L. BETTMAN & COMPANY V. JOHN L. MCCONNELL.

FILED JUNE 9, 1898. No. 8142.

Landlord and Tenant: PAYMENT FOR HEAT: LEASE: EVIDENCE. In an action by a landlord against his tenant to recover for heating the demised premises, the lease being silent as to the landlord's duties in that respect, evidence set out in the opinion *held* to tend to show that payment for the heat was included in the rent reserved, and that it was error to peremptorily instruct the jury to find for the plaintiff.

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

Stevens & Cochran, for plaintiffs in error.

Edwin M. Lamb and *Ralph E. Johnson, contra.*

IRVINE, C.

John L. McConnell leased to L. Bettman & Co. a storeroom and basement and two upper rooms in a building in Lincoln, owned by McConnell, for a term of two years from February 1, 1892. After the term expired he brought this suit to recover for steam heat furnished by him, under an express contract that Bettman & Co. should pay for the same at the rate of $250 per year. Bettman & Co. denied the contract and claimed that the rooms occupied by them were to be heated by McConnell without charge, except as the value might be included in the rent. The court at first submitted the case to the jury, but later gave a peremptory instruction requiring a verdict for the plaintiff for the amount claimed. The giving of this instruction is assigned as error.

The lease reserved a rent of $240 per month, and made no reference to the heating of the rooms, except that the lessees covenanted to keep in repair the gas pipes, water pipes, and steam pipes. There was an express provision that the lessees should pay for water used. The evidence showed that the building contained many rooms

besides those leased to defendants; that there was a single steam heating apparatus with connections for heating the whole building; that this apparatus was maintained by plaintiff; that when the lease was made the rooms were being heated from this apparatus, and nothing was then said on the subject. There is evidence tending to show that there were no flues connecting the demised premises with the chimneys so that they could be heated otherwise; that the rent was paid monthly for the whole term, without any demand for pay for the heating or any suggestion that payment was expected, and that no such suggestion was made until after the lease expired; that the steam was turned on when the term began, and that defendants had no control thereover and no means of disconnecting the pipes or discontinuing the use of the steam. There was also evidence tending to prove a local custom for the landlord to furnish steam heat under similar circumstances. Plaintiff's testimony as to an express contract after the lease was made was squarely contradicted. We think the court erred in directing a verdict. It was not a question of contradicting the written contract. The written contract was silent. The plaintiff himself relied on extrinsic evidence. The evidence was conflicting as to an express contract, and if it be assumed that the petition justified a recovery on an implied assumpsit, certainly the evidence referred to tended to rebut any presumption from the furnishing of the heat, that pay therefor beyond the rent reserved was expected, or in good conscience due.

REVERSED AND REMANDED.

BURNEY J. KENDALL V. JOSEPH GARNEAU, JR.

FILED JUNE 9, 1898. No. 8150.

1. **Statutes:** CONSTRUCTION OF LANGUAGE: PRESUMPTION. When the legislature, in a statute, employs language which has elsewhere received a fairly well settled construction, it will be presumed that such construction was in the contemplation of the legislature, and expresses the true meaning.
2. **Statute of Frauds:** VERBAL AGREEMENTS: PERFORMANCE. That portion of our statute of frauds which brings within its inhibition verbal or unsubscribed agreements which by their terms are not to be performed within one year from the time of making does not extend to agreements wholly performed on one side within the year.
3. ———: ———: ———. Whether there is ground for a distinction between executory contracts contemplating performance on one side within a year, and contracts actually executed on one side within that time, *quære.*
4. **Unsubscribed Deed:** COVENANT TO PAY MORTGAGE. The grantee in a deed, although he does not subscribe the same, is bound by a covenant to pay a mortgage not due for more than a year after the delivery of the deed. RAGAN, C., dissenting.
5. **Review:** ORDER REMANDING CAUSE: DISREGARDING STIPULATION. The parties had stipulated that if a judgment for the defendant should be reversed, this court should render judgment for a stipulated amount in favor of plaintiff. It being made to appear that subsequent proceedings had been had which might in whole or in part avoid the obligations of the stipulation, the court refused to enter judgment according to the stipulation, and remanded the case that the district court might hear and determine the questions so suggested.

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

Albert Swartzlander, for plaintiff in error.

Joel W. West and *H. J. Davis, contra.*

IRVINE, C.

Kendall, in his amended petition against Garneau, alleged that December 11, 1890, the Patrick Land Com-

pany sold and conveyed to Charles F. Mullin twenty-four lots of land, and that to secure the purchase-money Mullin that day made and delivered to the land company his twenty-four promissory notes, each payable December 11, 1893, each for $600, and each secured by a mortgage on one of the lots; that these notes had become the property of the plaintiff; that February 23, 1891, Mullin conveyed said lots to Garneau by deed-poll, incorporated in the petition, containing the following covenant: "Subject to incumbrances amounting to $14,400, which the said Joseph Garneau, Jr., hereby assumes and agrees to pay, and the interest thereon from December 11, 1890." It was further alleged that the incumbrances mentioned in said covenant were the mortgages securing plaintiff's notes, and that said notes were due and unpaid. Judgment was prayed for their amount. A general demurrer to this petition was sustained and a judgment of dismissal entered.

It will be observed that the notes were not payable for more than one year after the conveyance to Garneau, and that that deed was not subscribed by the grantee. The question raised by the demurrer is whether such a transaction is within the first subdivision of section 8, chapter 32, Compiled Statutes, which provides: "In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: First—Every agreement that by its terms is not to be performed within one year from the making thereof." It is contended that the liability of the grantee under similar circumstances has been settled by repeated adjudications. An examination of the cases will disclose that the propositions so far decided have been that a third person for whose benefit a promise is made may sue thereon, although he be not a party to the consideration; and that such a promise is a principal undertaking, and so not within that provision of the statute of frauds which requires a writing in order to charge

one on a promise to answer for the debt, default, or misdoings of another. In some cases it affirmatively appears that the debt became due or that it was in terms payable within the year. In only one does the contrary appear, and in none has the provision we are now called upon to consider been invoked, or its application considered. In ascertaining whether this provision applies, the determining question is whether the statute contemplates an agreement which by its terms is not to be completed within the year, or only those which are not to be performed on either side within that period. If the latter, it is not here applicable, because the conveyance was made at once and only payment by the promisor was postponed beyond the year.

Were we at liberty to base our construction upon what seems the natural and ordinary meaning of the language employed, the solution ought not to be difficult. As stated by Lord Ellenborough in *Boydell v. Drummond*, 11 East [Eng.] 142, "performed" means completely performed. It means done, not begun or half done. The policy of the statute was to prevent the evidence of such contracts from resting in the uncertain memory of witnesses for so long a time. A half performance would not satisfy this object. But the language of the statute is not altogether certain, and we have, from another rule of construction, a guide to the intent of the legislature. Our statute was first enacted in 1856. (Session Laws, ch. 33.) It was re-enacted in 1864. (Session Laws, p. 70.) From its closely following in the main the statute of Charles II, and from the changing of some words which had created difficulty in the construction of that statute, and the addition of certain sections rendering explicit matters which were left by the English statute in doubt, it is quite evident that it was carefully prepared, with a view to the many decisions construing the original act and the earlier American acts founded thereon. If the words used had at the time received a settled construction, we must presume that the legislature adopted

them in that sense. *Boydell v. Drummond* was decided in 1809. One of the questions in that case was whether an agreement was within the statute if its performance was to be commenced on both sides within the year. The court held that it was. To the writer's mind the reasons for holding that a part performance does not take the case out of the statute apply with equal force to a contract wholly performed on one side but unperformed on the other. Nevertheless it was in the course of the argument suggested by Lord Ellenborough that if there was complete performance on one side, and nothing remitted beyond the year except payment of the consideration, the statute would not apply. This chance suggestion, in argument of an idea apparently removed by final consideration of the case, was seized upon later and made the basis of one or more *obiter dicta*. Finally, in 1832, the doctrine was announced, in a case directly involving the question, that the statute refers only to agreements not to be performed on either side within the year. (*Donellan v. Read*, 3 B. & Ad. [Eng.] 899.) The reason there given is solely *ab inconvenienti* and fallacious. The case is supposed of a sale of goods to be paid for in thirteen months, and it is said that the law could not intend that the vendee should so get the goods and evade payment. The court failed to perceive that although the special contract would fail there could be a recovery on a *quantum valebant*. Moreover, the statute is founded on public policy, and contemplates that individuals must and shall suffer if they neglect to comply with its simple requirements. *Donellan v. Read* was doubted in *Souch v. Strawbridge*, 2 M. G. & S. [Eng.] 808, in 1848, but was followed in *Cherry v. Heming*, 4 Exch. [Eng.] 631, and other cases. In 1886 the doctrine was disapproved, but was considered to be too firmly established to be departed from. (*Miles v. New Zealand Co.*, 32 L. R. Ch. D. [Eng.] 266.)

When our statute was first enacted the doctrine of *Donellan v. Read* had been adopted in Maine (*Holbrook v. Armstrong*, 10 Me. 31), in Alabama (*Rake v. Pope*, 7 Ala.

161), in Georgia (*Johnson v. Watson*, 1 Kelly 348), in South Carolina (*Bates v. Moore*, 2 Bailey 614), in Missouri (*Blanton v. Knox*, 3 Mo. 343), and in Maryland (*Ellicott v. Turner*, 4 Md. 476). It had then been disapproved in only two states—in New York (*Broadwell v. Getman*, 2 Den. 87), and in Vermont (*Pierce v. Paine*, 28 Vt. 34). Prior to its re-enactment in 1864 the English rule had been followed in New Jersey (*Berry v. Doremus*, 30 N. J. Law 399). It was again re-enacted as a part of the Revised Statutes in 1866, and had in the meantime received a construction like that put upon it in England in New Hampshire (*Perkins v. Clay*, 54 N. H. 518, overruling an earlier case to the contrary), and in Illinois in a case just like that before us (*Curtis v. Sage*, 35 Ill. 22). By a course of decisions Indiana and Wisconsin had committed themselves also to the English construction. (See cases cited in *Wolke v. Fleming*, 103 Ind. 105, and *Grace v. Lynch*, 80 Wis. 166). Massachusetts had, however, in 1864, adopted the view previously expressed in New York and Vermont. (*Marcy v. Marcy*, 9 Allen 8.) The cases since the last enactment of our statute are not of similar importance, but it may be said that the following later cases enforce the English rule: *Smalley v. Greene*, 52 Ia. 241; *Dant v. Head*, 90 Ky. 255; *Durfee v. O'Brien*, 16 R. I. 213; *Seddon v. Rosenbaum*, 85 Va. 928; *Atchison, T. & S. F. R. Co. v. English*, 38 Kan. 110. The other view has received an implied support from Judge Toulmin in *Warner v. Texas & P. R. Co.*, 54 Fed. Rep. 922. It will thus be seen that at the time of the first adoption of our statute the almost uniform current of authority was in accord with *Donellan v. Read*, and that the later decisions have not tended to very materially reduce that preponderance. There are, it is true, some slight variations in the language of different statutes, but nothing of any logical force in controlling the construction in this respect. We think it must be said that the words of our statute had received such a settled construction that our legislature in enacting them, and in twice re-enacting them, intended that that

construction should be placed upon them. In the recent case of *Bloomfield State Bank v. Miller*, 55 Neb. 243, we expressed our disapproval of the former tendency of courts to evade the statute of frauds, and refused to give effect to the English doctrine of an equitable mortgage by deposit of title deeds, in part because such a mortgage is opposed to the letter and the spirit of the statute; but in that respect the language of the statute is most explicit, and the English rule had been repudiated by all the well-considered cases in the United States, so that there was no presumption that our legislature had intended to give effect to such equitable mortgages. We here adopt the English rule, not as being a correct construction of their statute, but because we are convinced that in the light of history it is the construction which our legislature intended should be adopted. Before leaving the subject it may be well to say that some of the cases imply a distinction as between contracts merely contemplating performance on one side within the year, and those where performance has actually taken place on the one side within that period, and the action brought after such performance. Whether there is ground for such distinction we need not here consider, and do not decide, because in this case there had been actual as well as contemplated performance.

In the district court there was a stipulation whereby the parties in effect agreed to rest, the plaintiff on his amended petition and the defendant on his demurrer, and in the event of reversal by this court that judgment should be entered for the plaintiff for an amount stipulated. Recently there has been filed here a transcript of proceedings in the United States circuit court for this district, whereby it appears that pending these proceedings the land has been sold under decree foreclosing the mortgages, and that part of the debt has been by the plaintiff so realized. We are asked by the plaintiff to enter judgment under the stipulation, giving credit for the amount shown to have been so realized. The defend-

ant, on the other hand, insists that the foreclosure was a violation of the stipulation and released the defendant from its obligations. The transcript of a court over which this has no control or supervision is merely evidence, and as such is not relevant to any issue before us. If the proceedings in the federal court have any effect on the rights of the parties in this case, they should be asserted by supplemental pleadings, as facts arising since the action was begun and the stipulation was made, and the district court is the proper place for such original proceedings. We will not enter judgment as prayed, but remand the case to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

FIRST NATIONAL BANK OF OMAHA, APPELLEE, V. EMMA GOODMAN, APPELLANT.*

FILED JUNE 9, 1898. No. 8636.

1. **Sufficiency of Evidence.** In a civil action a preponderance of the evidence proves any issue.
2. **Pledge: LIFE INSURANCE POLICIES: HUSBAND AND WIFE: EVIDENCE.** Evidence examined, and *held* to sustain a finding that policies of insurance in favor of a wife on the life of her husband, admitted to have been by her pledged for his debt, had been deposited as a continuing security and were not discharged by granting him extensions.

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

Isaac Adams and *George W. Doane,* for appellant.

J. M. Woolworth and *Congdon & Parish, contra.*

*Rehearing allowed. See case next following.

IRVINE, C.

Charles F. Goodman entered into business in Omaha in 1868 as a druggist. The business prospered and was extended until it embraced a wholesale drug store. In 1887 the wholesale store was sold and the retail business was continued. For some years prior to the events creating this controversy it was conducted by a corporation known as the Goodman Drug Company, Mr. Goodman owning all the stock except a few shares which were held by members of his family. Mr. Goodman also became interested in the Omaha Brick & Terra Cotta Company and the Grandview Brick Company, corporations whose business is indicated by their titles, and quite largely in real estate. Except for a period prior to 1883 Mr. Goodman conducted his banking business with the First National Bank, and seems to have been practically all the time a large borrower on behalf of himself and the corporations in which he was interested. The debt was represented by divers notes, made from time to time, and at their maturity paid or renewed, apparently at Mr. Goodman's volition. In 1887 the debt amounted to $47,500. Early in that year, from the proceeds of the sale of the wholesale store, it was entirely paid. Before the close of 1887 Mr. Goodman began to borrow again, and the indebtedness gradually increased until 1890, when it was almost $63,000. It was subsequently reduced to $39,000, but grew again until it reached, in 1892, $45,000. The foregoing facts are important in showing that, instead of occasional single loans, paid at maturity, Mr. Goodman's debts to the bank arose out of a constant series of transactions, the amount fluctuating, but the distinct affairs merging in a continuous course of dealing, understood by both parties in that light. The debt in 1892 was made up of several notes—individual notes of Goodman, notes of the drug company with Goodman as joint maker, and notes of the brick company to Goodman and another and by them indorsed to the bank. The only se-

curity then held by the bank was Goodman's stock in the drug company, which had been pledged as a general cover. In 1892 Mr. Kountze, the president of the bank, asked Mr. Goodman to reduce his indebtedness or secure it. Mr. Goodman informed Mr. Kountze that he held much unincumbered land, and also life insurance policies to the amount of $45,000; that when the bank should desire it he would mortgage the land and assign the policies. Thereupon the bank continued its policy of renewing his notes. In December, 1892, one of the notes maturing, Mr. Kountze again requested security. Mr. Goodman said he did not wish to give it at that time, but repeated his promise to give it upon demand, and renewals were again granted. Mr. Goodman was then endeavoring to obtain a loan on his real estate which would enable him to discharge his existing debts. February 20, 1893, a note again maturing, a demand was made for the promised securities, and Mr. Goodman promised to bring to the bank a memorandum of his land, his certificates of stock in the brick company, and the policies of insurance. Certain notes then maturing or past due were then renewed. At this interview Mr. Goodman asked what the bank would do as to renewing paper if security were given, and Mr. Kountze answered that the bank would carry the paper along as it had been doing, renewing for periods of sixty or ninety days, as long as the securities were satisfactory and the condition of the bank and general financial conditions should allow. Mr. Goodman then said that he might need further moneys, and Mr. Kountze said that in case of emergency the bank would aid him. Soon after this, and prior to March 1, Mr. Goodman brought in the instruments, and it was then discovered that Mrs. Goodman was the beneficiary of every policy. The bank took steps to ascertain how in that condition the assignments could be perfected, and found that policies to the amount of $13,000 were in companies which permitted no assignments. Forms of assignments of the remaining policies were prepared ac-

cording to the requirements of the companies issuing them. March 1 a loan of $2,000 was made by discount of a note of the brick company, and Mr. Kountze then drew up, at Mr. Goodman's request, an instrument which the latter signed, reciting a pledge of the life insurance policies, and directing the bank, in the event of its applying their proceeds to his debt, to deliver the stocks pledged, after satisfying the debt, to Mrs. Goodman. This instrument contained the following by way of recital: "The money arising from said policies when collected shall apply on any indebtedness of C. F. Goodman or the Goodman Drug Company to said bank." Mr. Kountze about this time drew up a mortgage of the land listed by Mr. Goodman, conditioned in broad terms to secure existing and future indebtedness and renewals. On the morning of March 8 Mrs. Goodman went to Mr. Goodman's place of business and was there met by Mr. Gates, the assistant cashier of the bank, and by Mr. Bexton, its collection clerk, who was also a notary public, Mr. Gates bearing with him the mortgage and the assignments of the policies. Without any inquiry or conversation with reference to the nature of the contract Mrs. Goodman then signed the assignments and signed and acknowledged the mortgage, and Mr. Gates took them back to the bank, where they were retained. Subsequently all the notes, except one, were extended by the payment and receipt of interest in advance, such payments being indorsed on the notes. Later in 1893 other notes were made. One of these was secured by mortgage on land in Lancaster county, conditioned also as a continuing security for all indebtedness, Mrs. Goodman joining in its execution. Part of the proceeds of these later notes went to the payment of Mr. Goodman's individual overdrafts, part to the payment of taxes, chiefly on the mortgaged land, and the remainder was indorsed as payments on some of the old notes. On a date not disclosed by the printed abstract on which the case is submitted, but stated to be January 4, 1895, the bank brought this suit to foreclose

the mortgages and subject the stocks to the payment of the debt. The petition alleged the pledge of the policies, but asked no relief as to them. Mrs. Goodman was made a party apparently solely to bar dower in the land. January 11, 1895, Mr. Goodman died. Mrs. Goodman was made executrix of his will. The bank collected the life insurance, applied it to the notes then held by it, and presented, proved, and caused to be allowed its claim against the estate for the amount of the debt, less the proceeds of the policies. In the probate proceedings no objection was interposed by Mrs. Goodman to such application. She, however, began suit at law to recover the proceeds of the policies, but afterwards dismissed that suit without prejudice. In the meantime the bank, by supplemental petition in this case, had set up the death of Goodman, its collection of the life insurance and its application to the debt, and asked to have its right to so apply it adjudicated. Mrs. Goodman by her answer set up in effect three defenses: want of consideration, undue influence, and discharge of the securities by extending the time of payment of the notes. The court found generally for the plaintiff, and found specially, also for the plaintiff, as to the defenses of undue influence and want of consideration. It is contended that the general finding was insufficient to cover the issues as to discharge, but we think otherwise. The decree directed that the land be first sold, then the stocks; set aside the application made of the insurance, and directed that it be held by the bank at interest at the rate the notes bore, and applied if necessary to the debt after the other security should be exhausted, the surplus to be paid to Mrs. Goodman. Mrs. Goodman appeals.

The case as presented is peculiar in this, that counsel almost agree as to the law, and there is no material conflict in the evidence, yet the solution of the case is by no means simple or free from difficulty. It depends upon inferences from established facts. It is conceded that the evidence sustains the findings so far as regards the

defense of undue influence. It would hardly be contended, in the face of the decisions of this court, that the extension of the existing debt of the husband is not a sufficient consideration for the pledge of the wife's property; but it is contended, and the appeal rests on that contention, that the pledge of the policies was only for the security of the existing debt and in the form it then bore, and that the subsequent extensions discharged the pledge.

On this phase of the case it is asserted by the appellant, and conceded by the appellee, that the following propositions are sound: (1.) The relations of Mrs. Goodman to the bank were those of pledgor and pledgee. (2.) Her relations to the bank with reference to the property were also those of surety and creditor. (3.) In case of any change in the rights existing between principal and creditor, property of a third person, pledged for the debt, is discharged, unless the owner consent to the change. (4.) It is only by virtue of a special agreement that a pledge operates as a continuing security. (5.) Acceptance of interest in advance presumptively constitutes an extension of time of payment. A recognition of these principles narrows the controversy to this question: Was the contract between Mrs. Goodman and the bank one for a pledge by way of continuing security, or a pledge for specific notes? The question is one of fact alone. It is conceded that a pledge for some purpose was intended and actually made, so that no questions arising out of the appellant's status as a *feme covert* are involved. Her acts and her obligations, in ascertaining the particular nature of the contract, are to be judged as if she were a man or a single woman. Notwithstanding the general rule for the construction of contracts of suretyship, there is fair ground for the argument that when the written contract is on its face one for the absolute transfer of property, as were these assignments, the burden should devolve on the grantor to limit the effect of the apparently absolute conveyance. But we regard the concession of the fourth

proposition of those just stated as equivalent to an assumption by the plaintiff of the burden of proving that the pledge was by way of continuing security. To get a proper view of the facts it is first necessary to learn the nature of Mr. Goodman's contract with the bank. From what has been stated it appears beyond all question that by him and the bank it was understood and intended that the policies, like the stock and the mortgages, should operate as a continuing security and a general cover. Indeed, it is evident that Mr. Goodman's main purpose in complying with the demands of the bank was to obtain extensions and further credit. While he hoped to obtain a loan on the security of his land, he had been compelled to obtain extensions while seeking the new loan, and he must have been convinced by the time the securities were given that there was no immediate prospect of his so obtaining means to pay the bank, and that with notes maturing from time to time at short intervals, further extensions and further credits were necessary. To learn Mrs. Goodman's position a further statement of facts is essential. The policies had never been in her possession. Mr. Goodman had always retained them and paid the premiums. The relations of Mr. Goodman and his wife had always been those of affection and confidence. Mrs. Goodman occupied herself with her domestic duties and neither knew nor cared to know much of Mr. Goodman's business affairs. She knew, nevertheless, that he was in debt to the bank and was in financial difficulty. About March 1, 1893, Mr. Goodman told her that Mr. Kountze wanted him to assign his life insurance "for his indebtedness;" that Mr. Goodman thought he would have to do so to keep Mr. Kountze quiet until he could make a loan and pay the bank; that Mrs. Goodman need not fear, it would all come back to her. Mrs. Goodman said that she did not think it was right for her to do it or for Mr. Kountze to ask it. Mr. Goodman said it was only for a short time. Nothing further was said until the morning of March 8. Mr. Goodman then

asked her to come down that morning and sign the papers. She said she did not want to do so, and that if she were asked if she was willing she could not answer that she was. Mr. Goodman said: "Oh, Emma, you must not do that," meaning she must not say she was not willing. She made no further protest, but went to Mr. Goodman's office as requested, where, as already stated, she executed the mortgage and assignments without any conversation on the subject. The foregoing is from Mrs. Goodman's testimony. In addition one of her answers in direct examination is significant as well as touching. She was asked who presented the papers for her to sign, and answered: "I think it was Mr. Gates. I think that was the name. I think it was; I would not be positive. Mr. Goodman introduced me to him, but my feelings were such that I did not care whether he had any name." She further testified that she understood the purpose of the assignments, and in three different places she describes that purpose as securing "Mr. Goodman's indebtness at the bank." It will be remembered that both mortgages executed by her plainly expressed their object as a continuing security; but much of the probative force of this fact is destroyed by Mrs. Goodman's testimony that she did not read the assignments before signing them. Very probably she did not read the mortgages. Studying the foregoing facts, together with all the circumstances, we are led to the conclusion that Mrs. Goodman did not concern herself as to the character of the pledge or the nature of the debt. She realized that she was pledging a provision which Mr. Goodman had made for her, for the satisfaction of his debt to the bank; that she was thereby placing in jeopardy what might be her only resource in case of widowhood. She did not wish to do so, she protested to her husband against doing so, but yielded to his persuasion and assurance that she would regain the policies. She complied with his wishes finally to the full extent of the phrase. There is hardly enough to warrant the inference that she knew that his

purpose was to obtain further extensions in the technical sense, but she certainly knew that the object was to postpone in some way the day of settlement with the bank. There is nothing whatever to indicate that she knew how the debt was represented or that she intended to secure the specific notes then outstanding and no more. If she thought of the matter at all she would know that such a specific pledge for a short time would almost certainly sacrifice the policies. Her reluctance was to part with the policies at all. Having consented to part with them, she did so according to her husband's wishes, to fulfill his promises and to accomplish his purposes. His purpose was to obtain further extensions. Her mind and her acts must be read in this light. When she yielded to his importunings it was evidently by making his undertakings her own.

