustain a finding that defendant had not waived performance of conditions precedent to completion of sale. *Id.*

**Sales**—*concluded.*

*Damages for Breach of Contract.*

13. In an action against a buyer for breach of an executory contract of sale the seller's measure of damages is the difference between the market value of the property at the time and place of delivery, and the price fixed by the contract. *Funke v. Allen*..... 407

*Fraud.*

14. Sale *held* not fraudulent. *Richardson Drug Co. v. Meyer*.....319

*Principal and Agent.*

15. Construction of contract between harvesting machine company and agents authorized to sell machines. *Unland v. McCormick Harvesting Machine Co*..... 364

16. A sale, by a factor, of goods of his principal as his own and for his own benefit confers no title upon the buyer, as against the real owner. *Regier v. Craver*..... 507

*Rescission.*

17. Where a harvester was delivered under a contract requiring the seller to deliver a bundle carrier on a later date, the seller's failure to deliver the bundle carrier was *held* ground for the buyer's rescission of the contract. *McCormick Harvesting Machine Co. v. Courtright*..... 18

18. To entitle seller to rescind a sale for false representations of buyer it is unnecessary to establish that the latter at the time knew the representations were false and untrue. *Field v. Morse*..... 789

19. Where goods are sold upon credit obtained by fraudulent representations of buyer as to a past or existing fact, the seller may rescind the sale and replevy the goods within a reasonable time after the fraud is discovered. *Id.*

20. In an action to rescind a sale of goods for fraud practiced by the purchaser, where reliance was placed on reports of a commercial agency, evidence reviewed and *held* insufficient to show any false representations or any fraud. *Bennett v. Apsley Rubber Co*..... 553

*Stoppage in Transitu.*

21. That goods sold are in transit from the seller to the immediate buyer is essential to the seller's right of stoppage *in transitu*. *Neimeyer Lumber Co. v. Burlington & M. R. R. Co*.... 323

**Satisfaction.** See CHATTEL MORTGAGES, 9. MORTGAGES, 15.

**Schools and School Districts.**

An appeal will not lie from the order of a county superintendent changing the boundaries of school districts or creating new districts, the method of reviewing such proceedings being by petition in error. *Pollock v. School District*..... 171

**Section-Line Roads.** See HIGHWAYS, 2.

**Sentence.** See CRIMINAL LAW, 15.

**Sheriffs and Constables.** See EXECUTIONS, 4, 5. EXEMPTION.

1. An officer who seizes mortgaged chattels on mesne or final process against the mortgagor is not liable in an action by the mortgagee if he does nothing to place the property beyond the reach of the mortgagee or to prevent him from taking possession of it when his right of possession accrues. *Locke v. Shreck*..... 472

2. A ministerial officer is not liable in an action for false imprisonment for the arrest of a person under a warrant regular on its face and issued by proper authority, where there is no abuse thereof in the manner of its execution. *Kelsey v. Klabunde*..... 760

**Sheriffs' Deeds.** See EXECUTIONS, 25.

**Special Findings.** See TRIAL, 3.

**Specific Performance.** See REFORMATION OF INSTRUMENTS, 2. VENDOR AND VENDEE, 4.

**Stare Decisis.** See REVIEW, 74.

**State and State Officers.**

1. For the disallowance of a claim against the state by the auditor the law furnishes an adequate remedy by appeal. *State v. Cornell*..... 158

2. The auditor of public accounts is powerless to draw a warrant upon the treasury for commissions due a county treasurer upon moneys collected by him for the state and paid into the treasury, unless a specific appropriation has been made for that purpose by the legislature. *Id*..... 648

**Statute of Limitations.** See LIMITATION OF ACTIONS.

**Statutes.** See JUDGMENTS, 5. MUNICIPAL CORPORATIONS, 12. TABLE, *ante*, p. lv.

*Adoption of Judicial Construction.*

1. Where the legislature re-enacts a law of the state, it thereby adopts the judicial construction which had been placed thereon by the supreme court. *State v. Cornell*..... 648

*Amendments. Titles. Subjects.*

2. Where the title to a bill is to amend a designated section of a law, no amendment is permissible which is not germane to the particular original section proposed to be changed. *Id.*..... 72

3. The amendment to section 134, article 1, chapter 18, Compiled Statutes (Session Laws 1883, p. 191), relating to the sale of county bonds, is germane to the original section, and fairly within the scope of the title of the amendatory act. *Id.*