In this connection it is argued that the law requires something more than a preponderance of the evidence to establish a continuing pledge. Authorities to that effect are cited. Several cases say that such an intention must be clearly expressed. A text-book (Baylies' Sureties and Guarantors p. 7, note 1) is cited to the proposition that a guaranty will not be construed as continuing "unless the intention of the parties is so clearly manifested as not to admit of a reasonable doubt." The incorporation of this phrase, borrowed from the criminal law, into a statement of evidence in civil cases, is not, as might be supposed, the reckless statement of a text-writer, but has a certain sanction in the reports. The language was used by the editors of the American Leading Cases (vol. 2, p. 33) in a note to *Lent v. Padelford*, citing cases not supporting the statement. In *Birdsall v. Heacock*, 32 O. St. 177, the court announced at the beginning of the opinion that such a contract should be construed according to the same rules as any other, and proceeded upon that theory, but unfortunately quoted, with apparent approval, near the end of the opinion, the foregoing language, citing the American Leading Cases. Mr. Baylies quoted Messrs

Hare & Wallace's note, with its citations, *verbatim*, it having obtained from *Birdsall v. Heacock* a sort of *ex post facto* judicial sanction. Somewhat similar loose language with regard to the degree of proof has been used in other connections in *obiter dicta*, and has found its way into some cases in our reports; but this court, when the question was directly presented, took occasion to disapprove such statements and to announce that a preponderance of the evidence proves an issue in any civil case. (*Stevens v. Carson*, 30 Neb. 544; *McEvony v. Rowland*, 43 Neb. 97; *Wylie v. Charlton*, 43 Neb. 840.) The more reasonable, the more obvious, the more probably true construction of this contract accords with the finding of the trial court. In a civil case we are not at liberty to reject the more reasonable, the more obvious, the more probably true view of the evidence, and accept the less reasonable and the less probable, because of any technical rule of proof by which the latter is fortified. Nor may we reject the more reasonable and the more probable from sentiment of sympathy, which, if it could have sway, would here exert a strong influence in favor of the appellant.

AFFIRMED.

FIRST NATIONAL BANK OF OMAHA, APPELLEE, V. EMMA GOODMAN, APPELLANT.*

FILED DECEMBER 22, 1898. No. 8636.

1. **Liability of Surety.** A surety is entitled to stand upon the strict terms of his contract. He is bound only to the extent and in the manner pointed out in his obligation.

2. ———: ALTERATION OF CONTRACT. If the contract of a surety be altered without his consent, it ceases to be his contract, and he is no longer bound to its performance.

3. ———: CONSTRUCTION OF CONTRACT. But in ascertaining the extent to which a surety has become obligated, unreasonable and overstrained constructions are not to be resorted to. The contract of suretyship, like every other agreement, is to be given a fair

*Rehearing allowed January 5, 1899.

and reasonable interpretation in accordance with established rules, with a view of determining upon what proposition the minds of the contracting parties have met in the same intention.

4. **Pledge by Wife to Secure Husband's Debt:** FURTHER ADVANCES: EXTENSION OF TIME FOR PAYMENT. A pledge of property by a wife to secure an indebtedness of her husband, and to prevent his creditor from enforcing immediate payment, will not, of itself, entitle the creditor to hold such property as security for further advances to the husband. Neither will it entitle the creditor to hold the property for the satisfaction of the original indebtedness after having made a valid contract extending the time for its payment.

5. ———: ———: ———. Such an extension made by a creditor without the knowledge or consent of the wife will operate to release the pledge.

REHEARING of preceding case (55 Neb. 409. *Former decision overruled and judgment below reversed.*

Isaac Adams and *George W. Doane*, for appellant.

J. M. Woolworth and *Congdon & Parish, contra.*

SULLIVAN, J.

At the January term an opinion was filed affirming the judgment of the district court in favor of the First National Bank of Omaha. (*First Nat. Bank of Omaha v. Goodman*, 55 Neb. 409.) On the motion of counsel for Mrs. Goodman a rehearing was granted and the cause having been orally argued at the present term was again submitted. After a thorough consideration of the questions involved we feel constrained to recede from our former position, and to confess that we erred in the conclusion heretofore announced. We are now convinced that in dealing with the evidence from which that conclusion was deduced we indulged a latitude and freedom of interpretation not warranted by the law of suretyship. The facts are stated with substantial accuracy in the first opinion and will not be here reproduced in detail.

The inference to be derived from the conceded facts is the main question before us for decision. That a surety is entitled to stand upon the strict terms of his contract

is a proposition of law upon which the authorities are all agreed. To the extent, and in the manner, pointed out in his obligation he is bound, but no farther. It has been often said by judges and text-writers that sureties are favorites of the law, and that their liability will not be extended by implication. If the contract of a surety be altered without his consent, it ceases to be his contract and he is no longer bound to its performance. If he can say, as was remarked in *McWilliams v. Mason*, 31 N. Y. 294, "'This is not the precise contract I made,' the law attaches to him no liability." The reports abound with cases in which this principle has been illustrated and applied. But it is also true that the rule which requires that a surety shall not be bound beyond the terms of his engagement does not call for, nor authorize, a forced and unreasonable construction of the contract with a view of relieving the surety from an obligation which he has assumed. Far-fetched and over-strained constructions are not to be resorted to. The contract of a surety, like every other agreement, must be given a fair and reasonable interpretation in accordance with established rules, with a view of determining upon what proposition the minds of the parties met in the same intention. The intention, when ascertained from the evidence before the court, must in every case prevail. These principles are elementary. Tested by them it seems entirely clear that Mrs. Goodman did not pledge the policies in controversy for anything more than the indebtedness of her husband existing, and evidenced by the notes in the possession of the bank at the time the assignments were made. The bank came into court asserting a lien on the policies by virtue of a contract with Mrs. Goodman. To succeed in the action it was required to establish the contract on which it relied, by a preponderance of the evidence. It was required to show that the pledge covered the indebtedness evidenced by the obligations upon which the money collected from the insurance companies was applied. When it appeared on the trial that the

original notes were renewed, and the time for payment extended, the release of the pledge was established, unless there was evidence affording an inference that the pledgor intended, at the time of the bailment, that the policies should stand as a continuing security or general cover. It is contended by counsel for the bank that such an inference may be fairly drawn from the circumstances surrounding the assignment of the policies. To ascertain the intention of Mrs. Goodman we must look to the facts of which she was cognizant when the pledge was made. She was not a woman experienced in the methods or details of commercial transactions. She concerned herself, as was said in the former opinion, "with her domestic duties, and neither knew nor cared to know much of Mr. Goodman's business affairs." She was aware, of course, that her husband was in financial straits; that he was indebted to the bank and being subjected to some pressure for payment or security. She knew also that he was endeavoring to obtain a loan on his real estate with which to discharge his indebtedness to the bank. She hoped, and probably expected, that his efforts in this direction would be successful. She was assured that the pledge would stand but for a short time. She doubtless contemplated the failure of the pending negotiations for a real estate loan as a possible, or even a probable, event, and understood the risk she was assuming. She consented to part with the policies so that the bank would not enforce immediate payment of the indebtedness owing to it by Goodman. Her intention was to help her husband extricate himself from the financial difficulties in which he was involved. Had she been requested to do so, she might have agreed that the pledge should stand as security for all subsequent renewals and unlimited future advances. But the question for solution is not what she might have done, but what she, in fact, did. Her liability is to be measured and bounded by her specific intention. The evidence shows only that she consented to secure "Mr. Goodman's indebtedness to the

bank." That phrase, by legal implication, meant the indebtedness in the form in which it then existed—the contracts by which it was evidenced. Although Mrs. Goodman was ignorant of the form of the indebtedness, she became bound for the payment of the specific notes according to their terms. As she would not be permitted to say that her undertaking did not go that far, neither can the bank, without further proof, be heard to say that it went farther. The legal effect of the pledge was to secure Goodman's notes then in the possession of the bank. To hold that renewals and future advances were also secured, is to ascribe to Mrs. Goodman a definite mental attitude in relation to a matter of which she had never thought. There is nothing to show that she knew when the indebtedness to the bank would mature, or that the bank's custom was to make short loans and insist on frequent renewals. The truth is that there is no evidence whatever that the subject of renewals or future advances engaged her attention at any time either specifically or in a general way; and she is not bound for such renewals or advances because they were not made with her authority or consent.

Circumstances occurring after the pledge was made are relied on as tending to support the theory of the bank, but we think they are without evidential force. Mrs. Goodman proceeded to assert her claim to the proceeds of the policies with reasonable diligence after she was informed of the facts which operated to release the pledge.

Another ground upon which it is sought to justify the judgment of the trial court is that Mrs. Goodman, by her acts and conduct, is estopped from showing what her real intention was at the time the policies were assigned to the bank. We think the facts proven are manifestly insufficient to constitute an estoppel *in pais*. The bank did not deal with Goodman as the agent of his wife clothed with an ostensible general authority to dispose of her policies for his own purposes. Had it done so its

present contention would be entirely sustained by the precedents cited and many others to which reference might be made. The doctrine is impregnably established, by a long and uniform course of decisions, that one may, in dealing with another assuming to act in the capacity and character of an agent, implicitly rely on the apparent authority with which he has been, either intentionally or carelessly, invested by the putative principal. The rule is that "when one of two innocent parties must suffer, the law imposes the loss upon him who, by misplaced confidence, has enabled another on the faith of his obligation to obtain the money or property of the third person who, relying on such obligation, has dealt in good faith." In such case it is, in the language of the opinion of Denio, J., in *McWilliams v. Mason, supra*, "more consonant with public policy as well as sound morals that he who, by permitting himself to be deceived, has put it in the power of another to defraud an innocent third party should himself suffer rather than the latter." This is a sound principle, but we are unable to see its relevancy. The evidence does not bring the transaction in question within its sphere of influence. Up to the time the bank obtained possession of the policies it dealt with Goodman on the assumption that he was the owner and authorized to dispose of them as he might think proper. When it was discovered that they were the property of Mrs. Goodman, the bank did not return them, but retained possession and caused forms of assignment to be prepared under its supervision. It then presented these assignments to Mrs. Goodman for her signature. She signed them and returned them to the agent of the bank; and by that act they were for the first time lawfully delivered and became effective as a pledge. The bank was not deceived by any false evidence of authority exhibited to it by Goodman. It did not deal with the agent, but with the principal herself. It determined the form in which the agreement between it and Mrs. Goodman should be expressed. It neither

fixed her liability in the written instrument nor informed her as to its understanding in regard to the matter. A pledge by a surety to secure unlimited renewals and unlimited future advances was not a usual and ordinary one. It was unusual and extraordinary; and it was, under the circumstances, the obvious duty of the bank to either express it in the assignments or, in some other manner, bring it to Mrs. Goodman's attention. Having failed to do so it assumed the risk that there might not be mutuality of purpose in the transaction. It was not warranted in assuming that she was advised of the precise terms of its arrangement with Goodman. The woman may have been negligent, but her negligence was certainly not greater than that of the bank.

The judgment of the district court is reversed and a judgment rendered in this court in favor of the appellant for the sum of $35,753.72, that being the difference between the net proceeds of the policies and one of the notes for which they were pledged and which was not renewed, together with the interest on such difference at seven per cent from August 31, 1895.

A case much like the one at bar and strongly tending to sustain the conclusion here reached is *Allis v. Ware*, 28 Minn. 166, 9 N. W. Rep. 666.

REVERSED AND DECREE FOR APPELLANT.

IRVINE, C., adheres to the former opinion.

UNITED STATES NATIONAL BANK OF OMAHA V. EDGAR M. WESTERVELT ET AL.

FILED JUNE 9, 1898. No. 8106.

1. **Fraudulent Conveyances:** INTENT. Under our statute, when conveyances are assailed by creditors of the grantor, the question of fraudulent intent is one of fact.

2. ———: RECITALS IN MORTGAGE: EVIDENCE. There exists no rule of

law avoiding a mortgage to secure an existing debt, induced by the hope or agreement that extensions will be granted and payments accepted in installments; and the recital of such purpose in the mortgage does not of itself establish an intent to hinder, delay, or defraud other creditors.

3. **Banks:** COLLECTIONS: INSOLVENCY: PREFERENCES. A bank holding paper for collection merely, and charged with no duty other than its due presentment, if it discharges that duty and is guilty of no misrepresentation or fraudulent concealment, is not forbidden to obtain a preference for a debt owing to itself from the same debtor. *Dern v. Kellogg*, 54 Neb. 560, distinguished.

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

The opinion contains a statement of the case.

J. C. Cowin and *W. D. McHugh*, for plaintiff in error:

The deed conveying the premises to Mr. Hagge is absolutely void as to the creditors of the grantor, for the reason, apparent in the defeasance, that the instrument was made for the benefit of the grantor and to hinder and delay his creditors in the collection of their debts. (*Livermore v. McNair*, 34 N. J. Eq. 478; *Grannis v. Smith*, 22 Tenn. 179; *Harman v. Hoskins*, 56 Miss. 142; *Richards v. Hazzard*, 1 S. & P. [Ala.] 139; *Harris v. Sumner*, 2 Pick. [Mass.] 129; *Owen v. Arvis*, 26 N. J. Law 22; *Pilling v. Otis*, 13 Wis. 553; *Sandlin v. Robbins*, 62 Ala. 477; *Arthur v. Commercial & Railroad Bank*, 9 S. & M. [Miss.] 394; *Hutchinson v. Lord*, 1 Wis. 249; *Robinson v. Robards*, 15 Mo. 319; *Hartman v. Allen*, 9 Lea [Tenn.] 659; *Bowen v. Parkhurst*, 24 Ill. 258.)

Charles G. Ryan, also for plaintiff in error.

O. A. Abbott, *J. H. Woolley*, *W. H. Thompson*, *George H. Thummel*, and *W. A. Prince*, *contra*.

IRVINE, C.

Christian A. H. Von Wasmer was indebted to the Citizens National Bank of Grand Island on a number of notes made or indorsed by him, and on overdrafts, and on No-

vember 10, 1893, executed to William A. Hagge, who was vice-president of that bank, a deed absolute in form conveying certain real estate in Grand Island. At the same time there was executed by both Hagge and Von Wasmer a defeasance as follows: "Whereas Christian A. H. Von Wasmer and wife Emma have this day conveyed to William A. Hagge, by their deed in writing, all the following described real estate [describing it], for the expressed consideration of $20,000, subject to two mortgages thereon aggregating $4,300 and accrued interest, now this agreement witnesseth: That this deed was made and intended to operate as a security for any indebtedness now due or to grow due to the Citizens National Bank of Grand Island, Nebraska, whether owed by said Christian A. H. Von Wasmer separately or jointly with others, and for the convenience of the parties thereto, and to enable the said Christian A. H. Von Wasmer to renew and change the form of any existing indebtedness, and to enable him to provide for the payment of the same in installments at such time or times as may by him be deemed to his advantage, now therefore, upon payment of such indebtedness, or any indebtedness which may be incurred in discharge of any prior incumbrance above referred to, the said Christian A. H. Von Wasmer, his heirs or assigns, shall be entitled to demand and receive a reconveyance of said premises upon the tender of the lawful fees therefor." The deed and defeasance were filed together for record November 13, 1893. March 30, 1893, Von Wasmer and others had made their note to the United States National Bank of Omaha for $5,500, payable sixty days after date. After the conveyance to Hagge the Omaha bank began suit on this note and caused the land conveyed to Hagge to be attached as the property of Von Wasmer. The attachment was dissolved, but a supersedeas was effected and the proceedings brought to this court for review. While pending here the Omaha bank obtained judgment in the principal proceeding and caused execution to be levied upon the

land, and seems then to have abandoned the attachment. Meantime the Citizens Bank failed and Westervelt became its receiver. He brought the present suit to foreclose the instruments referred to, as a mortgage, making the Omaha bank a defendant. The Omaha bank by its answer assailed the lien of the plaintiff on two grounds: First, that the conveyance was made to defraud the other creditors of Von Wasmer; second, that a fiduciary relationship existed between the Citizens Bank and the Omaha bank which estopped the former from receiving and asserting any security as against the demands of the Omaha bank. The district court found for the plaintiff and established his lien as prior to that of the Omaha bank. The latter brings the case here by petition in error.

It is asserted that the mortgage was on its face fraudulent, and this chiefly on the ground that it appeared to have been made for the debtor's benefit, the defeasance reciting that its purpose was the convenience of the parties, and to enable Von Wasmer to renew and pay his debt in installments. The finding of the court that there was no fraud is supported by the evidence, if indeed it is not the only finding which the evidence would support. A conveyance may indeed be void on its face, but if so it is because it, by its terms or manner of execution, contravenes some positive provision of law or public policy, or because it discloses an actual fraudulent intent so clearly that if the case were before a jury the court would be justified in directing a verdict because no other finding would be sustained. Under our statute fraudulent intent, when conveyances are assailed by creditors of the grantor, is a question of fact (Compiled Statutes, ch. 32, sec. 20), and it must be always so treated. The instruments on their face constitute a mortgage to a trustee to secure the bank, and as a continuing security. They are made without reservation, and merely express the mortgagor's purpose as being to obtain renewals and to pay in installments. Such a conveyance is not prohibited by law unless made with the intent to hinder, delay, or

defraud creditors. Von Wasmer had a right to prefer the bank; he had a right to obtain, if he could, an extension of the time of payment and an arrangement whereby he could pay in installments. The fact that the granting of such privileges, or the hope that they would be granted, induced him to make the preference, did not disclose an intent to hinder, delay, or defraud others. This is all the instruments showed on their face, and the extrinsic evidence it is not even claimed showed actual fraudulent intent.

On the second question the argument of the Omaha bank is that the Citizens Bank had been made its agent to collect or secure the note held by it, and that it could not, while such agency existed, secure its own claim to the exclusion of its principal's. The reply admits that the Citizens Bank held the note of the Omaha bank for collection, but denies that it had any authority to obtain security, and there is no evidence that it had. The only evidence on the point consists of two letters from the Citizens Bank to the Omaha bank. The first is dated November 1, 1893, and acknowledges receipt of the note for collection, adding: "We will notify parties to-day. You can see Christ Wasmer in Omaha, as he is stopping there most of the time. Address him in Omaha, care Merchants Hotel." The other letter is without date, but acknowledges the receipt of a letter of November 14, so that it was written after the conveyance to Hagge. It gives information as to Von Wasmer's financial condition and advises the Omaha bank not to make expense by employing counsel at that time. We think this proof wholly failed to establish any such state of facts as would estop the Citizens Bank from receiving and asserting its security. The note, so far as appears, was transmitted for collection merely, without special instructions or the Citizens Bank's assuming any special duty. It does not appear that the Citizens Bank neglected any duty imposed upon it. In the recent case of *Dern v. Kellogg*, 54 Neb. 560, a collection agent was held liable where it took

a conveyance of all the debtor's property to itself, to the exclusion of the claim it held for collection. But there the agent had grossly violated its obligations. It had held the paper for a long time and had granted time to the debtor without the knowledge or consent of its principal, and after so doing had taken the security for its own use. Its liability was traced to its disregard of duty. We there said: "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." Business usage and the knowledge that the principal in such cases must be presumed to have as to the relations which the bank holds or may hold with other business men or institutions in the community forbid the application of so harsh a rule. It would prevent a bank's undertaking collections. So long as the collecting agent assumes no other duty than the due presentment of paper, and so long as it discharges that duty and is guilty of no misrepresentation or fraudulent concealment, it is not forbidden to in good faith obtain security for a claim it holds in its own behalf against the debtor. (*Freeman v. Citizens Nat. Bank*, 78 Ia. 150; *First Nat. Bank of Abilene v. Naill*, 52 Kan. 211.) There is nothing in this case to take it out of the rule.

AFFIRMED.

MARCUS WITTENBERG ET AL. V. JOHN T. MOLLYNEAUX.

FILED JUNE 9, 1898. No. 8553.

1. **Evidence**: BUSINESS OF HOTEL: REGISTERS. Hotel registers, without proof that the names thereon are true entries of the guests of the hotel that they were paying guests, or the duration of their visits, are inadmissible to prove the extent of business of such hotel.

2. **Deed**: COVENANT AGAINST USING PREMISES FOR HOTEL PURPOSES: WAIVER: DAMAGES. A deed conveyed land with the covenant by the grantees that the premises conveyed should not for two years be used for hotel purposes. Afterwards the grantor in

writing waived the covenant, the waiver containing the following: "Provided the maximum rate of said hotel shall be $1 per day, and provided a greater sum is charged this agreement shall be null and void, and the clause in said deed shall be binding on the owners of the above described property." This was made at a time when the grantees were contemplating a sale to a stranger for hotel purposes. *Held*, That the condition in the waiver was not merely intended to charge the second grantee, but that on a violation of the agreement as to the rate at which the hotel might be conducted the original grantees became liable on their covenant.

3. **Breach of Contract:** GAINS PREVENTED: EVIDENCE. A party injured by breach of contract may recover for gains prevented, provided they are within the established rules permitting consequential damages, and provided they can be proved to a reasonable degree of certainty.

4. ———: DAMAGES: EVIDENCE. Evidence set forth in the opinion *held* to leave the damages too uncertain to be allowed.

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

G. W. Bemis, Leslie G. Hurd, and *M. C. King,* for plaintiffs in error.

E. E. Hairgrove, Thomas Ryan, and *Thomas H. Matters, contra.*

IRVINE, C.

The plaintiffs in error were at one time owners of certain property in Sutton adapted to use as a hotel. The defendant in error, or his wife, owned hotel property in another part of the town. An exchange was effected whereby the hotel property of plaintiffs in error was conveyed to Mrs. Mollyneaux and that of Mollyneaux conveyed to plaintiffs in error. The deed conveying the latter contained the following: "The same not to be used for hotel purposes for two years from this date," the deed being dated June 11, 1889. Mollyneaux sued, alleging that he had continuously from the transfer operated a hotel in the property conveyed to his wife, and that the plaintiffs in error, the defendants below, had in Septem-

ber, 1889, in violation of their covenant, sold the other property for use as a hotel, and that it had been so conducted to plaintiff's damage. The answer, among other things, pleaded that defendants, at plaintiff's solicitation, had sold their property for use as a hotel, to prevent the threatened construction of another hotel in the town, and, to that end, that the plaintiff and his wife had given a written waiver, set out as an exhibit, which closes as follows: "Provided the maximum rate of said hotel shall be $1 per day, and provided a greater sum is charged this agreement shall be null and void, and the clause in said deed shall be binding on the owners of the above decribed property." The reply pleaded that the hotel had, in violation of the terms of the waiver, been conducted at the rate of $2 per day, and that the waiver was thereby avoided. From a judgment for the defendants on these pleadings error was prosecuted to this court, where the judgment was reversed and the cause remanded. (*Mollyneaux v. Wittenberg*, 39 Neb. 547.) It was then held that the covenant in the deed was not unlawful or contrary to public policy as being an unreasonable restraint of trade; and further, that the reply was not a departure from the cause of action stated in the petition. As to the damages claimed it was said that it was very doubtful whether any evidence could be received, because it was not apparent how it could be shown to what extent custom had been diverted and what profits had been lost. But it was held that this question could not arise on the pleadings if a cause of action was stated for even nominal damages, thus in effect approving the dissenting opinion of Judge MASON in *French v. Ramge*, 2 Neb. 254. When the case was reinstated in the district court the answer was amended in such a way that it put in issue the liability of the defendants on the theory that the waiver was as to them absolute, and that the provision annulling it, if more than $1 per day should be charged guests at the hotel, applied only to such person as should become the owner by purchase from the defendants. The cause was

then tried, and a verdict was returned for the plaintiff for $1,400. To reverse a judgment entered thereon the defendants bring the case here.

On the trial the plaintiff called as witnesses certain persons who had been employed as clerks at the hotel, which was operated by one Shope, who had purchased from the defendants. They identified certain books as registers, kept during their respective periods of service, wherein guests entered their names on arriving. The only entries made by the witnesses were such letters as "D" and "L," indicating the time of arrivals. The books did not show how long the subscribing guests remained at the hotel, and there was no proof whatever that the names therein written were true entries of *bona fide* guests. They were admitted in evidence over the objection of defendants, and we think their admission was erroneous. They proved, on the foundation laid, simply that certain persons had, at certain times, signed their names on the books. They afforded no proof of the real number of actual guests, that the persons were paying customers or the duration of their stay, and so of the extent of patronage the Shope hotel enjoyed. The error was accentuated by refusing to permit the defendants to cross-examine on these points. It must be borne in mind that this action is against plaintiff's immediate grantees, not for operating themselves the hotel, but for selling to another and permitting him to operate it. The books were not kept or controlled in any way by the defendants, but were books of a stranger, which might, under proper circumstances and on proper preliminary proof, perhaps, be admitted as entries made in the course of business, or which might be used to refresh the memory of a witness, but which could not, without a foundation and supplementary evidence, which were not here admitted, be used to prove the issue in this case.

As the case must be retried it is proper that we should now consider certain other questions which will inevitably again arise. It is insisted that the operating of the

hotel at the rate of $2 per day avoided the waiver only as against Shope, but that the waiver as to defendants was absolute. We do not so construe the contract. The language of the clause in question, already quoted, is that if a greater sum than $1 be charged "this agreement [the waiver] shall be null and void." Then follows a further provision that in such case the restrictive covenant in the original deed should be binding on the owners. In our opinion, this language means that if more than $1 a day should be charged, then the waiver should not be effective for any purpose; and further, that the obligations of the covenant should in that event run with the land and charge the then owners as well as the immediate grantees of plaintiff. Even if the waiver be in that respect ambiguous, the same construction would be required, because in the original answer no such defense was pleaded, nor was it suggested when the case was here before. It is evident that the parties themselves have, until the filing of the amended answer, several years after the cause of action arose, treated the agreement in the light indicated. Such construction should, in case of doubt, be adopted. (*School District v. Estes*, 13 Neb. 52; *Rathbun v. McConnell*, 27 Neb. 239; *Paxton v. Smith*, 41 Neb. 56; *Davis v. Ravenna Creamery Co.*, 48 Neb. 471.)

The rule of damages is much discussed, and it is argued that only nominal damages could in such case be recovered. It is said that there can be no recovery for profits prevented. The former opinion voiced the difficulty of proof in such cases, but did not hold that substantial damages could not, as a matter of law, be recovered in such case. A doubt was expressed as to the practicability of proving them. In *French v. Ramge*, 2 Neb. 254, it was not held that recovery could never be had for a loss of profits, but that the circumstances of that case forbade proof to that degree of certainty which the law requires. It has since been held that the party injured by a breach of contract is entitled to recover for

gains prevented as well as for losses sustained, provided they are certain and such as might naturally be expected to follow the breach. (*Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 910.) Indeed the former opinion in this case impliedly recognizes such rule. There was not made, however, proof to the requisite degree of certainty, although plaintiff almost succeeded in that effort. It was made to appear that prior to the opening of Shope's hotel plaintiff's was the only hotel in town. The extent of his receipts was shown. It was then shown that the amount of business did not change. This was by proving that the number of travelers entering the town, and other conditions, remained practically the same. Then the receipts of the plaintiff's hotel, after the opening of Shope's, were shown, and there was evidence in addition that the receipts of the two hotels were about the same as plaintiff's receipts had been. But one important element was lacking. There was no proof as to expenses under the first condition. We may surmise that in such a business certain elements of expense remain constant, but that others must vary according to the volume of business. It is said in the briefs that it was shown that the expense remained the same, but counsel certainly mistake the record. The only evidence relating to expenses is found in plaintiff's testimony, where, in answer to a question as to how his "trade ran" after Shope had opened the other hotel, he said: "My trade ran about even with my expenses, about $11 a day. It just took all I could get to make my expenses." This tends to prove that, after Shope opened, plaintiff's business was not profitable, but for all that appears his expenses before his business was reduced were so much greater than afterwards that the same condition then existed. In the absence of evidence on that point proof of receipts alone would fail to establish the loss of profits to any degree of certainty.

REVERSED AND REMANDED.

RYAN, C., not sitting.

PHILADELPHIA MORTGAGE & TRUST COMPANY, APPELLEE, v. JOHN L. GUSTUS ET AL., APPELLANTS.

FILED JUNE 23, 1898. NO. 9484.

Foreclosure of Mortgage: APPEAL: REDEMPTION. If of an order of confirmation of a sale of real estate under a decree of foreclosure of a mortgage there has been perfected an appeal to this court, also the execution and approval of the proper appeal bond, the mortgagor may redeem from the sale at any time prior to the decision or decree of this court, by which the order of confirmation may become of force and operative. RYAN, C., dissents.

APPEAL by defendants from confirmation of a judicial sale of mortgaged realty. Heard below before HASTINGS, J., in the district court of Fillmore county. Submitted to supreme court on motion of appellant John L. Gustus for leave to redeem the premises from the foreclosure sale. *Motion sustained.*

John Barsby and *Charles H. Sloan*, for the motion.

References in support of the motion for leave to redeem the property from the mortgage-foreclosure sale: 1 Am. & Eng. Ency. of Law, 425; *Teaff v. Hewitt*, 1 O. St. 511; *Union P. R. Co. v. Ogilvy*, 18 Neb. 638; *Long v. Hitchcock*, 3 O. 274; *Wilcox v. Saunders*, 4 Neb. 569; *Parrat v. Neligh*, 7 Neb. 459; *Warren v. Raben*, 33 Neb. 380, 46 Neb. 115; *Fuller v. Ryan*, 34 Neb. 183; *Porter v. Sherman County Banking Co.*, 40 Neb. 275; *State Bank v. Green*, 10 Neb. 130.

Conley & Fulton, contra:

Appellant's right to redeem ceased at the time the sale was confirmed. (*Ewing v. Cook*, 85 Tenn. 332; *Cameron v. Adams*, 31 Mich. 426; *Lombard v. Gregory*, 57 N. W. Rep. [Ia.] 621; *Wilson v. Schneider*, 17 N. E. Rep. [Ill.] 8; *Eiceman v. Finch*, 79 Ind. 511; *Cummings v. Pottinger*, 83 Ind. 294; *Teabout v. Jaffray*, 74 Ia. 29; *Waller v. Harris*, 20 Wend. [N. Y.] 555; *Hill v. Walker*, 98 Am. Dec. [Tenn.] 465; *Casey v. Gregory*, 56 Am. Dec. [Ky.] 581; *Smith v.*

Randall, 65 Am. Dec. [Cal.] 475; *Campau v. Godfrey*, 100 Am. Dec. [Mich.] 133; *Suitterlin v. Connecticut Mutual Life Ins. Co.*, 90 Ill. 483; *Dobbins v. Lusch*, 53 Ia. 304; *Gates v. Ege*, 59 N. W. Rep. [Minn.] 495; *Hoover v. Johnson*, 50 N. W. Rep. [Minn.] 475; *McConkey v. Lamb*, 33 N. W. Rep. [Ia.] 146.)

An appeal does not vacate the judgment below. (*State v. Doane*, 35 Neb. 707; *Nill v. Comparet*, 16 Ind. 107; *Briggs v. Shea*, 50 N. W. Rep. [Minn.] 1037; *Low v. Adams*, 6 Cal. 277; *Bank of North America v. Wheeler*, 73 Am. Dec. [Conn.] 683; *Planters Bank v. Calvit*, 41 Am. Dec. [Miss.] 616; *Scheible v. Slagle*, 89 Ind. 323; *Padgett v. State*, 93 Ind. 396; *State v. Young*, 46 N. W. Rep. [Minn.] 204; *Sage v. Harpending*, 49 Barb. [N. Y.] 166; *Allen v. Mayor*, 9 Ga. 286; *Thompson v. Giffen*, 6 S. W. Rep. [Tex.] 410; *Bullion Beck & Champion Mining Co. v. Eureka Hill Mining Co.*, 13 Pac. Rep. [Utah] 174; *Curtiss v. Beardsley*, 15 Conn. 523; *Sloan's Appeal*, 1 Root [Conn.] 151; 2 Ency. Pl. & Pr. 324, 325.)

HARRISON, C. J.

In an action in the district court of Fillmore county to foreclose a mortgage against the real property or farm of John L. and Anna L. Gustus, in the due course of procedure, a decree for the relief demanded by the plaintiff, also some cross-petitioners, was granted and a sale of the land for the satisfaction thereof was had, and on motion an order of confirmation of the sale was entered in the district court. Objections to the confirmation were presented for the mortgagors, which on hearing were overruled, and from the order of confirmation an appeal has been perfected to this court for the mortgagors, inclusive of the proper appeal bond or undertaking.

During the pendency of the cause in this court John L. Gustus, of appellants, has applied to be allowed to redeem the premises from the sale. This application is opposed by the party who purchased. The provisions of our law relative to redemption of land from levy and

sale, or sale under order of sale or decree of foreclosure of a mortgage, are contained in section 497*a* of the Code of Civil Procedure, the terms of which are as follows: "The owners of any real estate against which a decree of foreclosure has been rendered in any court of record, or any real estate levied upon to satisfy any judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be confirmed by a court of competent jurisdiction by paying into court the amount of such decree or judgment, together with all interests and costs; and in case the said real estate has been sold to any person not a party plaintiff to the suit, the person so redeeming the same shall pay to said purchaser twelve per cent interest on the amount of the purchase price from the date of sale to the date of redemption, or deposit the same with the clerk of the court where the decree or judgment was rendered." It will be noticed that the statute fixes the expiration of the time for redemption at the date of the confirmation of the sale, and for the purchaser herein it is contended that the time of the order made by the district court must govern, and the applicant could not after such time, and cannot now, redeem. For the applicant it is urged that he may redeem at any time during his appeal. The settlement of the question of dispute rests, or depends, on a construction of a portion of the section of the Code we have quoted, in connection with the effect to be given the appeal from the order of the district court. The appeal and bond, if they did not vacate the order of the district court, superseded, suspended, or rendered it inoperative. The purchaser acquired no rights and the applicant was not divested of his title to, and rights in, the land. (*Tootle v. White*, 4 Neb. 401; *State Bank of Nebraska v. Green*, 8 Neb. 297; *State Bank v. Green*, 10 Neb. 133.) All things remained as before the sale and subsequent order of the district court, and will so remain and exist until a decision in and by this court of the matter appealed. The

order of the district court by the perfection of the appeal became ineffectual as to all other purposes for which it was made, and it certainly does not seem unfair to say that it was not of force or effect as against the right to redeem; nor does it appear unwarranted to construe the section of the Code in its reference to time to have indicated the date when the order shall become forceful and of full operation, which it cannot until this court has so decreed.

There were other arguments advanced, but we do not deem them of sufficient weight to lead to a conclusion other and different than the one we have just announced. It follows that the motion of the applicant will be sustained.

MOTION SUSTAINED.

HENRY O. DEVRIES V. J. W. SQUIRE, TRUSTEE, ET AL.

FILED JUNE 23, 1898. No. 8189.

1. **Deficiency Judgment:** MORTGAGES. A deficiency judgment in an action to foreclose a real estate mortgage under the provisions of our Code of Civil Procedure, as it existed prior to the legislative session of 1897 (see Code of Civil Procedure, sec. 847, Compiled Statutes 1895), could not be rendered until the "coming in of the report of the sale" of the mortgaged property.

2. ———: ———: PLEADING. If by facts pleaded in the petition and relief prayed thereon, and by answer filed, issue was joined relative to the liability of a debtor for any deficiency, the determination by finding in the original decree of such issue was proper and of force.

3. **Ruling on Motion for New Trial:** EXCEPTIONS: REVIEW. To obtain a review in this court of points properly presented in the trial court by a motion for a new trial there must be an exception to the order of the trial court by which the motion was denied.

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

G. W. Shields and *F. C. O'Hollaren*, for plaintiff in error.

George E. Turkington, contra.

HARRISON, C. J.

In this, an action of foreclosure of a real estate mortgage, it was pleaded in the petition that the plaintiff in error, subsequent to the execution by the then owners of the mortgage in suit, purchased the mortgaged property, and that in the instrument of conveyance to him there was a clause in reference to the premises in which it was stated that the grantee assumed and agreed to pay the mortgage debt by which the plaintiff in error became obligated and bound. A sale of the mortgaged property, the application of the proceeds to the payment of the debt, and judgment against certain parties, inclusive of the plaintiff in error, for any deficiency was prayed. The plaintiff in error answered and denied that he had assumed and agreed to pay the debt. By the decree rendered in the cause the amount of the debt was stated, and also that for any deficiency designated parties, of whom was the plaintiff in error, should be liable. After sale and confirmation thereof a motion was made for a deficiency judgment against the plaintiff in error, which was resisted in his behalf. Evidence was taken on the subject of his liability for the payment of the amount of deficiency, and judgment was rendered against him therefor, of which he seeks a reversal in the present error proceedings.

It is asserted for the plaintiff in error that the jurisdiction of the district court to render a deficiency judgment in the action was purely statutory, and by statute the adjudication of a recovery of a deficiency could not be until after the "coming in of the report of the sale." (See Compiled Statutes 1895, sec. 847, Code of Civil Procedure.) This is correct, but in this case there was no allowance of a recovery of the deficiency until after the report and confirmation of the sale. It is true the court did fix, by its decree, who should be liable for any deficiency, but it did not then render any judgment for the amount thereof against them. Against whom the lia-

bility might be rendered was of the issues in the cause, and, as was entirely proper, was determined and became of the settled matter of the litigation. (*Stover v. Tompkins*, 34 Neb. 465; *Kloke v. Gardels*, 52 Neb. 117.)

The question of the liability of the plaintiff in error for the deficiency, as we have before stated, was heard after the confirmation of the sale, and it is asserted for the plaintiff in error that the finding and judgment of the trial court, to the effect that the plaintiff in error was liable for the deficiency, was not sustained by, or was contrary to, the evidence. If it be conceded that a trial of the question was, at the time it occurred, proper herein, which we need not and do not decide, the plaintiff in error cannot be heard in this error proceeding, for the reason that he did not except to the order of the court by which the motion for a new trial was overruled. (*Van Etten v. Medland*, 53 Neb. 569, and citations therein.) It follows that the judgment of the trial court will be

AFFIRMED.

WESTERN CORNICE & MANUFACTURING WORKS v. MAX MEYER.

FILED JUNE 23, 1898. No. 8211.

1. **Amendment of Pleadings.** An amendment to conform a pleading to facts proved or sought to be proved, when it will substantially change the claim or cause of action, is not allowable.

2. **Issues on Appeal.** Causes on appeal to the district court must be tried on the same issues as were presented in the court from which appealed.

3. ———: AMENDMENT OF PLEADINGS. If in an appeal to the district court from the judgment of a justice of the peace the bill of particulars filed before the justice and the petition filed in the appellate court declare on an account for the plaintiff as the original creditor, the latter may not, during trial, be amended to show that the plaintiff claims by assignment or transfer of the account, as this would substantially change the cause of action and also present different issues than were of the litigation in the inferior court.

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

F. W. Fitch, for plaintiff in error.

L. F. Crofoot, contra.

HARRISON, C. J.

The plaintiff commenced this action before a justice of the peace in Douglas county, and alleged in the bill of particulars that the defendant, and others impleaded as defendants, and each of them, were "indebted to the plaintiff for work, labor, and material furnished at defendant's special instance and request" in a stated sum. The plaintiff was successful, and the cause was appealed to the district court, where, in the petition filed, the asserted cause of action was set forth in the same language as in the inferior court. Of some portions there were somewhat more specific statements, and the account was pleaded in itemized form. For the defendant in error there was filed a general denial. There were answers for others of defendants, but we need not further notice them, for as to all of them, except Max Meyer, the defendant in error, the case was before trial, on motion of plaintiff, dismissed.

At the time of or during the trial in the district court it became apparent that the plaintiff was not the owner of the account in suit as the original creditor, but claimed by or through an assignment or transfer thereof from the "Western Cornice Works, C. Specht, proprietor;" and for the plaintiff there was a motion that he be allowed to amend the petition so that it would declare on the account in favor of the plaintiff as assignee of the account, or owner thereof by transfer from the business concern which had performed the labor and furnished the material as shown in the account in suit. This motion the court overruled, or refused to allow the amendment; also excluded evidence of the assign-

ment or transfer of the account, and at the close of the evidence for plaintiff (the trial was to the court, a jury had been waived) dismissed the action for the reason that the plaintiff had failed to prove the cause stated in the petition.

In error proceedings to this court the plaintiff urges that the trial court erred in the refusal to allow the petition to be amended, also in the exclusion of the evidence of the change of ownership of the account, and in the resultant judgment of dismissal. To recover on the account as assignee or owner thereof by transfer or change of right and title from the original creditor to it the plaintiff must have pleaded and proved the assignment, transfer, or change. It was an issuable fact, without plea or proof of which the plaintiff could not succeed. (*Henley v. Evans*, 54 Neb. 187; *Hoagland v. Van Etten*, 22 Neb. 681, 23 Neb. 462, 31 Neb. 292.) That the court did not permit the petition to be amended as requested was not improper. To have allowed the amendment would have made elemental of the cause of action the plaintiff's right to recover by virtue of the transfer to it of another's right. The suit, as amended, would not have been, as commenced, one to recover for work done, etc., by the plaintiff, but would have been to recover because for a consideration the plaintiff had succeeded to the right of another party; this would have been a substantial change in the cause of action, hence the amendment was not allowable; it would have been the substitution of a different pleading. (*Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 319; *Dietz v. City Nat. Bank of Hastings*, 42 Neb. 584; *Harrington v. Wilson*, 74 N. W. Rep. [S. Dak.] 1055.) Further than this, to have permitted the partition to be changed in the manner proposed would have presented different issues for trial in the district or appellate court than were tried in the court in which the action was instituted. This may not be done. Causes must be tried on appeal to the district court on the same issues as in the court from which appealed. (*Darner v. Daggett*, 35 Neb.

695; *Spurgin v. Thompson*, 37 Neb. 39; *Lee v. Walker*, 35 Neb. 689; *Bishop v. Stevens*, 31 Neb. 786; *Fuller v. Schroeder*, 20 Neb. 636.)

The petition, by fair construction, was a declaration on an account in favor of the plaintiff as the original creditor. It is evident from the tenor of the motion of plaintiff's counsel to amend it that he so construed and considered it, and as no assignment or transfer of the account was pleaded, evidence of either was properly excluded; and had it been received and a judgment for plaintiff rendered thereon, when viewed in connection with the petition, the judgment must have been set aside as unsupported by the petition. (*Thompson v. Stetson*, 15 Neb. 112.) The judgment of the district court was right and must be

AFFIRMED.

WILLIAM C. TILLSON, APPELLEE, V. ELIZABETH A. BENSCHOTER, APPELLANT.

FILED JUNE 23, 1898. No. 8191.

1. **Judicial Sales**: APPRAISAL: CERTIFICATE OF LIENS. The failure to file applications for and certificates of liens as parts of an appraisal of lands in the sale thereof under decree of foreclosure is without prejudice to the rights of defendants, owners in whole or part of the equity of redemption.

2. ———: CONFIRMATION: HARMLESS ERROR. A judicial sale will not be set aside because of errors or irregularities in the conduct thereof which were not prejudicial to the rights of the complainant.

3. ———: APPRAISAL: NOTICE. No special notice to a defendant in an action is required of an appraisal of lands to be sold under decree or order of sale. SULLIVAN, J., dissenting.

APPEAL from the district court of Buffalo county. Heard below before SINCLAIR, J. *Affirmed.*

F. G. Hamer, for appellant.

William Gaslin, contra.

HARRISON, C. J.

In this, an appeal from the confirmation of a judicial sale of property under an order of sale to enforce a decree of foreclosure of a real estate mortgage, it is complained by appellant, the mortgagor and alleged to be still an owner of an interest in a portion of the mortgaged property, that (1) a copy of the appraisement, together with written applications for and certificates of liens, were not filed in the office of the clerk of the district court before the advertisement of the sale; (2) the property was situate in the city of Kearney, and no application was made to the city treasurer for a certificate of liens; (3) there was no notice to the appellant that the appraisement would be made or had been made. That applications for or certificates of liens were not made or filed was not an objection to confirmation of the sale of any avail to appellant. (See *Hamer v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 705; *Smith v. Foxworthy*, 39 Neb. 214; *Craig v. Stevenson*, 15 Neb. 362; *La Flume v. Jones*, 5 Neb. 257.) Moreover, the property sold for a sum in excess of two-thirds of the gross valuation placed on it by the appraisers, and if deductions of liens were made and the record did not disclose the applications for and certificates of the liens, there was no prejudice to the rights of the complainant, and nothing for which the sale should be set aside. (*Miller v. Lanham*, 35 Neb. 886.) The appraisement is a part of the proceedings in the action of which there is no requirement of special notice to the defendant. (*Smith v. Foxworthy*, 39 Neb. 214; *Iowa Loan & Trust Co. v. Stimpson*, 53 Neb. 536.) It follows that the decree of the district court must be

AFFIRMED.

W. F. R. MILLS, RECEIVER, APPELLEE, v. F. G. HAMER ET AL., APPELLANTS.

FILED JUNE 23, 1898. No. 8214.

1. **Judicial Sales:** OBJECTIONS TO CONFIRMATION. It is no valid ground of objection to confirmation of sale that the defendants were not notified of the issuance of the order of sale and of the meeting of the appraisers. SULLIVAN, J., dissenting.
2. ———: OBJECTIONS TO APPRAISEMENT. Objections to the appraisement of real property under a decree of foreclosure must be made prior to the sale by a motion to vacate the appraisement.
3. **Review Without Bill of Exceptions.** The finding of the trial court on a question of fact cannot be reviewed in the absence of a bill of exceptions preserving the evidence upon which such decision was made.

APPEAL from the district court of Buffalo county. Heard below before SINCLAIR, J. *Affirmed.*

F. G. Hamer, for appellants.

Dryden & Main, contra.

NORVAL, J.

This is an appeal by the defendants from an order confirming the sale of their property made under a decree of foreclosure.

It is urged that no notice was given the defendants of the issuance of the order of sale and of the meeting of the appraisers. The statute requires no such notice to be given, and to hold that the sale is erroneous for want of such notice would be the rankest kind of judicial legislation. It is no valid ground for setting aside the sale that no notice of the time of making the appraisement was given the defendants. (*Smith v. Foxworthy*, 39 Neb. 214; *Iowa Loan & Trust Co. v. Stimpson*, 53 Neb. 536.)

It is insisted that the appraisers made an error in deducting the amount of taxes against the property, that the interest of defendants on each quarter section was

not separately appraised, and also that Louis S. Deets, one of the appraisers, was prejudiced against the defendant Hamer. These objections cannot be considered, for the very good reason the appraisement was not assailed on either of those grounds prior to the sale. It is an inflexible rule that objections to an appraisement of property under a decree of foreclosure must be filed in the district court prior to the sale. (*Vought v. Foxworthy*, 38 Neb. 790; *Smith v. Foxworthy*, 39 Neb. 214; *Ecklund v. Willis*, 42 Neb. 737; *Burkett v. Clarke*, 46 Neb. 466; *Kearney Land & Investment Co. v. Aspinwall*, 45 Neb. 601; *Overall v. McShane*, 49 Neb. 64.)