4. Where the title to a bill is to amend a designated section of a law, no amendment is permissible which is not germane

**Statutes**—*concluded.*

to the subject-matter of the particular original section proposed to be changed. *State v. Bowen*..... 211

5. Section 31, chapter 14, Session Laws 1897, purporting to amend section 91, article 1, chapter 13*a*, Compiled Statutes 1895, contravenes section 11, article 3, of the constitution, since said amended section contains new matter of legislation not germane to the original. *Id.*

6. Section 46, chapter 78, Compiled Statutes, relating to section-line roads, is embraced within the title of the act of which it forms a part, and is valid, though it may operate incidentally to modify other laws. *Howard v. Board of Supervisors* ..... 444

*Construction.*

7. Special provisions in a statute in regard to a particular subject control general provisions. *State v. Cornell*..... 72

*Effect Upon Judgment.*

8. Chapter 52, Session Laws 1893, takes from a county the right to maintain an action against its treasurer to recover illegal fees retained by him pursuant to a settlement with the county board, but does not satisfy or vacate a judgment already obtained against him by the county for the illegal fees thus retained. *Kearney County v. Taylor*..... 542

*Invalid Parts of Act.*

9. When the invalid part of an act was the consideration or inducement for the passage of the residue, the valid and invalid portions will fall together. *State v. Bowen*..... 211

10. Section 31, chapter 14, Session Laws 1897, was the motive inducement to the passage of sections 6 and 7 of the same chapter purporting to amend sections 13 and 14, article 1, chapter 13*a*, Compiled Statutes 1895, and the unconstitutionality of said section 31 invalidates said sections 6 and 7, leaving the original sections in full force and effect. *Id.*

*Penalties.*

11. A statutory enactment which provides by whom, and under what procedure, a penalty previously created may be recovered is not a penal statute, and there exists no reason for a requirement that it be strictly construed. *Albion Nat. Bank v. Montgomery*..... 681

*Public Welfare.*

12. Where, by any reasonable construction, the subject-matter of legislation can be held to be for the welfare of the public, the will of the legislature should prevail over any mere doubt of the court. *Cummings v. Hyatt*..... 36

*Repeal.*

13. Section 2 of an act passed February 18, 1873, entitled "Homestead Associations," being section 146, chapter 16, Compiled Statutes, was repealed by section 4, article 11, of the Constitution (Miscellaneous Corporations), fixing liability of stockholders. *Van Pelt v. Gardner*..... 702

**Stockholders.** See CORPORATIONS.

**Stoppage in Transitu.** See SALES, 21.

**Street Railways.**

1. A passenger on a street railway cannot recover for an injury resulting in part from his own negligence. *Lincoln Street R. Co. v. McClellan*..... 672
2. Section 3, article 1, chapter 72, Compiled Statutes, relating to the liability of railroad companies for injuring passengers, does not apply to street railways. *Id*..... 673
3. Street railways are common carriers of passengers, are required to exercise the utmost skill, diligence, and foresight, consistent with the business in which they are engaged, for the safety of their patrons, and are liable for the slightest negligence. *Id*..... 672
4. In a suit against a street railway company for injuring a passenger the burden is on defendant, the injury being shown, to show that it was in nowise at fault. *Id*..... 673
5. In a suit against a street railway company for injuring a passenger it is error to instruct that, the injuries being shown, the carrier, to escape liability, must prove that the passenger was guilty of gross contributory negligence. *Id.*, 672

**Strict Foreclosure.** See VENDOR AND VENDEE, 6.

**Subrogation.** See TAXATION, 7.

The mere fact that with the proceeds of a later mortgage a prior one was paid, for the purpose of removing the lien thereof, affords no ground for subrogating the junior mortgagee to the rights of the former mortgagee upon its being discovered that a lien had arisen between the two mortgages. *Hoagland v. Green*..... 164

**Summons.** See JUDGMENTS, 23,24.

1. After the entry of a decree, upon a showing that no service of the summons upon which the decree was based had in fact been made, it was erroneous to quash such summons upon a motion asking solely for that order. *Baldwin v. Burt*, 287
2. A person is privileged from service of summons in an action in which the venue is laid in a county other than that of his residence, while necessarily and in good faith within such county for the purpose of testifying as a witness in a cause. *Mayer v. Nelson*..... 434
3. A non-resident suitor, or witness, coming into the state for the sole purpose of attending the trial of a cause, is privileged from service of civil process while coming to, returning from, and attending upon the court, and for a reasonable time after the hearing to prepare for his return home; and what constitutes a reasonable time to depart is a question of fact to be determined from the evidence in each case. *Linton v. Cooper*.....438, 443