The objection that the appraisement was so low as to constitute a fraud upon the rights of the defendants is without merit, since the evidence adduced on the hearing, if any, has not been preserved by a bill of exceptions. Every presumption is in favor of the correctness of the decision of the trial court until the contrary is shown.

AFFIRMED.

MICHAEL O. MAUL ET AL. V. JOHN C. DREXEL, SHERIFF.

FILED JUNE 23, 1898. No. 8132.

1. **Parties**: SUBSTITUTION: EXCEPTION: REVIEW. Where no exception is taken to an order substituting a party plaintiff, such order cannot be reviewed.

2. **Action on Official Bond**: EVIDENCE. In a suit on the official bond of a coroner the introduction in evidence of a copy of such bond is not prejudicial error, where the execution, delivery, and approval of said bond are admitted by the answer.

3. **Voluntary Assignment to Sheriff**: SUCCESSOR IN OFFICE. Where property is assigned to the sheriff and his successors in office in trust for the benefit of the creditors of the assignor, on the expiration of the term of the then sheriff the execution of the trust devolves upon his successor in office, in case the assignee chosen by the creditors fails to qualify and enter upon the duties of assignee.

4. ———: DESCRIPTION OF PROPERTY. A deed of assignment which

describes the property conveyed with sufficient particularity to enable the same to be readily identified is not rendered void by the failure to attach to such deed a copy of the schedule of property referred to therein as being on file in the office of the county judge, and containing a more specific description.

5. ———: EXECUTION: EVIDENCE. An objection to the admission of a deed of assignment in evidence that it was not executed or acknowledged in the manner in which a conveyance is required to be executed and acknowledged is too general and not sufficiently specific to reach defects in the form of execution and acknowledgment of the instrument.

6. ———: REGISTRATION. An assignment of personal property for the benefit of creditors should be filed in the office of the county clerk of the county where the assignor resides within twenty-four hours after its execution, and is not void because not filed for record with the register of deeds within that period.

7. **Evidence:** ADMISSIONS. Admissions of a party against interest are receivable in evidence against him.

8. **Sheriff:** CONVERSION: INVENTORY: EVIDENCE. In an action against a sheriff or coroner for conversion of property seized by him under a writ of attachment the inventory and appraisement made and signed by such officer in the attachment proceedings are admissible in evidence against him on the question of the value of the property.

9. ———: ———: VALUE OF GOODS. And in such action of conversion the amount the officer received for the goods at the attachment sale is not a proper criterion for determining their value at the time of their conversion. The sum realized at such sale is an immaterial issue.

10. **Voluntary Assignment:** VALIDITY OF DEED: QUESTION OF LAW. Whether a deed of assignment is void for reasons which appear on its face is a question of law for the court, and not for the jury, to determine.

11. **Market Value of Property.** Market value is not what property is worth solely for the purpose for which it is devoted, but the highest price it will bring for any and all uses to which it is adapted, and for which it is available.

12. **Instructions:** HARMLESS ERROR. Error in an instruction is not available to a party where he was not prejudiced thereby.

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

Bartlett, Baldrige & De Bord, C. P. Halligan, and *Lee S. Estelle,* for plaintiffs in error.

Winfield S. Strawn, contra.

NORVAL, J.

On July 10, 1893, the firm of Rhoads & Sievers, of the city of Omaha, executed an assignment for the benefit of all its creditors to George A. Bennett, sheriff of Douglas county. The following is a copy of the deed of assignment:

"This indenture, made and executed at Omaha, the —— day of July, A. D. 1893, by and between Darius G. Rhoads and William Sievers, of the county of Douglas and the state of Nebraska, copartners doing business in the city of Omaha under the firm name and style of Rhoads & Sievers, parties of the first part, and George A. Bennett, sheriff of Douglas county, Nebraska, party of the second part,

"Witnesseth, that the said first parties, pursuant to the statute of the state of Nebraska in such case made and provided, and in consideration of $1 to them in hand paid, before the delivery of these presents, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter expressed, do hereby transfer, assign, set over, bargain, sell, and convey, give, grant, and release to the said George A. Bennett, sheriff as aforesaid, party of the second part, all such property of the said Rhoads & Sievers, copartners as aforesaid, whether the same be real or personal or mixed, and all our right, title, and interest in and to any and all property, both real and personal, and also the stock of goods now on hand located at, and known and described as follows, to-wit: All that part of lot one (1), five (5), and six (6), block two hundred and twenty-three (223), in said city of Omaha, lying and being south of a line drawn parallel to and fifty feet distance southerly from the center line of the main track of said Omaha & North Platte railroad, as now located over and across said block 223, in the city of Omaha, and all books of account of said Rhoads & Sievers, and all of our notes

and accounts or bills of exchange of whatever name or nature to the said partnership belonging, and all choses in action and claims against any and all persons, and more particularly described in the schedule prepared and this day filed in the office of the county judge of Douglas county, Nebraska, according to law; the leasehold interests of said parties in and to the real estate being known and described as follows, to-wit: All that part of lot one (1), five (5), and six (6), block two hundred and twenty-three (223), in said city of Omaha, lying and being south of a line drawn parallel to and fifty feet distance southerly from the center line of the main track of said Omaha & North Platte railroad as now located over and across said block 223, in the city of Omaha; to have and to hold the same under the said sheriff, George A. Bennett, and successor and successors who may be appointed by the county clerk of Douglas county, Nebraska, according to law, and their assigns, in trust, for the use and benefit of all the creditors of said copartnership of Rhoads & Sievers, as aforesaid, in proportion to the amount of their respective claim, the second party, and his successor or successors, in trust, to make an equal distribution of all such estate, whether real, personal, or mixed, among all such creditors, within the time and according to the terms prescribed by the laws of the state of Nebraska.

"And we, the said Rhoads & Sievers, do hereby constitute and make the said second party, and his successors, as assignee of our estate, our lawful attorney for ourselves as such copartners, and in our name, place, and stead and for the uses and purposes aforesaid, and to the use and benefit of the said creditors aforesaid, as they may be entitled to receive, and to collect all such funds as may be due and owing to us as such copartnership, whether upon notes or in any other way, and to receive and manage and dispose of all said property, real, personal, or mixed, and to distribute the same and the proceeds thereof among all our creditors, in propor-

tion to the amount of their respective debts, and giving and granting to our said attorney full power and lawful authority in and about the premises, and to use the due course and processes of law for accomplishing the same, and in our name make, seal, and execute due acquittance and discharges therefor, according to law, and under the orders and supervision of the county court of Douglas county, Nebraska.

"Witness our hands this 10th day of July, 1893.

"RHOADS & SIEVERS,
"By D. C. RHOADS and WM. SIEVERS.

"Witness:
"JAS. W. CARR.

"STATE OF NEBRASKA, } ss.
COUNTY OF DOUGLAS, }

"Be it remembered that on this —— day of July, A. D. 1893, personally appeared before me, a notary public, duly appointed, qualified, and acting as such, within and for the county aforesaid, Rhoads & Sievers, a copartnership composed of Darius G. Rhoads and William Sievers, doing business under the firm name and style of Rhoads & Sievers, to me known to be the identical persons who subscribed the foregoing instrument and assignment, and acknowledged that they executed the same as copartners, and that as such the same was their voluntary act and deed for the uses and purposes therein set forth.

"Witness my hand and notarial seal this 10th day of July, A. D. 1893.

"[SEAL.] JAS. W. CARR,
"Notary Public."

The assignment was delivered to the officer, or his deputy, who immediately took possession of the assigned estate, filed the deed of assignment for record in the office of the county clerk, and three days later the instrument was also recorded by the register of deeds. Subsequently, C. B. Havens & Co., a corporation creditor of said insolvent, commenced a suit against said Rhoads &

Sievers, aided by attachment, and Michael O. Maul, as coroner, executed the writ by seizing all the assigned property. After the recovery of judgment in that action the coroner sold the property under the attachment process, and the proceeds were applied in satisfaction of said judgment. The person chosen as assignee by the creditors having failed to qualify, the sheriff continued in the trust, and as such assignee instituted this action against Maul, and the sureties on his official bond, to recover the value of the property so seized under said writ of attachment. John C. Drexel, having succeeded Bennett as sheriff, was substituted as plaintiff in the suit. The trial resulted in a verdict against the defendants, and from the judgment entered thereon they prosecute this proceeding.

The petition in error contains eighty-eight assignments, but we shall specially notice only the more important of those argued by counsel.

The first two assignments of error relate to the substitution of John C. Drexel as party plaintiff for and instead of Bennett, whose term of office had expired. A complete answer to this is that no exception was taken to the order in question at the time it was made, and the substitution was not pleaded or raised as a defense in the answer on which the trial was had.

Error is assigned because the court refused to sustain a motion made by Drexel that he be dismissed out of the case. To this ruling the record does not disclose that the defendants caused an exception to be entered. We must, therefore, presume that they were then satisfied with the order as made, and they will not now be heard to urge that it was erroneous.

Exception was taken to the introduction in evidence of a copy of the official bond of the defendant Maul, as coroner of Douglas county. No useful purpose could have been served by the admission of that instrument in the evidence, since the execution, delivery, and approval of the bond were alleged by the petition and ad-

mitted to be true by the answer, so that no prejudice could have resulted to the defendants from the ruling under consideration.

It is argued that the petition fails to state a cause of action, because it appears from the record and proceedings in the case that John C. Drexel is not the real party in interest in the suit. Section 5, chapter 6, Compiled Statutes, relating to assignments, provides that "in every such assignment the sheriff, and his successor in office, of the county in which the assignor resides, or if there be two assignors, in which one of them resides, or if there be more than two assignors, in which two or more of them reside, shall be named as assignee." In strict compliance with this provision the deed of assignment in the case at bar was made to George A. Bennett, as sheriff of Douglas county, and his successor or successors in office, in trust. Drexel succeeded Bennett as sheriff of the county, and the duty of carrying out the trust by virtue of the statute and deed of assignment devolved upon the former upon the expiration of the term of the latter, since the person chosen by the creditors of the assigned estate failed to qualify or enter upon the duties of assignee. The assignment was not made to Bennett as an individual, but to him in his official capacity as sheriff, and to his successor in office. It is plain that Drexel is the real party in interest.

Objections were urged in the trial court to the introduction of the deed of assignment in evidence, and they have been renewed in this court. It is strenuously insisted that the deed of assignment is void for various reasons: First—The assignment runs to George A. Bennett, sheriff, and not as sheriff. This objection is exceedingly technical, and devoid of merit. The section of the assignment law, already quoted, requires every assignment for the benefit of creditors to be made to the sheriff and his successor in office, and this deed of assignment was so made, not to Bennett as a private individual, but in his official capacity as sheriff of the county.

Second—The deed of assignment refers to a certain schedule on file in the office of the county judge of Douglas county, for a more specific description of the property assigned, while such a schedule was not annexed to the assignment. The assigned estate was with such sufficient particularity described in the deed of assignment as to enable the same to be readily identified, and the failure to attach the schedule in question to said deed did not invalidate the assignment. Third—The property was not conveyed to Bennett and his successors as required by law, but "unto the said sheriff, George A. Bennett, and successors who may be appointed by the county clerk of Douglas county, Nebraska, according to law, and their assigns, in trust, for the use and benefit of all the creditors of said copartnership of Rhoads & Sievers," etc. That portion of the provision quoted relating to the successor or successors who may be appointed by the county clerk is nugatory, but such clause does not invalidate the whole assignment. The statute designates the manner in which a successor of an assignee of an insolvent estate shall be chosen, and such mode will prevail over any different direction upon the subject in the deed of assignment. No successor of the assignee could be chosen by the county clerk, and none has been so selected, and the deed of assignment does not attempt to authorize such officer to make such appointment. It merely conveys the property in trust to the assignee and his successor or successors "who may be appointed by the county clerk." It is obvious that the use of this clause was a mere clerical error of the scrivener, and its insertion was not intended as a limitation upon the statute. Fourth—The assignment confers powers upon the assignee other and different from those prescribed by the statute. The argument of counsel for defendants has failed to convince us that this objection was well taken. On the other hand, it is very evident that this assignment can be enforced without in any manner contravening the law relating to assignments. The assign-

ment does not give a preference to the smaller over the larger creditors, since it is expressly stipulated that the proceeds arising from the assigned estate should be distributed "among all our creditors in proportion to the amount of their respective debts." No preference whatever was attempted to be given to one debt or class of debts over another; but all creditors were to share *pro rata* in the proceeds.

Another objection urged to the receipt in evidence of the assignment is that it was not executed or acknowledged in the manner in which a conveyance was required to be executed and acknowledged. This objection was exceedingly general, and did not indicate to the trial court the particular defects relied upon to invalidate either the execution or acknowledgment of the instrument. (*Gregory v. Langdon*, 11 Neb. 166; *Rupert v. Penner*, 35 Neb. 587.) The deed of assignment was signed "Rhoads & Sievers, by D. G. Rhoads and Wm. Sievers," and to the instrument is appended the certificate of acknowledgment by a notary public of Douglas county reciting that Rhoads & Sievers, a copartnership composed of Darius G. Rhoads and William Sievers, to the officer known "to be the identical persons who subscribed the foregoing instrument and assignment, and acknowledged that they executed the same as copartners, and as such the same was their voluntary act and deed for the uses and purposes therein set forth." The assignment having been signed by the firm of Rhoads & Sievers and an acknowledgment of the execution of the instrument, we are not called upon, under the general objection urged to the introduction of the deed of assignment in evidence, to decide whether the form of the execution and acknowledgment of the instrument were technically accurate and sufficient to satisfy the demands of the statute.

It is insisted that the deed of assignment is invalid and should not have been admitted in evidence, since it was not filed in the office of the register of deeds of Douglas

county until July 13, 1893, three days after its execution. By section 6, chapter 6, Compiled Statutes, it is provided that a deed of assignment "within twenty-four hours after its execution shall be filed for record in the clerk's office of the county in which the assignee resides. If it shall convey real estate it shall be recorded in the deed record, and entered upon the numerical index in said office, otherwise it shall be recorded in the miscellaneous record. * * * A failure to file such assignment for record within the time aforesaid in any county in which by the terms of this section it is required to be recorded, shall avoid such assignment as to property situate in such county," etc. After the foregoing provisions became a law the legislature created the office of register of deeds for each county of the state containing a certain population (Session Laws 1887, ch. 30), and instruments affecting real estate are required to be filed and recorded in such office. This assignment conveyed no real estate, as the assignors owned none, but personal property merely, and is not invalidated because not recorded by the register of deeds. It was filed in the office of the county clerk of Douglas county within twenty-four hours after its execution, which is in compliance with the strict letter of the statute, and is sufficient. (*Lancaster County Bank v. Horn*, 34 Neb. 742.)

It is argued that the decision just cited is not in point here, since in that case the assignment was of personal property alone. That is precisely the situation of the assignment before us. Rhoads & Sievers owned no real estate and the deed of assignment described none as being conveyed or assigned. It is true a certain leasehold interest of the parties in realty was assigned. But such interest was not real, but personal, property. (*Mulloy v. Kyle*, 26 Neb. 316.)

It is suggested that the assignment is void on its face for the alleged reason that it does not transfer to the assignee all the property, real and personal, of the assignor. If this argument is sound, we fail to comprehend

the plain import of the language of the deed of assignment. It in express terms purports to convey all the right, title, and interest of the insolvents in and to all their property.

Complaint is made of the admission by the trial court in evidence, over the objection of the defendants, of the inventory and appraisement of the property under the writ of attachment. The defendant Maul, in his official capacity as coroner, participated in, and signed, the appraisement, which fixed the value of the goods in controversy at $2,810.90. The appraisement was an admission of Maul in writing, over his own signature, of the value of the property, and such paper was competent evidence tending to prove such value in an action against him and the sureties on his official bond for the conversion of the goods by reason of the levy of the writ of attachment. The receipt in evidence of the inventory was not conclusive on the question of value, but that it was proper to allow the same to go to the jury there cannot be a shadow of doubt. Admissions against interest are invariably receivable as evidence against the party making them, according to the writers on the law of evidence.

Many rulings of the court below on the introduction of evidence relating to the value of the property are argued in the brief of counsel, which, owing to the length of this opinion, we will not discuss separately. We have patiently examined all of them with considerable care and find no substantial cause for complaint, or that defendants were prejudiced by the rulings assailed. The value of the property as stated in the appraisement, with the interest thereon until the date of the verdict, it is conceded by counsel, equals the sum found by the jury, and which evidence alone, had all other testimony offered by plaintiff on the subject of value been excluded, would have been ample to sustain the amount of the recovery in this case. The property was sold under the attachment proceedings to C. B. Havens, and the defendant endeavored to prove the amount which the property brought

at such sale. The evidence was excluded, and we think it was properly rejected. The sum realized by the officer at the attachment sale was no proper criterion for determining the value of the goods at the time of their conversion. (*Watson v. Coburn*, 35 Neb. 499.)

The following instruction is criticised: "Under the pleadings and evidence in this case the plaintiff is entitled to recover of the defendant the fair market value on the 20th of July, 1893, of the articles mentioned in the plaintiff's petition and proved to have been taken from the sheriff by defendant Maul under and by virtue of his writ of attachment on the 20th of July, 1893, and interest thereon at seven per centum per annum from that date to February 5, 1895." By the foregoing the court directed a verdict for plaintiff below, submitting to the jury for their consideration the single question as to the value of the property. No other issue of fact was tendered by the pleadings. It is true that the answer pleaded that the assignment was void for certain reasons appearing on the face of the instrument, which raised questions of law for the court alone to decide, which objections to the validity of the assignment we have already sufficiently considered. The plaintiff, under the pleadings, was entitled to a verdict, the amount alone being for the jury to pass upon, and the instruction quoted was, therefore, not erroneous.

Objection is urged against the second paragraph of the court's charge, which reads as follows: "By fair market value is meant the value of the property in controversy for the most advantageous uses to which it might then have been applied,—the highest price it would then have brought for any and all uses. It is what any one who wanted it, and who was willing to pay what it was worth, cash down, would have been willing to have paid for it." Undoubtedly the measure of damages for conversion is usually the fair market value of the property at the time and place of conversion. It is argued that this rule is infringed by the instruction now being considered, for the reason that the uses to which the property might have

been devoted do not enter into the question of value. In determining the market value of real estate this court said in *Lowe v. City of Omaha*, 33 Neb. 587, "it was proper to take into consideration not only the use to which it was at that time devoted, but the availability for any other purpose and the demands therefor, so far as the same entered into and affected its market value. If it was worth most in the market as a residence, the plaintiff was entitled to have such value considered, but if it would have sold for the highest price for some other use to which it was adapted, she was entitled to that. The market value of any thing is the highest price it will bring for any and all uses." In the opinion in that case several adjudications of other courts are cited which fully sustain the doctrine quoted, and the rule is equally applicable in determining the value of personal property. If a horse is converted, the owner is entitled to recover its value not alone for the purpose to which it is devoted, but the highest market price it will command for any and all purposes to which the animal is adapted. Defendants could not have been prejudiced by limiting the recovery to the cash value of the property. Experience has shown that property will sell less for cash than on time, so that if the use of the words "cash down" in the instruction was erroneous, such error is not available to the parties assailing the verdict and judgment.

The defendants complain of the refusal of the court to instruct the jury that they should disregard the appraisement introduced in evidence in determining the value of the property. Such an instruction was tendered, and refused, but no exception was taken by the defendants at the time. It has been often judicially asserted that exceptions to instructions, whether given or refused, must be taken at the time or they will not be reviewed in the appellate court.

The record discloses that the defendants have had a fair and impartial trial, and, no reversible error appearing, the judgment is

AFFIRMED.

PAXTON & GALLAGHER V. WILLIAM R. LEARN, CONSTABLE.

FILED JUNE 23, 1898. No. 8161.

1. **Replevin:** PLEADING: CHATTEL MORTGAGES. In replevin, where plaintiff bases his right to possession of the property upon a special ownership by virtue of a chattel mortgage, he must plead the facts which create such special ownership and right to possession.
2. ———: ———: ———: EVIDENCE. An allegation of general ownership and right of possession cannot be proved by introducing in evidence a mortgage on the chattels replevied.
3. ———: EVIDENCE. Evidence examined, and *held* not to establish an absolute ownership of the property in plaintiffs.

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

McCabe, Wood, Newman & Elmer, for plaintiffs in error.

Bartlett, Baldrige & De Bord, contra.

NORVAL, J.

David Davidson on June 27, 1893, was engaged in the grocery business in South Omaha, and being insolvent, he gave to several of his creditors mortgages covering his entire stock of merchandise, as follows: Consolidated Coffee Company, $922.80; John Bradley, $405.97; Paxton & Gallagher, $568.98, and others. The mortgages had priority in the order named. Allen Bros. had an attachment lien for $138.25, superior to the lien of Paxton & Gallagher. Under and in pursuance of an agreement between mortgagor and the mortgagees Davidson remained in the possession of the goods, disposed of them in the regular course of trade at retail, replenished the stock from time to time from the proceeds of the sale, and paid off prior to the following October the claims of all the above mentioned creditors, excepting Paxton & Gallagher. Davidson remained in

possession of the stock until August, 1894, and made sales therefrom, used the proceeds to purchase new goods and defray the expenses of running the business, but paid no portion of the mortgage debt to Paxton & Gallagher. On June 28, 1893, the American Biscuit & Manufacturing Company obtained a judgment before a justice of the peace of Douglas county against Davidson for the sum of $123.25 debt, and costs. Execution was issued on this judgment on August 20, 1894, and delivered to William R. Learn, constable, who levied the writ on the same day upon certain merchandise in the possession of Davidson, as his property, a portion of the same being covered by the mortgages aforesaid, and the remainder being goods purchased after the mortgages were executed. Paxton & Gallagher thereupon instituted this action of replevin against Learn, before a justice of the peace, to recover the property so seized under the execution, claiming to be the absolute owner of the portion of the goods bought by Davidson subsequent to the giving of the mortgage, and asserting a mortgage lien on the remainder of the stock. Upon giving bond the goods were delivered to Paxton & Gallagher. It appearing from the return of the officer that the value of the property was not within the jurisdiction of the justice, the cause was certified to the district court. A trial was there had, without pleading by either party, upon the affidavit in replevin and the transcript from the justice of the peace, and on motion of the defendant a verdict was returned in his favor, upon which judgment was subsequently entered.

The mortgage to Paxton & Gallagher was given to secure a *bona fide* indebtedness, but it is insisted that the transaction was rendered fraudulent as to the creditors of Davidson, by reason of the subsequent acts and conduct of the parties to the mortgage, and able and exhaustive arguments are presented in the briefs for and against the proposition. In our view it is unnecessary to consider this question, as the decision of the case may

properly be put upon other grounds. As previously stated, Paxton & Gallagher claim to be the absolute owners of a part of the goods, and to have a special interest in the remainder by virtue of the chattel mortgage. There is not a scintilla of evidence to be found in this record tending to prove that the firm of Paxton & Gallagher owned in its own right any portion of the property in controversy. It neither bought it nor paid therefor. On the other hand, it is undisputed that the goods acquired subsequent to the execution of the mortgage were paid for by Davidson from the proceeds derived from the sale of the mortgaged stock, that Paxton & Gallagher merely had a lien thereon for the amount of its debt, and any portion of the property remaining after satisfying the mortgage was to belong to Davidson. It is confidently asserted that there is entire failure of proof to establish an absolute ownership in plaintiffs to any portion of the replevied goods. The replevin affidavit did not state facts sufficient to show that plaintiffs had the right of possession of the property by reason of a special interest therein. The affidavit in replevin avers "that plaintiff is the owner of the following described property, to-wit: * * * That plaintiff's ownership of said property is a qualified ownership purchased upon an unpaid chattel mortgage on a part of said property, and to the balance as the absolute and unqualified owner." There is no other averment relating to plaintiffs' right of possession. No condition or stipulation contained in the chattel mortgage is set forth, nor is it alleged that the condition of the mortgage has been broken by the mortgagor or that any portion of the mortgage indebtedness is due. The facts constituting the special ownership and plaintiffs' right of possession at the time the action was instituted should have been averred. (*Musser v. King*, 40 Neb. 892; *Randall v. Persons*, 42 Neb. 607; *Sharp v. Johnson*, 44 Neb. 165; *Camp v. Pollock*, 45 Neb. 771; *Strahle v. First Nat. Bank of Stanton*, 47 Neb. 319; *Garber v. Palmer*, 47 Neb. 704; *Raymond v. Miller*, 50 Neb. 506; *Griffing v.*

Curtis, 50 Neb. 334; *Robinson v. Kilpatrick*, 50 Neb. 795; *Norcross v. Baldwin*, 50 Neb. 885; *Hudelson v. First Nat. Bank*, 51 Neb. 557; *Bolin v. Fines*, 51 Neb. 650; *Thompson & Sons Mfg. Co. v. Nicholls*, 52 Neb. 312.) Plaintiffs having failed to allege the facts creating the special ownership in the property, it is unnecessary to determine whether such special interest was established by the proofs. The averment of general ownership and right of possession cannot be proven by the introduction in evidence of the chattel mortgage. The judgment is

AFFIRMED.

UNITED STATES NATIONAL BANK OF OMAHA V. J. H. GEER ET AL.

FILED JUNE 23, 1898. No. 7607.

1. **Commercial Paper:** INDORSEMENT: EVIDENCE. Where commercial paper is indorsed in blank, the terms of the contract may be shown by parol evidence to be different from those which the law implies in such cases.

2. ———: ———: ———. A restrictive indorsement in unambiguous language cannot be contradicted or explained by evidence resting in parol.

3. ———: ———: ———. A certificate of deposit indorsed by the payee, "Pay to the order of R. C. O., Cash, for account" of the indorser, is a restrictive indorsement, vests no general property to the paper in the indorsee, but merely constitutes him an agent for the purpose of collecting; and parol evidence is not admissible to establish that the transfer of title was absolute.

4. ———: ———: ———. The former opinion in this case, reported in 53 Neb. 67, overruled.

REHEARING of case reported in 53 Neb. 67. *Former decision overruled and judgment below affirmed.*

J. C. Cowin and *W. D. McHugh*, for plaintiff in error.

O. H. Scott and *Cobb & Harvey, contra.*

NORVAL and SULLIVAN, JJ.

At the last term of this court a decision was entered in this case reversing the judgment of the trial court. Upon a proper application a rehearing was granted, and the cause has been a second time submitted for our consideration. The issues involved and the essential facts of the case are stated with sufficient accuracy in the former decision reported in 53 Neb. 67. In reversing the judgment below we proceeded upon the theory that the form of the indorsement of the certificate of deposit was ambiguous and not conclusive, as to the intentions of the parties; that it was permissible to show by parol evidence the exact nature of the contract, and that the only inference to be drawn from the proofs established a sale of the draft and not a bailment for collection. A careful re-examination of the record and questions thereby presented, assisted by the able argument of counsel, has convinced us that the former decision was erroneous. In the opinion it was said: "Whatever may be the law elsewhere, it is the law of this state that as between the immediate parties the true relationship may be shown, notwithstanding the form or terms of the indorsement itself," citing *Roberts v. Snow*, 27 Neb. 425; *Dusenbury v. Albright*, 31 Neb. 345; *Salisbury v. First Nat. Bank of Cambridge*, 37 Neb. 872; *Holmes v. First Nat. Bank of Lincoln*, 38 Neb. 326; *Corbett v. Fetzer*, 47 Neb. 269. The adjudications of this court do not warrant the statement of the rule as broadly as above indicated, nor do the decisions elsewhere support such a doctrine. The general rule is, and it has been frequently asserted by this court, that the terms of a written contract cannot be contradicted, varied, or explained by parol evidence of a prior or contemporaneous oral agreement between the parties. (*Hamilton v. Thrall*, 7 Neb. 210; *Dodge v. Kiene*, 28 Neb. 216; *Watson v. Roode*, 30 Neb. 264; *Kaserman v. Fries*, 33 Neb. 427; *Mattison v. Chicago, R. I. & P. R. Co.*, 42 Neb. 545; *Clarke v. Kelsey*, 41 Neb. 766; *Maxwell v. Burr*, 44

Neb. 31; *Commercial State Bank v. Antelope County*, 48 Neb. 496; *Waddle v. Owen*, 43 Neb. 489; *Nebraska Exposition Ass'n v. Townley*, 46 Neb. 893.) It is true this court has more than once decided that when the rights of *bona fide* purchasers of negotiable paper for value before maturity are not involved, it is competent to show by parol evidence, in cases of indorsement in blank of such paper, that the terms of the agreement between the parties were other and different from those which arise by presumption of law. (*Holmes v. First Nat. Bank of Lincoln*, 38 Neb. 326; *Corbett v. Fetzer*, 47 Neb. 269.) The principle underlying these cases does not contravene the general rule, recognized and applied by this and other courts, that parol contemporaneous evidence cannot be received to contradict or vary the terms of a written instrument, for the obvious reason that the contract of a blank indorsement is not expressed in writing, but rests in legal implications, and this *prima facie* presumption of law may be overthrown, as between the original parties to such an indorsement, by the admission of competent parol evidence establishing the real terms of the agreement. If the law conclusively presumed the liability created by an indorsement in blank of commercial paper, then, of course, the actual terms of the contract would not be a proper subject of inquiry, and neither party would be permitted to show by parol the true agreement. But the presumption of liability arising from such an indorsement is *prima facie* merely, and not conclusive; hence, as against all except *bona fide* holders for value, the true terms of the contract may be shown by evidence resting in parol. The indorsement of the Hebron bank on the certificate of deposit involved herein was an express written contract, not open to contradiction or explanation by proof of extrinsic facts, and conclusively proves an agency merely, and that the title and ownership of the paper never passed to the Capital National Bank. This doctrine is sustained by an unbroken line of authorities.

In *First Nat. Bank of Chicago v. Reno County Bank*, 3

Fed. Rep. 257, it was distinctly decided that an indorsement of a bill of exchange directing the drawee to pay to another "on account of" the indorser, or "for collection," is a restrictive indorsement carrying with it notice that the indorser did not thereby part with title to the paper or to its proceeds when collected. To the same effect are *Beal v. City of Somerville*, 50 Fed. Rep. 647; *Hoffman v. First Nat. Bank of Jersey City*, 46 N. J. Law 605; *Cecil Bank v. Farmers Bank of Maryland*, 22 Md. 148; 1 Morse, Banking sec. 217; *Blaine v. Bourne*, 11 R. I. 119; *Sweeny v. Easter*, 68 U. S. 166; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675; *First Nat. Bank of Crown Point v. First Nat. Bank of Richmond*, 76 Ind. 561; *White v. Miners Nat. Bank*, 102 U. S. 658.

Leary v. Blanchard, 48 Me. 269, was an action upon a promissory note indorsed by the payee, "Pay to Arthur Leary, or order, for account of the Atlas Mutual Insurance Co." It was ruled that the indorsement was restrictive and parol evidence was inadmissible to show that the transfer was absolute.

A draft bore the following indorsement: "Pay Penn Bank, or order, for account of People's Bank, McKeesport, Pa. C. R. Stuckslager, Cashier. D. Gardner, As. Cash." This indorsement was before the court for consideration in *Freeman's Bank v. National Tube Works Co.*, 151 Mass. 413, and it was held to be restrictive for collection, merely giving notice that the title and ownership of the paper had not passed from the indorser.

Third Nat. Bank of Syracuse v. Clark, 23 Minn. 263, was an action on a promissory note made payable to the order of the Williams Mower & Reaper Company and indorsed by the payee to the Third National Bank of Syracuse, or order, for collection. It was adjudicated in that case that the indorsement was restrictive and that parol evidence was not admissible to prove it absolute. (*Rock County Nat. Bank v. Hollister*, 21 Minn. 385.)

In *Armour Bros. Banking Co. v. Riley County Bank*, 30 Kan. 163, there was involved the scope and effect of the

following indorsement on a draft: "Pay W. H. Wynants, Esq., Cashier, or order, for account of the Riley County Bank of Manhattan, Kansas. J. K. Winchip, Cashier." Parol evidence was offered to contradict the indorsement, which, upon objection, was excluded by the trial court. Brewer, J., in delivering the opinion of the court on review, used this language: "The ruling of the district court was founded upon the idea that this indorsement is a restrictive indorsement, defining the rights and title of the indorsee, and not open to contradiction or explanation by parol testimony. In other words, this indorsement is a written contract, conclusive as against any parol testimony, and which shows absolutely that the plaintiff was not the owner, the real party in interest, but only held the draft as agent, and for the purposes of collection. That this is a restrictive indorsement, and that it operated to transfer the draft to the plaintiff only as agent for purposes of collection, cannot be doubted. (Byles, Bills 152; 1 Daniel, Negotiable Instruments sec. 698; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep., 429, and cases cited in the opinion.) In this latter case, speaking of an indorsement almost identical with the one at bar, the court says: 'The indorsee is rather an agent of the indorser with power of substitution, and the bill is still in the possession of the indorser by his agent.' And again: 'The words are notice that the restricted indorsee has no property in the bill.' It will be perceived that this is not a mere blank indorsement, but one in which the contract is written out in full, and, therefore, like any other written contract, not to be contradicted or varied by parol evidence (Greenleaf, Evidence, secs. 277, 281, 282; 1 Daniel, Negotiable Instruments sec. 717); so that upon the face of the paper it appears affirmatively that the plaintiff is not the owner, but only an agent for collection."

No case has come within the range of our vision which is in conflict with the adjudications already mentioned, nor is it believed that any decision can be found which lends support to the doctrine that it is competent to

prove, in case of a restrictive indorsement like the one before us, that the actual contract was different from the one expressed in writing on the back of the certificate of deposit.

It is argued by counsel for plaintiff in error that the contractual rights of the parties are not expressed in the indorsement in question; that the law infers a contract therefrom. We quote from the brief: "When one writes upon the back of a negotiable instrument 'pay to the order of A. B., for account of,' and signs it, his contract is not set forth in the writing. His obligations under this indorsement, and the rights and duties of the indorsee under this indorsement, are not in anywise set forth in the indorsement. It is not a written contract stating the mutual rights and obligations of the parties. The law merchant in the case of this indorsement, as in the case of one in blank, infers from the indorsement a certain contract, and it is this inferred contract which the law enforces when it holds the signer to the usual obligations. From a restrictive indorsement the law infers a certain contract. From an unrestricted indorsement the law infers a certain other contract. In both cases, it must be clear the contract is inferred, and in no sense written." In this contention counsel are in error. This indorsement, in unequivocal language, shows that the title to the paper, except for the purposes of collection, was to remain in the Hebron bank, and that the indorsee, the Capital National Bank, was agent merely for collection. The rights of the parties, under this indorsement, do not rest upon any implication of law, but are determined by the contract of the parties as expressed in the indorsement. And to permit oral evidence to be received to show the agreement was different from that indicated by the language used would be in violation of the principle that a written contract may not be varied by parol. The same result would be reached whether the indorsement be regarded the entire contract or said indorsement and letter transmitting the certificate of deposit be con-

strued together. The letter of transmittal states that the certificate was "for collection and credit." These words clearly indicate that the transmission was for the purpose of collection, and when collected the proceeds were to be credited to the transmitting bank. Until the collection was made the relation of debtor and creditor was not to exist. To hold otherwise would disregard the meaning of the word "collection." In *Branch v. United States Nat. Bank*, 50 Neb. 470, it was decided that the legal title of commercial paper indorsed "for collection" rests in the indorsee only to the extent of authorizing him to demand and enforce payment, and that the true owner of the paper so indorsed may control the same until paid in full, and may intercept the proceeds thereof in the hands of an intermediate agent.

The written contract is unambiguous, and it is unnecessary to resort to parol evidence to ascertain the true intention of the parties. An explicit written agreement cannot be contradicted or qualified by proof of any usage, custom, or course of dealing, while proof thereof is permissible in cases of doubt where the contract is expressed in vague and ambiguous language. The indorsement in question and the letter of transmittal, neither singly nor when considered together, show that the Hebron bank was divested of its title to the certificate of deposit in question. This is conceded by counsel for plaintiff in error, but they rely upon the prior course of dealing and the acts and conduct of the parties to overthrow the plain and unambiguous written contract of the parties and to establish a transfer of title to the paper. As we have seen, evidence of such matters is not admissible. The fact that the Hebron bank repeatedly sent remittances to the Capital National Bank, the paper containing restrictive indorsements the same as this, and from time to time drew against its remittances and was allowed interest from the Capital National Bank on its average balances, is insufficient to establish that the transfer of this paper was absolute. (*Scott v. Ocean Bank*, 23 N. Y. 289; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46.)

Upon principle and authority we are fully persuaded that the court below did not err in finding that the Hebron bank never parted with its title to this certificate of deposit. The judgment of reversal entered herein is vacated, and the judgment of the district court is

AFFIRMED.

IRVINE, C., dissenting.

I adhere to the former opinion. It seems to me that the opinion now held by the majority of the court logically overrules a number of earlier cases. If not, it certainly creates a distinction which is confusing, and which has no reason for its existence. It has been held that, as between the original parties, parol evidence is receivable to vary or to contradict the terms of a general indorsement, and also that such evidence may be received to show that the liability of those signing the note on its face is other than would be implied from the place and character of the signatures. The indorsement in this case is no more the expression of a complete contract than is a general indorsement. On its face it is simply an authority to the maker of the certificate to pay the same to R. C. Outcalt for the benefit in some way of the indorser. It is only by implication of law that these words acquire any of the distinctive features of a contract. To show that the reasons for allowing extrinsic evidence, as between the parties, apply as well to restrictive as to general indorsements the following language from *Dye v. Scott*, 35 O. St. 194, which has been quoted with approval by this court in *Holmes v. First Nat. Bank*, 38 Neb. 326, is pertinent: "If there was a contemporaneous contract between the parties upon which the indorsement was made, both reason and justice require that, as between themselves, the actual and not the presumed contract should be enforced; and, as between them, oral testimony should be admissible to prove the contemporaneous contract. This will not necessarily, or even probably, im-

pair the currency or credit of the instrument as commercial paper. Prior parties to it will not be affected, nor will the rights of subsequent indorsees without notice be impaired or limited in any degree." The above is a statement of a rule generally prevalent with regard to negotiable instruments. Often they are drawn contrary to the real relations of the parties for the very purpose of giving rights to transferees which could not be acquired were the true relations disclosed. A familiar instance is that of an accommodation note or an accommodation indorsement. In the case of the note the contract to pay a certain sum at a certain time is distinctly and fully expressed, and where rights are claimed under the law merchant the liability attaches. But if the payee himself should sue, he would be defeated by extrinsic evidence to show that, as between the parties, the note did not express the contract. In this case no rights are claimed under the law merchant. It is not sought to charge any one upon or through the indorsement. The question is simply whether the Hebron bank sold the certificate to the Lincoln bank. To transfer negotiable paper no compliance with the law merchant is necessary. It may be transferred so as to pass the holder's rights by assignment like any other chose in action. If it had not been indorsed at all, recovery could be had by proof of a sale. If it had admittedly been first transmitted as a bailment for collection, and the Lincoln bank had afterwards bought it without further indorsement, that fact might be shown. The chief fallacy in the majority opinion lies in treating the case as if rights were claimed under the law merchant, whereas the law merchant is not necessarily involved in the case. The form of the indorsement is merely evidence of what the contract was, but it was only a single step in the transaction and is explained by the other evidence and the acts of the parties in such a way as not even to tend to show a bailment. Other matters are somewhat fully discussed in the former opinion, and I do not care to again refer to them,

nor shall I enter into a discussion of the authorities, except to the extent of repeating that an inspection of the numerous cases cited in the briefs will show that in nearly all of them extrinsic evidence was considered to ascertain the contract, and that the issue has been treated as one of fact in the light of such extrinsic evidence.

HARRISON, C. J., and RYAN, C., concur in the foregoing dissenting opinion.

JAMES A. HAKE ET AL. V. SAMUEL WOOLNER.

FILED JUNE 23, 1898. No. 8163.

1. **Review**: MOTION FOR NEW TRIAL. Rulings of the court below during the trial, instructions given and refused, and the sufficiency of the evidence to sustain the verdict, to be available in this court, must have been raised by the motion for a new trial.
2. **Transcript for Review**: AUTHENTICATION. A paper included in the transcript purporting to be a motion for a new trial will be disregarded, unless authenticated by the certificate of the clerk of the district court.

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

Hall, McCulloch & Clarkson and *Edwin F. Warren*, for plaintiffs in error.

John C. Watson, contra.

NORVAL, J.

A reversal of the judgment is asked on account of certain rulings of the court below during the progress of the trial, alleged errors in the instructions, and that the evidence is insufficient to support the verdict. All of these matters, to be available here, must have been raised by the motion for a new trial. (*Miller v. Antelope County*, 35 Neb. 237; *Viergutz v. Aultman*, 46 Neb. 141; *Dillon v. State*, 39 Neb. 92; *Losure v. Miller*, 45 Neb. 465; *Barr v.*

City of Omaha, 42 Neb. 341; *Barton v. McKay*, 36 Neb. 632.) The transcript contains a paper designated as a "motion for a new trial," but the same is not authenticated by the clerk of the district court, whose certificate is as follows:

"I, M. S. Campbell, clerk of the district court within and for Otoe county, hereby certify the foregoing to be a true transcript of the record in the within entitled cause; petition, amended petition, stipulation, answer, amended reply, instructions asked by plaintiff, refused, instructions asked by the defendant, refused, instructions of the court, journal entries, and bond, as the same appear on file and of record in my office.

"Witness my hand and the seal of said court this thirty-first day of May, eighteen hundred and ninety-five.

"M. S. CAMPBELL, *Clerk.*

"By MINNIE GILMAN, *Deputy.*"

This is a proper authentication merely of the matters specifically enumerated in the certificate, of which the motion for a new trial is not one. The authentication would have been complete and sufficient had it ended with the language, "hereby certify the foregoing to be a true transcript of the record in the within entitled cause." But what follows these words limits the force and effect of the certificate to the particular matters therein designated. The motion for a new trial, therefore, cannot be considered. (*Romberg v. Fokken*, 47 Neb. 198, and cases there cited.) The judgment is

AFFIRMED.

BADGER LUMBER COMPANY, APPELLEE, V. EMMA H. HOLMES ET AL., APPELLANTS.

FILED JUNE 23, 1898. NO. 9691.

1. **Reversal on Appeal:** PROCEEDINGS BELOW. Where a decree in favor of plaintiff, foreclosing a mechanic's lien, is reversed on an appeal by the defendants, and the cause remanded to the trial court for further proceedings, the situation of the plaintiff is precisely the same as if his rights had never been tried.

2. **Mechanics' Liens:** EXTENT OF INCUMBRANCE. One who furnishes materials for all the buildings on several lots, under one contract, may make the entire debt a charge upon all the land, but not a charge upon a portion thereof.

3. ———: ———. Where a portion of the premises has been absorbed by a prior lien thereon, such material-man may have a lien for his entire debt on the remainder of the premises.

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

George H. Rogers, S. L. Geisthardt, and *Field & Brown,* for appellants.

Tibbets Bros., Morey, & Ferris, and *D. M. Vinsonhaler, contra.*

NORVAL, J.

This is the second appearance of this cause in this court. The opinion on the former appeal is reported in 44 Neb. 244. The Badger Lumber Company, in pursuance of a contract entered into with Charles M. Cadwallader, furnished lumber and other materials for the erection of eight dwelling-houses on lots 1, 2, 3, 10, 11, and 12, block 3, Avondale Addition to the city of Lincoln. A verified account of said lumber and materials was duly filed in the office of the register of deeds of Lancaster county, claiming a mechanic's lien upon said premises for $492.18, the balance remaining unpaid on said account. Subsequently, this suit was instituted to foreclose plain-

tiff's claim for a mechanic's lien. Answers and cross-petitions were filed by certain defendants, setting up mortgage liens upon a portion of the premises. Emma H. Holmes and John J. Gillilan, administrators of the estate of W. W. Holmes, deceased, have succeeded to the rights of the former owners of the equity of redemption. By the first decree entered in the district court the several mortgage liens on the premises were established, and plaintiff was adjudged to have a mechanic's lien for the balance of its account on the south fifty feet of lots 1 and 2, the north fifty feet and the south fifty feet of lots 11 and 12, the west forty-five feet of lot 10, in said block 3. The Holmes estate was awarded a first lien on the west forty-five feet of lot 3, in said block. An appeal was prosecuted by the representatives of W. W. Holmes, deceased, on which appeal it was determined that the entire debt to plaintiff might be charged to all the real estate, but the whole indebtedness could not be charged to a part of the lots. Stated differently, the entire premises were liable for the costs of erecting the improvements, but that such costs might be apportioned so that the parts of the lots charged should bear no greater amount of the expense than the value of the material actually used in erecting the improvements made on such part. Plaintiff on the first trial in the district court, having been awarded a lien on a part of the real estate for the balance due it for the lumber and materials for the erection of the whole of the improvements, the decree in favor of the plaintiff was reversed and the cause remanded to the trial court for further proceedings in accordance with the former opinion. After the reversal it is disclosed by supplemental pleadings, and the proofs, that subsequent to the commencement of the action, and while the first appeal was pending in this court, Sarah A. Rogers began an action in the court below, to which the Badger Lumber Company was a party, to foreclose a mortgage on the west forty-five feet of lot 10, and a portion of lots 11 and 12, in said block 3. A decree of fore-

closure was entered therein adjudging that said mortgage was the first and prior lien on said last mentioned premises, an order of sale was issued, said real estate was sold thereunder and the sale was confirmed, and by said proceedings the subsequent mechanic's lien of plaintiff upon said last described premises was cut out. During the pendency of the former appeal the Holmes estate, in pursuance of the stipulation of the parties, caused the west forty-five feet of lot 3, in said block 3, to be sold under the decree to satisfy its said mortgage lien. It was stipulated that the sale should be without prejudice to the rights of the plaintiff under the said appeal. Upon the second trial of the present cause in the district court is was determined that the Badger Lumber Company had a first lien upon all of lots 1, 2, 3, 10, 11, and 12, block 3, Avondale Addition to the city of Lincoln, except the west forty-five feet of lot 10 and that portion of lots 11 and 12 described as follows: Commencing at a point fifty feet north of the southeast corner of lot 12, thence west ninety-five feet, thence north fifty feet, thence east ninety-five feet, and thence south fifty feet to the place of beginning, and as to this last described premises plaintiff had a second lien subject to the first mortgage lien of Sarah A. Rogers as adjudicated in the said suit brought by her. From this decree certain defendants appeal.

It is now argued that the first or original decree rendered herein by the district court is *res judicata* against the Badger Lumber Company as to all the property in controversy upon which it was denied a lien by that decree, since plaintiff did not prosecute an appeal from the decision rendered against it. The principle is well established that on appeal to this court the appellee can ordinarily obtain no other or different relief from that awarded him in the trial court. But that doctrine, which is so strenuously invoked by the appellants, is not applicable here, since this court on the former appeal granted no relief to the plaintiff, but on consideration of the appeal prosecuted by defendants the decree in favor of the Badger Lumber Company was reversed and the cause

remanded to the district court for further proceedings in accordance with the views of this court expressed in the opinion filed. Under that decision the court below was authorized to try the cause *de novo* as to plaintiff's cause of action and render a decree in its favor either charging the balance due for materials furnished under the contract against all the lots, or apportion said amount to the several lots according to the rule announced in the former decision. The reversal of the cause left plaintiff in precisely the same situation as though its rights had never been adjudicated.

It insisted that the second or last decree was rendered in violation of the former decision and mandate of this court. In the previous opinion it was decided that plaintiff was not entitled to a mechanic's lien on a part of the property on which the improvements were erected for their entire costs, but that the lien might be upon all the property for the entire balance due. That decision was not violated by the court below. It found and adjudicated that plaintiff was entitled to a lien on all the lots, a first lien on certain parts, and a second or junior lien on the remainder, and that the portion of the premises on which plaintiff held a second lien had been sold under the prior mortgage lien of Sarah A. Rogers, which cut out and foreclosed plaintiff's rights or interest therein. A decree was awarded plaintiff on the second trial on the entire property on which the improvements were erected, except the portion which the proofs disclose had been already sold under the prior mortgage lien. This was a substantial compliance with our former decision. Plaintiff was entitled to a general lien on all the lots for the balance due it for materials, and it would be inequitable and unjust to hold that such general lien is defeated by the foreclosure of a prior lien on a portion of the premises. Plaintiff's lien is valid and binding on the remainder of the lots for the entire balance of the unpaid part of its claim. The decree is sustained by ample evidence.