**Summons**—*concluded.*

4. When suit is properly brought before a justice of the peace of one county, summons may issue to any other county to bring in other defendants; but service upon a nominal defendant in the county where the suit is brought will not justify the issuance of a summons to another county for a real defendant. *Miller v. Meeker*.....452

**Supersedeas.** See REVIEW, 75, 76.

**Taxation.** See LIMITATION OF ACTIONS, 7. MUNICIPAL CORPORATIONS, 3, 13, 15.

*Internal Improvements.*

1. Taxation in aid of internal improvements such as irrigating canals or ditches does not involve the taking of property for private use, or without due process of law. *Cummings v. Hyatt*..... 86

*Cost of Abating Nuisance.*

2. A statute authorizing a city to assess against a lot on which a nuisance exists the entire cost of abating the nuisance by improving the lot does not violate the constitutional provision relating to special taxation for local improvements, but is a proper exercise of police power. *Horbach v. City of Omaha*..... 88

*Treasurers' Fees.*

3. Under section 20, chapter 28, Compiled Statutes 1897, in computing the amount of taxes collected by a county treasurer for the purpose of charging percentage, all sums collected for each fiscal year, from whatever funds derived, except school moneys, whether belonging to the state or county, or any of its subdivisions, must be included together, the fees to be allowed but once and charged *pro rata* to the different funds. *State v. Cornell*..... 647

4. A county treasurer is not entitled to ten per cent commission on the first $3,000 of state taxes, and a like percentage on the first $3,000 of county moneys, collected by him for each fiscal year, but a fee of ten per cent alone is chargeable on the first $3,000 from whatever source derived, without regard to the year the taxes were levied, except school moneys, and such fees or commissions are to be apportioned *pro rata* among the various funds on account of which the collections were made. *Id.*

*Error of Collector.*

5. The public cannot be deprived of its revenue nor its lien for taxes against property because of the mistake of a tax collector in not collecting all that is due against such property. *Johnson v. Finley*..... 733

*Tax Sales.*

6. A county treasurer has no authority to sell land at private sale for taxes until he has made return to the county clerk

**Taxation—*concluded.***

of a public sale pursuant to section 109, chapter 77, Compiled Statutes. *Id.*

7. Where a private tax sale of realty is invalid because of a treasurer's failure to make return of a public sale, the purchaser at the void sale is subrogated to the rights which the public had against the realty thus sold, and is entitled to enforce his lien for the taxes paid at the sale and for all prior and subsequent taxes against such realty and paid on account of such purchase. *Id.*

*Constitutional Limit.*

8. 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*..... 781

**Telegraph Companies.**

Evidence *held* to justify a peremptory instruction for plaintiff in an action against a telegraph company for negligence in transmission of a message. *Western Union Telegraph Co. v. Cook* ..... 109

**Time.** See REVIEW, 50.

**Transcripts.** See REVIEW, 77-84.

**Trespass.**

An action to recover damages for trespass upon real estate can be brought alone in the county where the lands are situate. *Jacobson v. Lynn*..... 794

**Trial.** See CRIMINAL LAW, 5. INSTRUCTIONS. WITNESSES, 9.

1. Rights and duties of counsel stated. *Chicago, B. & Q. R. Co. v. Kellogg*..... 128

*Estoppel by Pleading.*

2. A party tendering an immaterial issue which the court refuses to strike from the pleadings on motion of the other party, cannot be heard to object to evidence relating to that issue on the ground that it is immaterial. *Smith v. Meyers*.. 1

*Special Findings.*

3. The submitting to the jury of special interrogatories is a matter resting in the discretion of the trial court. *Omaha & R. V. R. Co. v. Crow*..... 748

*Harmless Error in Admitting Evidence.*

4. The admission of improper evidence, in a case tried without the assistance of a jury, is not of itself a ground for reversal. *Bell v. Walker*..... 222

5. In a trial to the court the admission of incompetent testimony is not ground for reversal where the judgment should be affirmed regardless of the evidence erroneously admitted. *Stenger Benevolent Ass'n v. Stenger*..... 428

**Trial—*concluded.***

*Violation of Instructions.*

6. Where the jury clearly violates the duty to find a verdict according to the law as given in the instructions of the court, the verdict should be set aside. *Standiford v. Green*... 10

7. A verdict rendered in plain disregard of instructions is contrary to law, but the judgment will not for that reason be reversed when the instructions were erroneous and the verdict the only one which could properly be returned under the evidence. *Dern v. Kellogg*..... 560

*Communication to Jury.*

8. Evidence *held* to sustain a finding that no improper communication had been made to the jury while deliberating on their verdict. *Chicago, B. & Q. R. Co. v. Kellogg*..... 139

*Withdrawal of Rest.*

9. Under the facts stated in the opinion refusal to allow plaintiffs to withdraw their rest *held* not an abuse of discretion. *Omaha Coal, Coke & Lime Co. v. Suess*..... 379

*Excluding Witnesses.*

10. The practice of excluding unexamined witnesses from court during examination of the witness on the stand is a good one, but whether a witness shall be thus excluded rests in the discretion of the trial court. *Chicago, B. & Q. R. Co. v. Kellogg*..... 139

**Trover and Conversion.** See TRUSTS, 2-4.

1. One who converts the property of another is liable therefor. *Hill v. Campbell Commission Co*..... 59

2. One who aids and assists in the conversion of the chattels of a third person is liable for their value. *Id.*

3. In an action by a mortgagee of chattels for conversion of mortgaged property, he must, in his petition, plead the facts which create his special ownership in the property, and show his right to the possession of the same. *Id.*

4. A mortgagee of chattels, who is out of possession, and not entitled to possession by his mortgage, cannot maintain an action against a stranger for conversion. *Id.*
*Locke v. Shreck*..... 472

**Trusts.** See CORPORATIONS, 2.

1. The beneficiary of a trust fund, solely because of the character of his claim, is not entitled to the payment of the same in full, to the exclusion of the other creditors, out of the assets of an insolvent trustee's estate. *State v. Bank of Commerce*..... 725

2. Where trust funds were wrongfully converted, the beneficiary is entitled to the funds, or to the proceeds thereof, so long as he can definitely trace them, and before they reach the hands of an innocent holder. *Id.*

**Trusts**—*concluded.*

3. Where a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money and not the trust money. *Id.*

4. Where trust funds wrongfully converted by the trustee are traced out of his hands and shown to have been dissipated, the beneficiary is not entitled to have his claim allowed as a preferred one against the estate of the insolvent wrongdoer. *Id.*

5. Where trust property consisted of money, the claim of the beneficiary may be preferred to the extent of the cash found among the assets of the insolvent trustee at the time of his failure, unless it affirmatively appears that such cash assets are not part of the trust fund. *Id.*

6. A county treasurer is a trustee of moneys which come into his hands by virtue of his office, and if he wrongfully deposits them to his own credit in a bank aware of their character, which afterward becomes insolvent, the county is entitled to have its claim decreed a first lien upon any asset of the insolvent which it shows is the product of its moneys. *Id.*

7. Where a county treasurer, in his own name, wrongfully deposited county funds in a bank which subsequently failed, it was *held* that the county was entitled to reclaim the cash in the bank at the time of the failure, but not entitled to a first lien on other assets. *Id.*

**Ultra Vires.** See CORPORATIONS, 17.

**Undue Influence.** See HUSBAND AND WIFE, 9, 10.

**Usury.**

1. The inhibition contained in section 5197, Revised Statutes U. S., is general and forbids the taking of usurious interest by a national bank from an artificial as well as from a natural person. *Albion Nat. Bank v. Montgomery*..... 681

2. The right to recover double the amount of usury paid to a national banking association is, by section 5198, Revised Statutes U. S., conferred as well upon artificial as upon natural persons. *Id.*

**Variance.** See REPLEVIN, 7.

**Vendor and Vendee.** See MORTGAGES. PRINCIPAL AND SURETY, 4. TAXATION, 7.

1. Where a mortgagor made a deed for the incumbered realty, leaving a blank for grantee's name, and, after service upon grantor of notice of a foreclosure suit, the name of a grantee was inserted in the deed, it was *held* that one claiming title solely through the deed could not, after confirma-

**Vendor and Vendee**—*concluded.*

tion of judicial sale in the foreclosure proceeding, maintain an action to redeem. *Heller v. King*..... 22

2. A provision in a contract for the sale and exchange of lands, set out in full in the opinion, construed to be a personal covenant and not a condition, and so not entitling the vendee to rescind on account of its breach. *Barr v. Little*... 556