AFFIRMED.

JOHN J. BARTLETT V. WILLIAM T. SCOTT.

FILED JUNE 23, 1898. NO. 8205.

1. **Corporations:** ACTION FOR PURCHASE PRICE OF STOCK: PLEADING. To maintain an action at law for the purchase price of corporation stock plaintiff, ordinarily, must plead and prove a delivery or tender of such stock before the bringing of his suit.
2. **Evidence:** WITNESSES. This court will not weigh conflicting evidence, nor decide on the credibility of witnesses.
3. **Pleading:** AMENDMENTS: REVIEW. It is not reversible error to refuse to permit a petition to be amended on the trial, when such amendment, taken in connection with the other averment of the petition, did not state a cause of action.

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

Moore & Hand, for plaintiff in error.

William Gaslin, contra.

NORVAL, J.

This suit was instituted in the court below by John J. Bartlett against William T. Scott to recover $5,833.33 and interest on a written contract of which the following is a copy:

"KEARNEY, NEB., June 8, 1891.

"This agreement, made and entered into between J. J. Bartlett, R. L. Downing, and W. T. Scott, all of Kearney, witnesseth, that whereas J. J. Bartlett has subscribed to the stock of the Kearney Cotton Mill Company to the amount of $17,500 (175 shares) and is entitled by so doing to 1-12 of the subsidy given by the citizens of Kearney to said cotton mill company: Now, therefore, it is agreed that the stock shall be divided into three parts of $5,833.33 each and be paid for, respectively, by the aforesaid J. J. Bartlett, R. L. Downing, and W. T. Scott as called by the Kearney Cotton Mill Company, and such

subsidy shall also be equally divided between the aforesaid parties.

"Witness our hands this —— day of ———, 1891.

"J. J. BARTLETT.
"R. L. DOWNING.
"W. T. SCOTT.

"Witness:
"W. W. CUMSTOCK."

Upon the trial the defendant obtained judgment, to reverse which is the purpose of this proceeding.

As we read the foregoing contract, Scott thereby promised and agreed to purchase from Bartlett 58⅓ shares of the capital stock of the Kearney Cotton Mill Company and one-twelfth of the subsidy donated to said corporation by the citizens of Kearney, for which Scott was to pay Bartlett $5,833.33 at such times as the cotton mill company should call upon Bartlett for the payment of his stock subscription. The petition is framed upon that theory, and the action is, therefore, to recover the price of the 58⅓ shares of stock, rather than for damages for a breach of contract. There is no averment in the petition that plaintiff has ever delivered or tendered to the defendant the shares of stock and one-twelfth of the subsidy mentioned in the contract. To entitle plaintiff to recover the purchase price it devolved upon him to plead and prove either a delivery, or tender, to the defendant of the stock and subsidy. (*Wasson v. Palmer*, 17 Neb. 330; *Green v. Reynolds*, 2 Johns. [N. Y.] 207; *Jones v. Gardner*, 10 Johns. [N. Y.] 266; *Babcock v. Stanley*, 11 Johns. [N. Y.] 178; *Williams v. Healey*, 3 Den. [N. Y.] 363; *Hosmer v. Wilson*, 7 Mich. 303; *Campbell v. Gittings*, 19 O. 347.) It is true the petition alleges that plaintiff has been at all times and is now ready and willing to turn over the stock and subsidy, but this is not sufficient. It is not equivalent to a tender or offer to perform. (*Parker v. Parmele*, 20 Johns. [N. Y.] 130.)

It is argued that it was unnecessary to plead a tender of the stock, because defendant refused to pay or to

recognize the existence of the contract. Cases are cited to support the doctrine that "Where the vendor claims to have rescinded, repudiates, and denies the obligation of the contract, placing himself in such a position that it appears that if the tender were made its acceptance would be refused, then no tender need be made by the vendee." (*Brock v. Hidy*, 13 O. St. 306.) The petition contains no averments excusing a tender of the stock, as that the defendant repudiates the contract; hence the doctrine just quoted cannot be invoked by plaintiff.

One of the defenses interposed was that the contract above set forth has been rescinded by the subsequent agreement of the parties. The defendant pleads in his answer, and his evidence adduced on the trial tends to establish, that shortly after making the contract in question another agreement, upon sufficient consideration, was entered into between plaintiff and defendant whereby the contract in suit was rescinded and the defendant was released therefrom. The evidence bearing upon the question of rescission is conflicting and hopelessly irreconcilable. But this court must decline to weight conflicting evidence and pass upon the credibility of the witnesses. It is sufficient that the evidence is ample to sustain the finding and judgment.

Complaint is made of the refusal of the court below on the trial to permit the plaintiff to amend his petition by alleging that a mutual mistake was made by the parties in using the word "subsidy" in the contract, and to aver that the subsidy referred to was represented by the stock of the Central Land Company, and was so understood by the parties at the time. There was no prejudicial error in this ruling, since had the amendment been allowed, as proposed, still the petition would not have stated a cause of action on account of the omission to allege performance or offer to perform the conditions of the contract by the plaintiff. Moreover, the defendant had already filed an amended petition, and it was within the discretion of the court below whether it would permit

another amendment to be made after the trial had begun. (*Bush v. Bank of Commerce*, 38 Neb. 403.)

It is manifest from the views already expressed that no reversible error could have been committed in the exclusion of testimony. The judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. ATTORNEY GENERAL, V. FRANK E. MOORES ET AL.

FILED JUNE 23, 1898. No. 9855.

1. **Constitutional Law**: INVALID STATUTES: COURTS. To justify the courts in declaring a statute invalid it is not essential that it should contravene some express provision of the constitution. If the act is inhibited by the general scope and purpose of the fundamental law it is as invalid as though forbidden by the letter of that instrument.

2. ———: BILL OF RIGHTS: POWERS RESERVED. The bill of rights of our constitution is not an enumeration of all the powers reserved to the people of this state. A statute is unconstitutional and void which is repugnant to the rights, expressed or implied, retained by the people.

3. ———: MUNICIPAL CORPORATIONS: SELF-GOVERNMENT. The right of local self-government in cities and towns—*i. e.*, the power of the citizens thereof to govern themselves as to matters purely local in their nature, through officers of their own selection—existed in this state at the time the present constitution was framed, and was not surrendered upon the adoption of that instrument, but is vested in the people of the respective municipalities, and the legislature is powerless to take it away.

4. ———: ———: ———. The right to maintain a fire department in a city or town is one of the rights vested in the people of municipalities, and is to be exercised by them, without legislative interference, except to the extent the lawmaking body may prescribe rules to aid the people of the municipalities in the exercise of such right.

5. ———: ———: ———: FIRE AND POLICE COMMISSIONERS. The act of the legislature of 1897 (Session Laws 1897, ch. 10; Compiled Statutes, ch. 12*a*), in so far as it assumes to confer authority upon the governor to appoint fire and police commissioners in cities of the metropolitan class, is void, as being an unlawful attempt to deprive the people of such cities of the right of local self-government.

6. ———. *State v. Seavey*, 22 Neb. 454, overruled.

ORIGINAL action in the nature of quo warranto presenting to the supreme court the constitutionality of legislative enactments conferring upon the governor power to appoint four members of the board of fire and police commissioners of the city of Omaha. *Judgment of ouster against the governor's appointees.*

The facts and issues are stated in the opinions.

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

McCoy & Olmsted, for Peter W. Birkhauser and other appointees of the mayor of the city of Omaha:

The federal constitution guaranties to every state in the Union a republican form of government. A state with a different form of government could not be admitted. The right of local self-government is an essential element of republican government. Therefore it is not within the power of the legislature to prevent the people of the city of Omaha from selecting their own officers. (1 Curtis, History of Constitution pp. 183, 261; 2 Curtis, History of Constitution pp. 10, 470; Constitution 1866, art. 11, sec. 6; *Texas v. White,* 7 Wall. [U. S.] 700; *Penhallow v. Doane,* 3 Dal. [U. S.] 54; *Poindexter v. Greenhow,* 114 U. S. 270; *Hoke v. Henderson,* 4 Dev. [N. Car.] 1; *Allgeyer v. Louisiana,* 165 U. S. 578; *Ritchie v. People,* 155 Ill. 98; *Braceville Coal Co. v. People,* 147 Ill. 66; *Frorer v. People,* 141 Ill. 171; *Low v. Rees Printing Co.,* 41 Neb. 127; *State v. Julow,* 129 Mo. 163; *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226; *Luther v. Borden,* 7 How. [U. S.] 42; *Penn v. Tollison,* 26 Ark. 545; *Calhoun v. Calhoun,* 2 S. Car. 283; *Texas v. White,* 7 Wall. [U. S.] 700; *White v. Hart,* 13 Wall. [U. S.] 649; *Blair v. Ridgely,* 41 Mo. 64; *Brittle v. People,* 2 Neb. 198.)

The statute interfering with the right of local self-government in the city of Omaha is a violation of the follow-

ing provision of the federal constitution: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (*Calhoun v. Calhoun*, 2 S. Car. 283; *Strauder v. West Virginia*, 100 U. S. 303.)

Local self-government is an inalienable right, whether wholly written, partly written, partly reserved, or wholly reserved. (Von Holst, Constitutional Law 331; 1 Barbour, Rights of Persons & Property 99; *Texas v. White*, 7 Wall. [U. S.] 700; *Rathbone v. Wirth*, 6 App. Div. [N. Y.] 277, 150 N. Y. 459; *Burch v. Newbury*, 10 N. Y. 374; *People v. Porter*, 90 N. Y. 68; *People v. Albertson*, 55 N. Y. 50; *People v. Draper*, 15 N. Y. 532; *State v. Denny*, 118 Ind. 382; *People v. Hurlbut*, 24 Mich. 44; *City of Evansville v. State*, 118 Ind. 427; *State v. Mayor*, 72 N. W. Rep. [Ia.] 639; *Attorney General v. City of Detroit*, 58 Mich. 213; *People v. Lynch*, 51 Cal. 15; *People v. Common Council of Detroit*, 28 Mich. 228.)

Police commissioners are local or civil officers. (Pomeroy, Constitutional Law [Bennett's ed.] pp. 595-597; *Ex parte Milligan*, 4 Wall. [U. S.] 2, 127; *Luther v. Borden*, 7 How. [U. S.] 1; *In re Debs*, 158 U. S. 564; *State v. Denny*, 118 Ind. 449.)

The state cannot levy a tax for local police protection, but the city must do so. (*Bradshaw v. City of Omaha*, 1 Neb. 16; *State v. Mayor*, 72 N. W. Rep. [Ia.] 639; *People v. Hastings*, 29 Cal. 449; *Cornell v. People*, 107 Ill. 372; *Lovingston v. Wider*, 53 Ill. 302.)

W. J. Connell, for the city of Omaha.

Points argued:

At the time of the Declaration of Independence the town and the county were the only municipalities known to our political history, and they possessed complete

powers of government in all local matters, legislative as well as executive.

Any diminution of the original complete governmental powers of the towns or the counties arose solely from the voluntary surrender of their rights for the purpose of combining under a common government which should be so constituted as to act as an agent for all in all matters of common interest. Powers not surrendered in the written constitutions remain with the people.

The right of local self-government is the possession of the individual citizen. It does not belong to states, nor to towns, counties, nor cities, but to the men who inhabit them, in which respect it differs from the similar right exercised by European municipalities prior to the revolution.

It is an inherent right. It is conferred by no sovereign power, and no sovereign power can take it away.

It is a common and an equal right. It belongs to every American citizen; and a state constitution which should preserve it to some of its citizens and take it away from others would not in that respect conform to the requirements of a republican form of government.

It is a vital, substantial right, and no mere detail of government to be adopted or rejected at the will of the legislature.

Additional references: Cooley, Constitutional Limitations 3; *Robertson v. Baldwin*, 17 Sup. Ct. Rep. 327; *State v. Smith*, 14 Wis. 541; *State v. Van Beek*, 87 Ia. 577; *United States v. Ball*, 163 U. S. 662; *Brown v. Walker*, 161 U. S. 591; *Gandy v. State*, 13 Neb. 445; *Hanson v. Vernon*, 27 Ia. 73; *Police Commissioners v. Louisville*, 3 Bush [Ky.] 602; *Paducah v. Cully*, 9 Bush [Ky.] 325; *Buckner v. Gordon*, 81 Ky. 671; *Van Horn v. State*, 46 Neb. 62; *Henshaw v. Foster*, 9 Pick. [Mass.] 317; *People v. Draper*, 15 N. Y. 532; *Wilkinson v. Adam*, 1 Ves. & Bea. [Eng.] 466; 1 Story, Constitution 408; *Holmes v. Lansing*, 3 Johns. Cas. [N. Y.] 75; *Green v. Biddle*, 8 Wheat. [U. S.] 1; *Bronson v. Kinzie*, 1 How. [U. S.] 311; *Morse v. Goold*, 1 Kern. [N.

Y.] 281; 1 Dillon, Municipal Corporations [3d ed.] sec. 9; Cooley, Constitutional Limitations [5th ed.] 225; *People v. Mayor*, 51 Ill. 17.

M. B. Reese, for the mayor and council of the city of Omaha.

Points argued:

Legislative enactments attempting to confer upon the governor power to appoint members of the board of fire and police commissioners of the city of Omaha are unconstitutional and void.

It is not within the power of the legislature to take from the people of municipalities the right of local self-government.

Additional references: Black, Constitutional Law 8; Cooley, Constitutional Limitations [4th ed.] 44, 212, 228; *People v. Lothrop*, 24 Mich. 234; *Regents of the University of Maryland v. Williams*, 9 Gill & J. [Md.] 365; *Attorney General v. Common Council of Detroit*, 29 Mich. 108; Cooley, Principles of Constitutional Law 358; 1 Dillon, Municipal Corporations sec. 183.

Cases reviewed: *State v. Lancaster County*, 4 Neb. 537; *State v. Dodge County*, 10 Neb. 20; *Hanscom v. City of Omaha*, 11 Neb. 37; *State v. Ream*, 16 Neb. 681; *Shaw v. State*, 17 Neb. 334; *Magneau v. City of Fremont*, 30 Neb. 843; *Commonwealth v. McCloskey*, 2 Rawl. [Pa.] 368; *State v. Irey*, 42 Neb. 186; *Gillespie v. City of Lincoln*, 35 Neb. 34; *State v. Seavey*, 22 Neb. 454; *People v. Mahaney*, 13 Mich. 481; *State v. Covington*, 29 O. St. 102; *State v. Hunter*, 38 Kan. 578; *Commonwealth v. Plaisted*, 148 Mass. 375; *State v. Kolsem*, 29 N. E. Rep. [Ind.] 595; *Police Commissioners v. City of Louisville*, 3 Bush [Ky.] 597; *In Re Senate Bill*, 21 Pac. Rep. [Colo.] 481.

E. R. Duffie, George A. Day, and *I. J. Dunn*, for J. H. Peabody and other appointees of the governor:

The constitution is not a grant, but a limitation upon

the legislative power. The legislature may legislate upon any subject not inhibited by the constitution. (*Magneau v. City of Fremont*, 30 Neb. 843; *State v. Lancaster County*, 4 Neb. 537; *State v. Dodge County*, 8 Neb. 124; *Hanscom v. City of Omaha*, 11 Neb. 44; *State v. Ream*, 16 Neb. 685; *Shaw v. State*, 17 Neb. 334.)

A statute must stand or fall, as an expression of the will of the lawmaking power of the state, to whom the right to enact laws has been delegated by the people, and not upon the will or voice of any other body or power. (*Santo v. State*, 2 Ia. 165; *Geebrick v. State*, 5 Ia. 491; *State v. Beneke*, 9 Ia. 203; *Commonwealth v. McCloskey*, 2 Rawl. [Pa.] 368; *Philadelphia v. Fox*, 64 Pa. St. 169; *State v. Denny*, 118 Ind. 382; *State v. Irey*, 42 Neb. 189.)

Until some express provision of the constitution is claimed to be violated by legislative action there is nothing to call for judicial interpretation. (Cooley, Constitutional Limitations 153; *Walker v. City of Cincinnati*, 21 O. St. 14; *State v. McCann*, 21 O. St. 198; *Adams v. Howe*, 14 Mass. 340.)

Other references in an argument in favor of the constitutionality of the statute assailed: *Mayor of Baltimore v. State*, 15 Md. 376; *People v. Draper*, 25 Barb. [N. Y.] 366; 1 Dillon, Municipal Corporations [4th ed.] sec. 68 and note pp. 112, 113; *People v. Hurlbut*, 24 Mich. 44; *Burch v. Hardwicke*, 30 Gratt. [Va.] 24; *Gillespie v. City of Lincoln*, 35 Neb. 34; *Bryant v. City of St. Paul*, 33 Minn. 289; 1 Beach, Public Corporations sec. 744; *State v. Denny*, 118 Ind. 382, 449; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121; *Town of Granby v. Thurston*, 23 Conn. 416; *Webster v. Town of Harwinton*, 32 Conn. 131; *Atwater v. Town of Woodbridge*, 6 Conn. 223; *McLoud v. Selby*, 10 Conn. 390; *Beardsley v. Smith*, 16 Conn. 368; *Chase v. Merrimack Bank*, 19 Pick. [Mass.] 564; *Gaskill v. Dudley*, 6 Met. [Mass.] 546; *Adams v. Wiscasset Bank*, 1 Greenl. [Me.] 361; *Fernald v. Lewis*, 6 Greenl. [Me.] 264; *Hopkins v. Town of Elmore*, 49 Vt. 176; *State v. Seavey*, 22 Neb. 454; *People v. Mahaney*, 13 Mich. 841; *Police Commissioners v. City of*

Louisville, 3 Bush [Ky.] 597; *People v. Draper*, 15 N. Y. 532; *Daley v. City of St. Paul*, 7 Minn. 390; *Mayor of Baltimore v. State*, 15 Md. 376; *Diamond v. Cain*, 21 La. Ann. 309; *State v. Covington*, 29 O. St. 102; *Burch v. Hardwicke*, 30 Gratt. [Va.] 24; *State v. Hunter*, 38 Kan. 578; *In re Senate Bill*, 21 Pac. Rep. [Colo.] 481; *Commonwealth v. Plaisted*, 148 Mass. 375; *State v. Kolsem*, 29 N. E. Rep. [Ind.] 595; *State v. Baltimore & O. R. Co.*, 12 Gill & J. [Md.] 399; *Regents of the University of Maryland v. Williams*, 9 Gill & J. [Md.] 397; Tiedeman, Limitations of Police Power sec. 1; *Davock v. Moore*, 63 N. W. Rep. [Mich.] 428; *People v. Tweed*, 63 N. Y. 202.

NORVAL, J., and RAGAN, C.

The legislature of this state at its session held in 1897 passed an act incorporating metropolitan cities and defining, prescribing, and regulating their duties, powers, and government. (Session Laws 1897, ch. 10; Compiled Statutes, ch. 12*a*.) Sections 166 and 167 of said act follow:

"Sec. 166. In each city of the metropolitan class, there shall be a board of fire and police commissioners, to consist of the mayor, who shall be ex officio chairman of the board, and four electors of the city who shall be appointed by the governor.

"Sec. 167. Immediately on the taking effect of this act, the governor shall appoint for each city governed by this act four commissioners, not more than two of whom shall be of the same political faith or party allegiance, one of whom shall be designated to serve until the first Monday of April 1898, and one to serve until the first Monday of April 1899, and one to serve until the first Monday of April 1900, and one to serve until the first Monday of April 1901, and on the last Tuesday in March in 1898, and on the same day in each year thereafter the governor shall appoint one commissioner in each city governed by this act, to take the place of the commissioner whose term of office expires on the first Monday

in April following such appointment, and those so appointed to succeed others shall serve for the term of four years following the first Monday in April after their appointment, except where appointments are made to fill vacancies, in which cases those appointed shall serve the remainder of term of the persons whose vacancies they are appointed to fill. Whenever a vacancy shall occur in any board of fire and police commissioners either by death, resignation, removal from the city, or any other cause, the governor shall appoint a commissioner to fill such vacancy."

Section 168 provides, *inter alia*: "No person shall be appointed a police commissioner who is engaged in the sale of malt, spirituous or vinous liquors, or who is engaged in the business of dealing in tobacco or articles manufactured therefrom, or who is an agent for any fire insurance company or companies or interested therein, or in the business of soliciting fire insurance, or who shall have been engaged in any of such callings or business within one year previous to the date of appointment."

Section 169 confers upon such board "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." The board is empowered and required to appoint a chief of the fire department and such other officers of said department as may be deemed necessary, and to remove such officers, or any of them, whenever the board shall consider and declare such removal necessary for the proper management or discipline or for the more effective working or service of said department. The board is given power to employ all necessary firemen and assistants, and it is made its duty to appoint a chief of police, police matron, and such other officers and policemen that may be necessary to the extent that funds may be provided therefor by the mayor and council. All officers and police of the police department are subject to removal by the board of fire and police commissioners

under such rules and regulations as may be adopted by said board, whenever such removal becomes necessary for the proper management or discipline, or for the more effective working or service of the police department.

The respondents J. H. Peabody, D. D. Gregory, William C. Bullard, and R. E. L. Herdman were appointed by the governor under the provisions of said sections 166 and 167 as members of the board of fire and police commissioners for the city of Omaha, and the respondent Frank E. Moores is the mayor of said city, and by virtue of said act is made a member of said board and its chairman. The mayor and a majority of the councilmen of the city of Omaha, having assumed to exercise, control, and manage the fire and police departments of said city to the exclusion of any and all acts of the board appointed by the governor, an application by the state, on the relation of the attorney general, was filed in this court for a writ of quo warranto against the respondents named above and the members of the city council of Omaha to test the constitutionality of the sections of the said act of 1897 which attempted to confer upon the governor the power to appoint four members of the board of fire and police commissioners for each city of the metropolitan class. To this application the appointees of the executive answered setting up their respective appointments as members of said board and their subsequent qualification, and the mayor and council also filed answers alleging their right, power, and authority to provide for the appointment of the members of the board of fire and police commissioners of said city of Omaha to exercise, control, and manage the fire and police departments of said city and control and direct in all respects said departments, and that Peter W. Birkhauser, Charles J. Karbach, Matthew H. Collins, and Victor H. Coffman have been, under and in pursuance of an ordinance of the city of Omaha, appointed by the mayor of said city, and confirmed by a majority of the council thereof, as members of the board of fire and police commissioners

of said city and have qualified as such. The said appointees of the mayor and council have intervened and filed an answer and cross-application or information setting up their respective claims to the offices in question, and that the said act of 1897 is unconstitutional and void. The attorney general has filed a general demurrer to the answer of the respondents as well as to the answer and cross-application of the interveners, and the interveners have demurred to the answer of the governor's appointees. The cause has been submitted for judgment on said demurrers.

The validity of the law is assailed on the ground that it is violative of the inherent right of local self-government, by depriving the people of cities of the metropolitan class from choosing their own officers. There is no express provision in the constitution of this state which gives municipal corporations the power to select their officers or to manage their own affairs, nor is there any clause to be found in that instrument which in express terms inhibits the legislature from conferring upon the governor the power to appoint municipal officers to manage and control purely local affairs. If this act is invalid on the ground that the appointing power was placed in the hands of the governor, it is because the law is repugnant to some right retained by the people at the time of the adoption of the organic law. It is true the state constitution is not a grant of legislative power, and the lawmaking body may legislate upon any subject not inhibited by the fundamental law, as has been held in *Magneau v. City of Fremont*, 30 Neb. 843, and numerous other decisions of this court. But it by no means follows from this that the legislature is free to pass laws upon any subject, unless in express terms prohibited by the constitution. The inhibition on the power of the legislature may be by implication as well as by expression. Laws may be, and have been, declared invalid although not repugnant to any express restriction contained in the fundamental law.