3. Evidence *held* insufficient to show that a purchaser of mortgaged property assumed payment of the mortgage. *Mendelssohn v. Christie*..... 684

4. Where a real estate agent gave a memorandum of sale subject to approval of his principal, and the evidence showed the latter's prompt disapproval, direction of a verdict against one claiming the realty under the memorandum was *held* proper. *Powell v. Binney*.....690, 694

5. Under facts stated in opinion, *held* that the record of an unsatisfied mortgage was sufficient to put an intending purchaser on inquiry as to the ownership of the note secured and as to whether the mortgage had been satisfied by merger of estates, or otherwise, and was notice that the mortgagee, at the time he acquired the legal title, intended to keep the two estates separate. *Peterborough Savings Bank v. Pierce*..... 712

6. A decree of strict foreclosure or forfeiture of vendee's rights under a contract of sale and purchase will be accorded only by reason of the existence of peculiar and special facts and circumstances; and applications for such relief are addressed to the sound legal discretion of the court, but should be granted where it would be inequitable and unjust to deny them. *Farmers & Merchants State Bank v. Thornburg*.. 782

**Venue.** See SUMMONS, 4.

An action to recover damages for trespass upon real estate can be brought alone in the county where the land is situate. *Jacobson v. Lynn*..... 794

**Verdict.** See REPLEVIN, 7. TRIAL, 6.

**Waiver.** See APPEARANCE. CRIMINAL LAW, 11. INSURANCE, 21-24. PARTIES, 6.

**Warrant for Arrest.** See JUSTICE OF THE PEACE, 7.

**Warrants.** See COUNTIES, 6.

**Warranty.** See SALES, 11.

**Water Commissioner.** See OFFICE AND OFFICERS.

**Waters.**

One who pollutes and renders unfit for use the waters of a running stream, or one who thus creates a nuisance, may be enjoined from committing such acts, at the suit of a person injured thereby. *Abraham v. City of Fremont*..... 395

**Wills.** See DOWER, 2.

**Witnesses.** See PERJURY. RAPE, 2.

*Married Women.*

1. A married woman may be subject to the penalties of perjury, though testifying in presence of her husband. *Smith v. Meyers* ..... 2

*Leading Questions.*

2. The extent to which leading questions may be allowed rests in the discretion of the trial court. *City of Harvard v. Stiles*, 26

*Presence in Court.*

3. The practice of excluding unexamined witnesses from court during examination of the witness on the stand approved. *Chicago, B. & Q. R. Co. v. Kellogg* ..... 139

*Protection from Service of Process.*

4. A judgment against defendant is not void but erroneous and subject to reversal on review, where the summons was served upon him while he was in attendance upon court as a witness and, for that reason, exempt from service of process. *Mayer v. Nelson* ..... 434

5. A person is privileged from service of summons in an action in which the venue is laid in a county other than that of his residence, while necessarily and in good faith within such county for the purpose of testifying as a witness in a cause. *Id.*

6. A non-resident witness coming into the state for the sole purpose of attending the trial of a cause is privileged from service of civil process while coming to, returning from, and attending upon the court, and for a reasonable time after the hearing to prepare for his return home; and what constitutes a reasonable time to depart is a question of fact to be determined from the evidence in each case. *Linton v. Cooper* ..... 438, 443

*Cross-Examination.*

7. The cross-examination of a witness should ordinarily be confined to matters concerning which he has testified in his direct examination. *Western Union Telegraph Co. v. Cook*, 109

8. In cross-examination of parties to an alleged fraudulent conveyance great latitude should be allowed. *Armagost v. Rising* ..... 764

9. Prejudicial limitation of the cross-examination of parties to an alleged fraudulent conveyance may be ground for the reversal of a judgment. *Id.*

**Words and Phrases.**

1. "Adequate remedy at law." *Richardson Drug Co. v. Meyer*.... 319

2. "Ascertained." *German Nat. Bank v. Farmers & Merchants Bank* ..... 593

**Words and Phrases**—*concluded.*
3. "Fiscal year." *State v. Cornell*..... 655
4. "For." *Id.*
5. "F. o. b." *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*.....326, 327, 346, 349, 351
6. "Freeholder." *Cummings v. Hyatt*..... 35
7. "Necessary." *Lancaster County v. Green*..... 98
8. "Removed." *Moores v. State*..... 495

**Writs.** See **Executions. Summons.**