In Von Holst, Constitutional Law, page 271, may be found this apposite language: "Congress has only the powers granted it by the federal constitution. The legislative power of the state legislatures, on the contrary, is unlimited as far as no limits are set to it by the federal or the state constitution. This does not mean, however, that these restrictions must always be expressed in explicit words. As it is generally admitted that the factors of the federal government have certain 'implied powers,' so it has never been disputed that the state legislatures are subject to 'implied restrictions,' that is, restrictions which must be deduced from certain provisions of the federal, or state constitution, or that arise from the political nature of the Union, from the genius of American public institutions," etc.

Judge Cooley, in his valuable work on Constitutional Limitations [5th ed.], page 203, uses this language: "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important where they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representatives, it cannot be necessary to prohibit its being done."

In Mechem, Public Officers, section 123, it is said: "Indeed this right of local self-government, as it has been briefly termed, is held to be an established feature and incident of our political system, and it is not within the power of the legislature of a state to permanently fill by appointment the local offices established by law for purely local purposes."

In *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 O. St. 77, the court say: "But as the general assembly, like the other departments of government, exercise only delegated authority, it cannot be doubted that any act passed by it, not falling fairly within the scope

of legislative power, is as clearly void as though expressly prohibited. And we agree, entirely, with the supreme court of Pennsylvania in *Parker v. Commonwealth*, 6 Barr 511, that 'it is this species of insidious infraction that is more to be feared and guarded against than direct attacks upon any particular principle proclaimed as a part of the primordial law; for attempts of the latter description will, generally, be met by instant reprobation, while the stealthy and frequently seductive character of the former is apt to escape detection, until the innovation is made manifest by the infliction of some startling wrong.' It is not my purpose to point out the numerous cases in which a legislative act might be avoided as transcending the limits of the powers delegated to that body, although not expressly prohibited. The attempted exercise of executive or judicial power, delegated to the other departments, will very readily suggest many instances, while many others may be easily imagined, of encroachments upon reserved rights, not surrendered to any department of the government. From these considerations it follows that it is always legitimate to insist that any legislative enactment, drawn in question, is void either because it does not fall within the general grant of power to that body, or because it is expressly prohibited by some provision of the constitution."

In *People v. Albertson*, 55 N. Y. 50, it was said: "A written constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of government and individual citizens, according to its spirit and the intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although not within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessa-

rily implied purposes, is as clearly void as if in express terms forbidden. A thing within the intent of a constitution or statutory enactment is, for all purposes, to be regarded as within the words and terms of the law. A written constitution would be of little avail as a practical and useful restraint upon the different departments of government if a literal reading only was to be given it, to the exclusion of all necessary implication, and the clear intent ignored and slight evasions or acts, palpably in evasion of its spirit, should be sustained as not repugnant to it."

Justice O'Brien in *Rathbone v. Wirth*, 150 N. Y. 459, uses this language: "When the validity of such legislation is brought in question it is not necessary to show that it falls appropriately within some express written prohibition contained in the constitution. The implied restraints of the constitution upon legislative power may be as effectual for its condemnation as the written words, and such restraints may be found either in the language employed, or in the evident purpose which was in view, and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law."

In *People v. Morris*, 13 Wend. [N. Y.] 325, Justice Nelson said: "The only limitation to the powers of the legislative department that can exist must be found either in the constitution of the United States or of this state, or in the natural and inherent rights of the citizens, which they cannot part with or be deprived of by the society to which they belong. The latter qualification is undefined, and perhaps undefinable by any general code, having a just regard to the security of these rights. Some of the constitutions of the states contain a declaration of these powers, and some also declare (and all are no doubt so to be understood) that the enumeration shall not be construed as denying or impairing others retained by the people. We have no bill of rights; though many of the principles usually found in such instruments are incor-

porated in the provisions of the constitution. The enumeration was designedly omitted, because unnecessary and tended to weaken, if not endanger, those unnoticed. The limitation or qualification in this respect must depend upon the enlightened wisdom and discretion of the legislature, and the decisions of the judicial department."

In *Rathbone v. Wirth*, 6 Hun [N. Y.] 277, Judge Herrick, speaking of the legislature, observed: "'It has the power, subject to the qualified negative of the governor, to pass any law which it may deem necessary for the public good, not inconsistent with the first principles of government, nor contrary to the provisions of the constitution of this state or the United States.' (*Burch v. Newbury*, 10 N. Y. 374-392.) And in interpreting the power of the legislature under the constitution we are not confined to the strict letter of that instrument, or compelled to point out the exact article, section, clause, or phrase therein which grants or denies the power in question. There are some things so contrary to the entire purpose and spirit of the constitution that they must be said to be in conflict with it, although it cannot be contrasted with any specific portion of it. The object of its adoption, and its purpose and intent taken as a whole, must be considered. * * * What has been called 'the political tendency of the constitution' may be considered in interpreting it. (*People v. Porter*, 90 N. Y. 75.) The full measure and intent of the instrument is not always to be found in its mere letter. To again quote Justice Cooley: 'If we may suppose for an illustration that the legislature shall provide that, in Detroit, any single person may be chosen, in whom may be vested the whole legislative authority of the city, and all other authority pertaining to local government of every description and nature, not expressly by the constitution confided to officers specified, it would require unusual boldness in any one who should undertake to defend such a local dictatorship as something within the competency of legislation under a constitution avowedly

framed to guard, protect, and defend the local powers and local liberties.' (*People v. City of Detroit*, 28 Mich. 228.) To put another illustration. Under the last clause of section 2 of article 10 of the constitution, all offices not in existence at the adoption of the constitution, but that shall thereafter be created by the legislature, may be filled by officers elected by the people, or appointed, as the legislature may direct. Suppose the legislature should see fit to create a new county office, and should provide that, at the general election for the election of state officers, the person for whom the next higher number of ballots should be cast for such office should thereafter discharge the duties thereof. A new office is created, which the legislature has a right to create, and also to determine the method of filling it. There is nowhere any express prohibition against legislation of that character in the constitution, and yet what man will say that an act of that kind will stand for a moment, not because it is in conflict with an express provision of the constitution, but because it is repugnant to its whole spirit and intent. * * * The supreme power of the people does not arise from the constitution or exist by virtue of it; it existed prior to it; it makes and unmakes constitutions, but is not made by them; consequently, we are not to look into the constitution for any grant of power to the people, or any definition of their powers; they possess all that they have not surrendered by the constitution. One of the primary purposes for the adoption of a written constitution is the protection of minorities and individuals from the exercise of absolute power. For that purpose the people have yielded up some of their powers, but they retain all that they have not restricted themselves from exercising, by the express words of the constitution or by necessary implication therefrom."

The legislature of Ohio enacted that certain cities of that state should have a board of police commissioners to be elected by the voters of the municipality, but that

no elector should vote at an election for more than two persons for such commissioners, and the four persons receiving the highest number of votes cast should be declared elected. In *State v. Constantine*, 42 O. St. 437, it was held that the provision which denied to an elector the right to vote for all the members of the police board was unconstitutional, although the constitution merely provided that each elector shall be entitled to vote at all elections. The court say: "This implication fairly arises from the language of the constitution itself, but is made absolutely certain when viewed in the light of circumstances existing at the time of its adoption. No such thing as 'minority representation' or 'cumulative voting' was known in the policy of this state at the time of the adopted of this constitution in 1851. The right of each elector to vote for a candidate for each office to be filled at an election has never been doubted. No effort was made by the framers of the constitution to modify this right, and we think it was intended to continue and guaranty such right by the provision that each elector 'shall be entitled to vote at all elections.'" (See *Maynard v. District Canvassers*, 84 Mich. 228.)

This court in *Low v. Rees Printing Co.*, 41 Neb. 127, held the act known as the eight hour law invalid on the ground that it denied the right of parties to contract with reference to compensation for services, although no express constitutional provision guarantied to the individual the right to contract as he pleased. The law was also held bad as class legislation, but the decision was placed as squarely upon the other ground.

In *West Point Water Power & Land Improvement Co. v. State*, 49 Neb. 218, it was ruled that the reserved powers of the state are inalienable and cannot be surrendered or taken away by the legislature.

The first article of our state constitution expressly enumerates certain rights which the people have reserved to themselves, and manifestly any law passed in violation of such reserved rights would be declared by the

courts unconstitutional. It cannot be successfully asserted that the only rights reserved to the people are those enumerated in said article of the constitution, since section 26 thereof declares: "This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people." This language removes all doubt that powers other than those specified in the bill of rights were retained by the people, and any statute enacted in violation of such rights is as clearly invalid as though the same had been expressly forbidden by the fundamental law. Suppose a statute should be enacted providing that a candidate who receives the smallest number of votes for a public office shall be declared elected thereto. Could it be doubted that such a law would be unconstitutional, notwithstanding it is not in conflict with any express provision of the constitution? We think not. The right of the majority to govern is as much reserved to the people as though such right had been in apt language expressed in the constitution.

The important question, therefore, is whether the right of the people of municipal corporations to choose their own local officers is one of the powers retained by the people which the legislature cannot take away. An examination of the various provisions of our constitution fails to show that the right is conferred upon the legislature or any other department of state government in direct, explicit, and plain language, or impliedly, to deprive municipal corporations of the power to govern themselves by officers of their own selection. On the contrary, it is very evident that the constitution was framed upon the theory of local self-government—the right of the people to determine in and for themselves who shall be their officers. It has provided that state and county officers shall be chosen by the people, and the legislation in this state prior to the adoption of the constitution has invariably recognized the principle of local self-government. The several charters of cities and towns existing

when the present constitution was adopted provided for the selection of municipal officers by the citizens of the municipalities, and it was in 1887 when the legislature of this state first attempted to deprive municipal corporations of the power to choose their local officers. The right of local self-government is not forbidden by the constitution, while the principle is fully recognized in that instrument, and its framers must have contemplated that the right then existing of municipal corporations to choose their local officers to administer their local affairs should continue as in the past. This right still exists, and the legislature is powerless to abridge the same, or take it away.

In *Rathbone v. Wirth*, 6 Hun [N. Y.] 277, we find this discussion of the right of local self-government: "Under our form of government that supreme power is vested in and exercised by the majority, and for all practical purposes the majority are the people. The principle that the majority shall govern lies at the very basis of our government. Among the rights of the majority, as a part of its sovereign power, is the right to select officers, either directly by election, or indirectly by authorities or officers whom they have chosen by election. * * * This power of the majority to govern, the legislature cannot take from them. The legislature exercises the legislative power of the people. It is their agent for that purpose; but it cannot limit or surrender any of the power or authority of its principles. But it may be said the legislature is composed of the representatives of the people, and that, therefore, their acts are presumed to be the acts of a majority of the people, and that while this act deprives the majority of the people in one locality of their power, still it is in accordance with the will of the majority of the people of the whole state, and that thereby the principle of majority government is recognized. There would be force in that suggestion if it was not for another principle of our government recognized by our constitution, and if the people had not by the constitu-

tion limited their power to override the will of a majority in any locality. The principle I refer to is the principle of local self-government. * * * Local self-government is the school which fits people for self-government. Local self-government is the result, and also the most efficient preserver of civil liberty. * * * The principle is one that runs through our entire system of government, from the road and school district up to the federal government. * * * Without further continuing this branch of the discussion, suffice it to say that, in my opinion, the purpose of the bill is obnoxious to the constitution, as an infringement upon the right of the majority to select their own officers, either immediately by election or by their accredited agents, and as destructive of the principle of local self-government."

In *Rathbone v. Wirth*, 150 N. Y. 459, Mr. Justice Gray, in delivering the opinion of the court, said: "I refer to the right of local self-government,—a right which inheres in a republican government, and with reference to which our constitution was framed. The habit of local self-government is something which we took over, or rather continued from, the English system of government, and, as Judge Cooley has remarked with reference to the constitutions of the states, 'if not expressly recognized, it is still to be understood that all of these instruments are framed with its present existence and anticipated continuance in view' (Cooley, Constitutional Limitations 35). The principle is one which takes but little reflection to convince the mind of being fundamental in our governmental system and as contributing strength to the national life, in its educational and formative effect upon the citizen. It means that in the local, or political, subdivisions of the state the people of the locality shall administer their own local affairs to the extent that that right is not restricted by some constitutional provision. I do not think that it can be seriously disputed that the conception of the state is free from the element that it belongs to it to control purely local affairs, and that state

interference finds justification only when state policy, or local abuses, demand it. I think that no inference is warranted that other powers have been conferred by the people upon their legislative body than those which are mentioned in the constitution, or which are necessary to carry into effect those which are expressly given. * * * 'The theory of the constitution is, that the several counties, cities, towns, and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them and the electors and inhabitants disfranchised by any act of the legislature, or of any or all of the departments of the state government combined. This right of self-government lies at the foundation of our institutions and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned; especially by the courts when such acts become the subject of judicial investigation.' This is strong and significant language. Read in its light, the provision of the act under consideration appears as legislation hostile to that freedom of action which the people of Albany have the right to claim, under the constitution, in the management of their own affairs."

In *People v. Hurlbut*, 24 Mich. 44, 79, there was involved the validity of an act of the legislature creating a board of public works in the city of Detroit, and providing for the appointment of the officers or members of the board by the legislature. Section 14, article 15, of the constitution of Michigan declares: "Judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature shall direct." The law was held invalid, and that permanent appointments for purposes solely municipal can be made alone by municipal author-

ity. Campbell, C. J., in his opinion said: "In the litigation now before us there is no acquiescence by the city in the choice of the board of works, or in any part of the legislative action on the subject. We are, therefore, compelled to consider the plain question, whether the state authorities have a right to assume unlimited control of all municipal appointments. Judicial offices the constitution has distinctly provided for as elective; and they are local in their action rather than in their nature. But as to other offices the power is plenary, or it does not exist at all. It may as well include every office as any less than all. It may put all the power into the hands of one person as well as divide it among several, and it may continue it for life as well as for a less period. Life tenure is not rare in municipal offices. The aldermen of London, and probably of many other cities, hold for life. It may create incorporated cities and villages, in such numbers as to put the great mass of local administration in the hands of state agents. This is not very likely to happen, but it is just as likely as many other things which it has been thought proper to guard against by constitutional enactment. It is, beyond dispute, directly opposed to the principal design of all our constitutions, and if it has not been guarded against there has been a very great oversight, and the present legislation shows that the danger was not imaginary. But the constitution is not fairly open to such criticism. We must never forget, in studying its terms, that most of them had a settled meaning before its adoption. Instead of being the source of our laws and liberties, it is, in the main, no more than a recognition and re-enactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions. They were not towns or counties or cities or villages, in the abstract—or municipalities which had lost all their old liberties by central usurpation—but American and Michigan municipalities

of common-law origin, and having no less than common-law franchises. * * * Our constitution cannot be understood or carried out at all, except on the theory of local self-government; and the intention to preserve it is quite apparent. In every case where provision is made by the constitution itself for local officers they are selected by local action. * * * It is impossible to read that document without finding the plainest evidence that every part of the state is to be under some system of localized authority emanating from the people. This is no mere political theory, but appears in the constitution as the foundation of all our polity. There is no middle ground. A city has no constitutional safeguards for its people, or it has the right to have all its officers appointed at home. Unless this power is exclusive, the state may manage all city affairs by its own functionaries. The only reasonable meaning of the constitutional clause in question is, that when the legislature has designated the time and manner of appointment or election, the local authority shall fill the offices as so ordained."

Cooley, J., delivered a separate concurring opinion in the same case so full of sound reason and common sense that we have taken copious excerpts therefrom. He said: "We have before us a legislative act creating for the city of Detroit a new board, which is to exercise a considerable share of the authority usually possessed by officers locally chosen; to have general charge of the city buildings, property, and local conveniences; to make contracts for public works on behalf of the city, and to do many things of a legislative character which generally the common council of cities alone is authorized to do. The legislature has created this board, and it has appointed its members; and both the one and the other have been done under a claim of right which, unless I wholly misunderstand it, would justify that body in taking to itself the entire and exclusive government of the city, and the appointment of all its officers, excepting only the judicial, for which, by the constitution, other

provision is expressly made. And the question, broadly and nakedly stated, can be nothing short of this: Whether local self-government in this state is or is not a mere privilege conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure? I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right. * * * The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government,

though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations. The circumstances from which these implications arise are: First, that the constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, second, that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system. * * * Our traditions, practice, and expectations have all been in one direction. And when we go beyond the general view to inquire into the details of authority, we find that it has included the power to choose in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a state power, have been purely exceptional. * * * In view of these historical facts, and of these general principles, the question recurs whether our state constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned. If it can be, it involves these consequences: As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in from abroad, and it is not a remote possibility that self-government

of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing. As the municipal corporation will have no control, except such as the state may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, and the conveniences to be supplied, it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people, who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on the one side and drawn on the other. As the legislature could not be compelled to regard the local political sentiment in their choice, and would, in fact, be most likely to interfere when that sentiment was adverse to their own, the government of cities might be taken to itself by the party for the time being in power, and municipal governments might easily and naturally become the spoils of party, as state and national offices unfortunately are now. All these things are not only possible, but entirely within the range of probability, if the positions assumed on behalf of the state are tenable. It may be said that these would be mere abuses of power, such as may creep in under any system of constitutional freedom; but what is constitutional freedom? Has the administration of equal laws by magistrates freely chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell, and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish

such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the constitution the power to establish it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written. If this charter of state government, which we call a constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local communities to redress local evils, instead of relying upon king or legislature at a distance to do so,—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone. * * * The state may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which

it should be equally admissible to allow the people full control in their local affairs, or no control at all. What I say here is with the utmost respect and deference to the legislative department, even though the task I am called upon to perform is to give reasons why a blow aimed at the foundation of our structure of liberty should be warded off."

The same doctrine was recognized and applied by the same court in *People v. Common Council of Detroit*, 28 Mich. 228. In that case there was under consideration a statute relative to a public park for the city of Detroit, which created a board of park commissioners and designated six citizens of Detroit as the first members of such board. The act was held invalid because the selection of the park commissioners by the legislature was repugnant to the inherent right of local self-government. The constitutional right of municipal self-government was sustained in *Attorney General v. Common Council of Detroit*, 29 Mich. 108; *Commissioners of Parks v. Detroit*, 80 Mich. 663; *Hubbard v. Township Board of Springwells*, 25 Mich. 153; *Allor v. Auditors of Wayne County*, 43 Mich. 76; *Attorney General v. Detroit Common Council*, 58 Mich. 213.

By an act of the legislature of Michigan the governor was empowered to appoint three commissioners to improve a certain highway and levy the expenses on adjacent lands. The law was declared invalid in *Hubbard v. Township Board of Springwell*, 25 Mich. 153, as inimical to the fundamental theory of self-government.

In Michigan there existed a statute making it the duty of the governor, by appointment, to fill any vacancy in a county office for and during the unexpired portion of the regular term limited to such officer, and in pursuance of said enactment the governor appointed one George C. Lawrence as auditor for the county of Wayne, in the place of William C. Mahoney, deceased. Proceedings in the nature of quo warranto by the attorney general on the relation of said Lawrence was instituted in the supreme court to test the right of the latter to said office

of county auditor. The validity of the law under which Lawrence was appointed was assailed, and the court said the statute which gave the governor power to fill vacancies in county offices was invalid, since it deprived the electors of the county of the right to choose their own officers. (*Attorney General v. Trombly*, 89 Mich. 50.) McGrath, J., speaking for the court, said: "No question is raised as to the legality of his appointment, but respondent insists that the act of 1857 is unconstitutional as abridging the right of local self-government; that the governor's authority under the act of 1873 is limited by implication to provisional appointments, and that the electors of Wayne county had the right to fill the vacancy at the next or at any subsequent general election after such vacancy occurred. While the constitution contains no express verbal restrictions upon the power of the legislature to authorize the governor to make permanent appointments to purely local offices, the principle of local self-government is so deeply imbedded in the groundwork of our system of government that no mere general grant of legislative power can be said to include the authority to take from the people the management of their local concerns, and all delegations of authority to the several departments of government must be deemed to have been made subject to this fundamental principle. This is but the restatement of the doctrine laid down by Justice Cooley, after an able and exhaustive discussion of the question, participated in by all members of the court, in *People v. Hurlbut*, 24 Mich. 44." Judge McGrath, after stating that the correctness of the doctrine enunciated in *People v. Hurlbut, supra*, has not been since questioned but approved in numerous cases which he cites, said: "The act of 1857 is therefore invalid, as the legislature cannot divest the people of the county of Wayne of the right to select their own officers in the usual manner."

The Michigan cases referred to in this opinion are in point here, as they were decided under a constitution

like our own, which contains no express provision limiting the power of the legislature to authorize the governor to appoint purely local officers. The supreme court of Michigan steadfastly denied the power of the legislature to deprive municipal corporations of the right of local self-government, although in *People v. Mahaney*, 13 Mich. 481, that court, in harmony with the principle announced by many courts, approved a law authorizing the selection by the governor of police commissioners for cities, recognizing a distinction between officers whose duties are purely of a local character and officers chosen for a particular city or town whose duties are of a public or general nature, and which concern the state or general public. The former class the legislature may not empower the governor to appoint, while such authority may be conferred upon the executive as to the officers belonging to the latter class.

The legislature of the state of Indiana passed a law (Acts 1889, p. 247) purporting to give control of the streets, alleys, sewers, lights, water supply, etc., in cities containing more than fifty thousand inhabitants to boards of public works appointed by the legislature for residents of the cities affected. This act was under consideration in *State v. Denny*, 118 Ind. 382, and held to be void as denying the right of local self-government, although the law contravened no express provision of the constitution of that state. That decision is planted squarely upon the proposition that the right of the people to govern themselves as to matters purely local in their nature, through the medium of local municipal officers of their own choosing, was not curtailed by the adoption of the constitution, but is still vested in them, and the legislature is powerless to take such right away. Coffey, J., in delivering the opinion of the court, observed: "It is perhaps true that the general assembly may, at will, pass laws regulating the government of towns and cities, taking from them powers which had previously been granted, or adding to that which had previously

been given, but we do not think that it can take away from the people of a town or city rights which they possessed as citizens of the state before their incorporation. The object of granting to the people of a city municipal powers is to give them additional rights and powers to better enable them to govern themselves, and not to take away any rights they possessed before such grant was made. It may be true, that as to such matters as the state has a peculiar interest in, different from that relating to other communities, it may, by proper legislative action, take control of such interest; but as to such matters as are purely local, and concern only the people of that community, they have the right to control them, subject only to the general laws of the state, which affect all the people of the state alike. The construction of sewers in a city, the supply of gas, water, fire protection, and many other matters that might be mentioned, are matters in which the local community alone is concerned and in which the state has no special interest more than it has in the health and prosperity of the people generally, and they are matters over which the people affected thereby have the exclusive control, and it cannot, in our opinion, be taken away from them by the legislature." In the same opinion, after speaking of the duties and powers conferred upon the three members of the board provided for by the act, this language is employed: "If the legislature may put these matters in the hands of three men, why not in the hands of one man? And if they may transfer these matters, why may they not transfer others? In other words, the effort is by this act to take from the city all control over the improvements of the city, without the consent of her people, and place it in the hands of the agents of the state chosen by the legislature, and charge the people of the city with the whole expense. We do not think that the people have conferred upon the legislature any such power. It is subversive of all local self-government, a right that the people did not surrender when they adopted the constitution. They

still retained, after the adoption of that instrument, the right to select their own local officers, and every effort to deprive them of such right must be held to be beyond the power of the legislature. In our opinion, the entire act, attempting to create a board of public works and affairs for cities having a population of fifty thousand or more, is in conflict with the constitution and is void."

Elliot, C. J., in a separate concurring opinion in the same case, said: "The right to choose officers is primarily and inherently in the people. Primarily it is neither an executive nor a legislative function. Except as expressly or impliedly delegated to the executive or the legislative department, it resides entirely in the electors of the state. Silence on the subject takes no part of the power from the people, and vests none in their representatives. (*State v. Johns*, 3 Ore. 533; *People v. Bull*, 46 N. Y. 57; *Speed v. Crawford*, 3 Met. [Ky.] 207.) * * * I do not deny that the legislature has the power to change the form and mode in which municipal corporations shall be governed; on the contrary, I affirm that without the consent of the inhabitants the form of the corporate government may at any time be altered, but I do deny that the legislature has the power to deprive the electors of a municipal corporation of the right to choose their own immediate local officers. By immediate local officers I mean such as are charged with the control of purely local concerns, as the streets, the fire apparatus, and the like matters. In the class of local officer I do not include the peace-keeping officers, or the constabulary, for such officers are, in reality, officers of the state, as it is the duty of the state to provide for the personal safety of its citizens on the thronged streets of a great city as well as on the secluded rural highways. What I affirm, in short, is this, that because an elector lives in a city he cannot have the right to vote upon purely local affairs taken from him by any statute. The decisions which declare that the state may appoint peace officers in cities can be sustained only upon the ground that

such officers are state officers and not local officers. The principle is one not to be extended, but to be limited."

The precise question now before us has been determined by the supreme court of Indiana in able and exhaustive opinions in *City of Evansville v. State*, 118 Ind. 426, and *State v. Denny*, 118 Ind. 449. In both of those cases there was under consideration an act creating a metropolitan police and fire board in cities having a certain population, providing for the appointment of the commissioners or members of said board by the legislature, and giving them full control and power over the police and fire departments of such cities and property and records belonging to said departments. The act was assailed as being unconstitutional on various grounds, among others, that it deprived the people of the cities coming within the provisions of the law of the right of local self-government. The invalidity of the law was declared on that ground. Berkshire, J., in delivering the opinion of the court in the first case, uses this language: "The commissioners who compose the board are not the officers or representatives of the city, for it has no part in their selection, and no control over their actions; they are appointed by the legislature and derive all authority from that high power. They are, therefore, the officers and representatives of the state, and not of the city. But, under the law, all expenses of whatever kind, relating to these departments, the city has to pay. * * * If the act related alone to the management of the police department, and the state was proposing to take upon itself the burden of maintaining the department as well as its management, or if it were made to appear that the city had failed to furnish a police force, or one that was sufficient for the protection of persons and property, then a very different question would be presented for our consideration. Except so far as an efficient police department goes, which is for the protection of the public at large, the people of the state are not interested in any of the matters to which the said act of the legislature re-

lates, but the citizens of Evansville and Indianapolis, the two cities to which the act applies, are alone interested. It, therefore, becomes a question whether or not the legislature may take from the people of these two cities the right of local self-government, the right to manage and control their own purely local affairs in their own way, and place the management of all such local affairs under state control. We do not believe that the legislature has any such power. Before written constitutions, the people possessed the power of local self-government. It is conceded that the people of Indiana originally possessed all governmental power, and it will not be questioned but that they still possess such of that power as has not been delegated. All the power which the people have delegated is what has passed from them by the constitution. (Pomeroy, Constitutional Law [9th ed.], see title 'Centralization and Local Self-Government,' sec. 151 *et seq.*; 1 Dillon, Municipal Corporations [3d ed.] sec. 9; Cooley, Constitutional Limitations [5th ed.] 225; *People v. Hurlbut*, 24 Mich. 44; *People v. Detroit Common Council*, 28 Mich. 228; *People v. Mayor*, 51 Ill. 17; *People v. Lynch*, 51 Cal. 15; *People v. Albertson*, 55 N. Y. 50; *People v. Porter*, 90 N. Y. 68.) * * * No provision is found anywhere in the constitution which takes from the people the right of local self-government."

The third division of the syllabus in *State v. Denny, supra*, reads thus: "The right of local self-government in towns and cities was not surrendered upon the adoption of the constitution, but is still vested in the people of the respective municipalities, and the legislature cannot appoint officers to administer municipal affairs, its power ending with the enactment of laws prescribing the manner of selection and duties of the officers." Olds, J., delivered the opinion of the court in that case, and in discussing the question under consideration said: "It is contended by counsel for appellants that by the constitution of the state all power is vested in the legislative department of the government except such as is expressly

granted to the executive and the judiciary, or retained by the people in the constitution itself. We are not in harmony with counsel's theory of our state government, but we state it this way: At the adoption of the state constitution all power was vested in the people of the state. The people still retain all power, except such as they expressly delegated to the several departments of the state government by the adoption of the constitution. The legislative, executive, and judicial departments of the state have only such powers as are granted to them by the constitution. In the first section and the first article of the constitution it is declared 'that all power is inherent in the people.' It is contended by counsel that as certain rights were granted and certain other rights reserved by the people, therefore all rights were granted except such as were expressly reserved. The peculiarity of the theory is that while the people, by the constitution, made grants of power to three different departments of government, it is contended that all power that was at that time in the grantor, the people, passed to one branch of the government, viz., the political or legislative branch, and that it took all power not mentioned in the instrument, and the executive and judiciary took only such as was expressly granted to them and the people retained such only as was specifically named and reserved. It is certainly a novel method of construction, and contrary to all rules for construing contracts, deeds, wills, and other written instruments, and it seems to us that the proposition need but to be stated to prove its fallacy. In construing and giving an interpretation to the constitution we must take into consideration the situation as it existed at the time of its adoption, the fact expressed in the instrument that all power is inherent in the people, the rights and powers vested in and then exercised by the people, the existence of cities and towns and the right of local self-government exercised by them, and the laws in force and form of government existing at the time of its adoption. One of the fundamental principles of mu-

nicipal corporations is the right of local self-government, including the right to choose local officers to administer the affairs of the municipality."

Again, in the same opinion, after quoting from various authorities to establish that the inherent right of local self-government lies at the foundation of our institutions, it is stated that "we might quote from numerous other authorities to the same effect as the above, but we have quoted sufficient to show that the right of local self-government, including the right of the people of a municipality to select their own officers, was a sacred, fundamental principle and idea of municipal corporations, well founded, sacredly guarded, and long enjoyed by the people of the state at the time of the adoption of the constitution. As we interpret the theory of our state government, this right of local self-government, vested in, exercised, and enjoyed by the people of the municipalities of the state at the time of the adoption of the constitution, yet remains in them, unless expressly yielded up and granted to one of the branches of the state government by the constitution. And in the decision of the question presented in this case it is only necessary to determine whether or not that power is granted to the legislative branch of the government, as it is only it which has attempted to deprive the people of cities of the right to choose their own officers and administer their own local affairs."

After reviewing the various provisions of the constitution of Indiana relating to the legislative department of the state, the opinion continues: "The conclusion we have unhesitatingly reached is that the right of local self-government in towns and cities of this state is vested in the people of the respective municipalities, and that the general assembly has no right to appoint the officers to manage and administer municipal affairs; that the right of the general assembly ends with the enactment of laws prescribing the manner of selection and the duties of the officers. There is a class of officers whose duties

are general, but who act for the state in localities, which the general assemblies of some states have exercised the right to appoint, and courts have upheld the right to make such appointments; but this class of officers are constabulary or peace officers, those whose duties are to preserve the peace. In this case we do not deem it necessary to consider that portion of the law relating to peace officers, or to determine the right of the general assembly to appoint officers of that character under our constitution. The right of the state, however, to exercise such power must rest on the theory that the state owes protection to its citizens wherever they may be within the borders of the state, alike upon highways in a sparsely populated territory as upon the streets of a densely populated city, and to discharge such obligation has the right to exercise control over the peace officers of the state; but the law in question provides for taking exclusive control of the fire department within certain cities, appointing the officers and controlling the department, and compelling the cities to pay all the expenses. * * * Is it fair to presume that the people of this state, in the adoption of the constitution, did not intend to surrender the right of self-government in so far as to allow the legislature to even take charge of the fire department of every town and city of the state, and to appoint officers to take charge of and manage the affairs of such department and limit the legislative body to sixty-one days in every two years? We do not believe that such was the intention of the people at that time, nor do we believe that such is their understanding of the power of the legislature at the present time; nor is there any word or sentence in the constitution granting such power. * * * We hold that the right to provide and maintain a fire department in a town or city is one of the rights which are vested in the people of the municipalities, is to be exercised by them, and is not subject to legislative interference, except in so far as that body may prescribe rules to aid the people of the municipality in the exer-

cise of such right; that such right is an element of local self-government which was vested in the people of the municipalities at the time of the adoption of the constitution and was not parted with by them; that so much of the statute under consideration as relates to the management and control of the fire department of cities is unconstitutional and void."

Further along in the opinion it was decided that the provisions of the statute relating to the fire and police departments were so interwoven, connected with, and dependent upon each other as to invalidate the entire law. It is true that the statute was held unconstitutional also on other grounds, one of them being that it attempted to confer on the legislature executive functions, the power to appoint the members of the board. But the right of local self-government was not incidentally discussed in the opinion as has been suggested, but was a prominent feature of the decision, and the law was expressly declared invalid as infringing the inherent right of the municipalities embraced within the purview of the law to choose their own local officers.

No case has come under the observation of the writer, except *State v. Seavey*, 22 Neb. 454, which sustains a law authorizing the appointment, either by the legislative or the executive, of a board of fire and police commissioners for a municipal corporation. The decisions relied upon and cited by Commissioner RYAN, excepting the case above indicated, do not so hold, as a cursory examination discloses.

In *Daley v. City of St. Paul*, 7 Minn. 311, it was ruled that the legislature possessed the power to appoint commissioners to lay out and establish a public street within the corporate limits of the city of St. Paul, and to assess the damages and benefits flowing from the taking of property for that purpose. It is to be observed that only seventeen lines of the official report of the opinion of the court are devoted to a consideration of the question, and the conclusion there reached is predicated entirely upon

People v. Draper, 15 N. Y. 533, in which last mentioned case the power of the legislature to appoint municipal officers was not involved nor decided. In *People v. Draper* the validity of an act of the state of New York was sustained which established a metropolitan police district, comprising the counties of New York, Kings, Richmond, and Westchester, and provided for the appointment of five commissioners by the governor with the advice and consent of the senate, who, with the mayors of New York and Brooklyn, constituted a board of police for said district. The law under consideration in that case was assailed as being in conflict with section 2, article 10, of the constitution of 1846 of the state of New York, which provided: 'All county officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties, or appointed by the board of supervisors or other county authorities, as the legislature shall direct. All city, town, and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns, and villages, or some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct." The court held, and properly so, that the commissioners provided for by the act there under consideration were not county, city, town, or village officers, but mere officers created after the adoption of the constitution, and therefore the section of the constitution quoted expressly committed to the legislature the power to provide for election or appointment of such commissioners in any manner it deemed suitable. We have no similar constitutional provision in Nebraska.

In *Police Commissioners v. City of Louisville*, 3 Bush [Ky.] 597, there was under consideration an act of the

legislature providing for the organization of a police force for the city of Louisville and county of Jefferson. That decision is not in point here, for the very obvious reason the statute there involved provided for the election of the commissioners by the qualified voters of the city and county. Moreover, said commissioners were not municipal officers, nor was the question of the inherent right of the people to local self-government involved.

By article 133 of the constitution of the state of Louisiana of 1864 it was provided that the citizens of the city of New Orleans should have the right of appointing the several public officers necessary for the administration of the police of said city, and the said article gave the mayor the power to select the members of the police force of said city. The constitution of that state of 1868 omitted article 133 of that of 1864, and under the subsequent constitution the legislature created a board of police commissioners for the city of New Orleans to be appointed by the governor, which board was given full power to appoint and remove and control the officers and men of the police force of said city. This act was under consideration in *Diamond v. Cain*, 21 La. Ann. 309, where it was held that the omission in the constitution of 1868 of article 133 of the constitution of 1864 left the entire matter of the police regulations of New Orleans under the power and discretion of the legislature, and that the act there under review divested the mayor of the authority to appoint public officers. The right of local self-government was not discussed or adjudicated in that case.

In *Commonwealth v. Plaisted*, 148 Mass. 375, a law was sustained which created a board of police for the city of Boston to be appointed by the governor and council. The court in the opinion concede that the question of the invalidity of the law, on the ground that it deprived the city of the power of self-government in matters of internal police, was but little relied on in the argument; and the question was disposed of by the court without much

consideration and without the citation of a single authority in support of the conclusion reached. Moreover, that case is distinguishable from the one at bar, in that the officers provided for by that act had nothing to do with the control or management of the fire department of the city, while the statute before this court commits the whole subject of the appointment of firemen and the selection of the chief and other officers of the fire department of metropolitan cities, and the removal of such officers and men, to the board of fire and police commissioners created by said law. The authorities quite uniformly agree that the preservation of the public peace is essentially a matter of public concern; that the instrumentalities by which the same is effected, whether appointed by the governor or elected by a vote of the people, are agencies of the state and not of the municipalities, and that there exists a well defined distinction between matters which concern the municipality and those which pertain to the state at large. Conceding that the legislature, unless inhibited by the constitution, may provide the mode of selecting police officers, yet it has no power or authority to deprive the municipalities of the right to select officers whose duties are solely of a local nature, such as officers connected with the fire department. While the police control of cities in some of the states has been confided to boards of police commissioners appointed by some executive state officer or officers, yet the validity of such laws has been sustained solely on the ground that such officers are agencies of the state and not of the municipalities for which they were appointed.

State v. Hunter, 38 Kan. 578, and *State v. Covington*, 29 O. St. 102, are distinguishable on the ground above stated, since the act under consideration in each case provided for the appointment of a board of police commissioners to be appointed by state authority, and no power was given such board concerning the management and control of the fire department.

Gillespie v. City of Lincoln, 35 Neb. 34, is not an authority

in favor of the proposition that the state has the power to choose the officers or members of the fire department of a city. It was decided in that case that a municipal corporation was not liable for the negligent act of members of its fire department.

State v. Seavey, 22 Neb. 454, sustained a section of "An act incorporating metropolitan cities and defining, regulating and prescribing their duties, powers, and government," approved March 30, 1887, which provided for a board of fire and police commissioners for cities governed by that act, and for their appointment by the governor. It was held that the mode designated for the selection of the members of the board did not contravene the constitution. That decision is diametrically opposed to the conclusion reached by the writer and is the only one of its kind. It has been asserted, and probably not without foundation, that the section of the law there under consideration was adopted to give the party then in power in the state a supposed partisan advantage in the government of the affairs of the city of Omaha, and it may be the same motive influenced the adoption of the provision of the law of 1897 under review. However that may be, it affords no ground for declaring a law unconstitutional. The sole question that concerns the court is whether the law is repugnant to any express or implied limitations upon the power of the legislature. The act before us, as well as the one construed in *State v. Seavey, supra*, denied to the people of Omaha the power to choose a portion of their own local officers, and in so far as it did so is unconstitutional; for the right to provide and maintain a fire department in a city is one of the powers vested in the inhabitants of such municipality as an element of local self-government and is to be exercised by them without legislative interference, except to the extent that the lawmaking body may create rules to assist in the exercise of such right. It is to be deplored that a different conclusion was reached in the case just mentioned, as it is always embarrassing to a court to overrule

one of its own decisions. No member of the court has been more persistent than the writer in following our own adjudications, and would do so now were he not convinced that the rule announced in *State v. Seavey, supra*, is not only wrong, but is far-reaching in its consequences. The legislation which that opinion sustains tended to take from the people one of their reserved powers—the right of local self-government, one of the principles upon which our state fabric rests. If the legislature may authorize the governor to appoint a fire and police commission for cities of the metropolitan class, then there is nothing to prevent the lawmakers from taking from every city and town in the state the power to choose all of the local officers thereof, except police judge, which position is made elective by the constitution, and empower the governor to appoint all municipal officers, except the one just named. The mind revolts when the doctrine of the *Seavey Case* is carried to its legitimate extent. The denial to the people of the right to govern themselves is undemocratic, and if such doctrine is enforced, we could no longer boast of "a government of the people, for the people, and by the people." The demurrer to the application, as well as the demurrer to the answer and cross-petition of the interveners, should be overruled. The demurrer to the answer of the respondents, the governor's appointees, should be sustained, and a judgment of ouster entered against them.

It will be observed that section 168 of chapter 12*a*, Compiled Statutes, attempts to make persons engaged in any one of certain enumerated vocations ineligible to the office of police commissioner. The omission to discuss that provision must not be construed as impliedly sustaining its constitutionality. We merely refrain from now expressing an opinion on the subject.

JUDGMENT ACCORDINGLY.

HARRISON, C. J., concurring.

RYAN, C., dissenting.

We cannot concur in the views of a majority of the court. This action of quo warranto was instituted in this court upon the relation of the attorney general to test the right of J. H. Peabody, D. D. Gregory, William C. Bullard, and R. E. L. Herdman to serve as fire and police commissioners of the city of Omaha under and by virtue of appointments of the governor of this state. Certain other parties were made defendants or became such by intervention, but neither their claims nor status need be described, for the sole question presented by the demurrer to the answer asserting the validity of the said appointments is whether the statute, under which the above indicated appointments were made, is valid. This statute is embodied in the Compiled Statutes as chapter 12*a*, of which the sections to be discussed are 166 and 169. By these it is provided that in cities of the class of Omaha there shall be a board of fire and police commissioners, to consist of the mayor and four electors of the city, who shall be appointed by the governor. 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, are vested in that board, to which are delegated certain defined powers proper to enable it to perform its functions. It is argued against the validity of the above noted statutory provisions that by them the people of Omaha are deprived of the right of local self-government. It is not claimed that these sections contravene any express provision of the constitution prescribing how municipal officers must be appointed, but that they deny the right of local self-government, which exists independently of our constitution, upon principles which are recognized in the Declaration of Independence and the federal constitution and are illustrated in the evolution of our forms

of government, state and national. It is conceded that the case of *State v. Seavey*, 22 Neb. 454, must be overruled if this contention is sustained, and accordingly we shall consider whether or not there have been advanced arguments of sufficient weight and cogency to justify the course indicated.

It seems to be assumed that if *State v. Seavey* is overruled there will result no confusion or conflict by reason of other decisions of this court. In this assumption we think counsel for plaintiff are mistaken. In *Magneau v. City of Fremont*, 30 Neb. 843, it was said: "It has been the uniform holding of this court that the constitution is not a grant but a restriction of legislative power, and that the legislature may legislate upon any subject not inhibited by the constitution. (*State v. Lancaster County*, 4 Neb. 537; *State v. Dodge County*, 8 Neb. 124; *Hanscom v. City of Omaha*, 11 Neb. 37; *State v. Ream*, 16 Neb. 685; *Shaw v. State*, 17 Neb. 334.)" In *State v. Moore*, 40 Neb. 854, there was under consideration the validity of a specific appropriation made by the legislature for the relief of Scott's Bluff county, and it was said: "The next reason assigned by the auditor for not drawing the warrant to pay the appropriation is 'that the act making the appropriation is contrary to the letter and spirit of the constitution of the state of Nebraska.' We quote Cooley, Constitutional Limitations 4th ed., p. 210, as follows: 'When a law of congress is assailed as void, we look into the national constitution to see if the grant of specified powers is broad enough to embrace it; but when a state law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the constitution of the United States, or of the state, we are unable to discover that it was prohibited. We look in the constitution of the United States for grants of legislative powers, but in the constitution of the state to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the state is vested

in its creation. Congress can pass no laws but such as the constitution authorizes, either expressly or by clear implication, while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. The lawmaking power of the state recognizes no restraints and is bound by none, except such as are imposed by the constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is, therefore, the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute.' Tested by the rule quoted from this eminent jurist, there is nothing in the constitution of Nebraska that prohibits the legislature of the state, representing, as it does, the sovereignty of the people, from appropriating money to reimburse a county for expenses incurred by it in the prosecution of criminals." To sustain the contention against the right of the four commissioners appointed by the governor we must therefore not only directly overrule *State v. Searey, supra*, but we must go a step further and discard the principle just quoted from *Magneau v. City of Fremont, supra*. In the first paragraph of the syllabus of *Boyes v. Summers*, 46 Neb. 308, it was said: "When this court is asked to declare a statute unconstitutional, the particular section of the constitution which it is claimed the law infringes should be pointed out in the brief filed," and by analogy we are led to believe that there should be a like certainty that a statute is void by reason of considerations other than a conflict with a constitutional provision.

In entering upon the discussion of the identical question with which we are now concerned it was said by Judge Dillon, with a conservatism not always the characteristic of text-writers: "The adjudged cases exhibit some contrariety of opinion respecting the scope of legislative authority over municipal corporations, or rather respecting the question how far corporations, viewed as

legal personalities, and as such representing special rights of the community that is incorporated, are within the operation or protection of the usual constitutional restraints upon legislative power. The present chapter will be devoted to a consideration of this subject. In dealing with questions of this complex nature we must beware of broad propositions and avoid general speculations. The only wise and safe course is to keep near the shore and within the light of actual adjudications, accompanying these with such observations as seem to be required." With this cautionary language in mind the case of *State v. Denny*, 118 Ind., 449, very confidently relied upon by counsel for the relator, may be profitably considered. A statute of the state of Indiana provided that in all cities of the state, of 29,000 or more inhabitants, there should be established within and for such cities a board of metropolitan police and fire department, to consist of three commissioners. The members of the first board or boards were to be elected by the general assembly upon the taking effect of the act, and said board was empowered to select a superintendent of police, captains, sergeants, detectives, and such other officers and patrolmen as the said board might deem advisable. This board was also clothed with power to remove or suspend any member of the police force and provide rules of discipline, and to make and promulgate general and special orders through the superintendent, who was constituted the executive head of the force. In the discussion of the provisions of the above act there were used certain expressions with reference to local self-government, and those expressions have been seized upon as material with which to fortify the position of the relator. It may be that the court was influenced to its conclusion adverse to the validity of the act by the fact that the right of local self-government was denied to people resident within cities of the class indicated; but even if this is true, a careful consideration of the line of argument of the court will disclose that this was not the para-

mount consideration, but that this action of the legislature in reserving to itself the power of appointment of the three commissioners provided by the act was a very prominent, if not the controlling, factor. After a statement of the facts and a discussion of the authentication of the act in question there is found in the opinion this language: "We next consider whether or not the act and its provisions are within the scope of legislative authority under the constitution of the state. It is contended by counsel for appellants that, by the constitution of the state, all power is vested in the legislative department of the government, except such as is expressly granted to the executive and the judiciary or retained by the people in the constitution itself. We are not in harmony with counsel's theory of our state government, but we state it this way: At the adoption of the state constitution all power was vested in the people of the state. The people still retain all power, except such as they expressly delegated to the several departments of the state government by the adoption of the constitution. The legislative, executive, and judicial departments of the state have only such powers as are granted to them by the constitution. In the first section and first article of the constitution it is declared 'that all power is inherent in the people.' It is contended by counsel that as certain rights were granted and certain other rights reserved by the people, therefore all rights were granted except such as were expressly reserved. * * * As we interpret the theory of our state government, this right of local self-government, vested in, exercised, and enjoyed by the people of the municipalities of the state at the time of the adoption of the constitution, yet remains in them, unless expressly yielded up and granted to one of the branches of the state government by the constitution. And in the decision of the question presented in this case it is only necessary to determine whether or not that power is granted to the legislative branch of the government, as it is only it which has attempted to de-

prive the people of cities of the right to choose their own officers and administer their local affairs." Following the above quoted language there was a discussion of the powers of the legislative branch of the state government as defined by the constitution of the state of Indiana. It would be unprofitable to closely follow this discussion, but from it we shall quote the following language: "Under our system of government, divided into three separate, distinct, co-ordinate branches, the legislative and judicial departments may exercise appointing power to offices peculiarly related to and connected with the exercise of their constitutional functions, and to maintain their independent existence; that is to say, the general assembly may elect or appoint the officers of their respective branches and relating to their department of the government; courts may appoint administrators, guardians, master commissioners, and such officers as are necessary to the free and independent exercise of power conferred by the constitution, but the appointment of officers generally is naturally and properly an executive function. (*Taylor v. Commonwealth*, 3 J. J. Marsh. [Ky.] 401; Letter of Thomas Jefferson to S. Kerchival, dated November 21, 1816; *Marbury v. Madison*, 1 Cranch [U. S.] 137; *Wood v. United States*, 15 Ct. of Claims [U. S.] 151; *Perkins v. United States*, 20 Ct. of Claims [U. S.] 438; *United States v. Perkins*, 116 U. S. 483; *State v. Covington*, 29 O. St. 102; *Achley's Case*, 4 Abb. Pr. Rep. [N. Y.] 35; *State v. Kennan*, 7 O. St. 546; *People v. McKee*, 68 N. Car. 429; *State v. Tate*, 68 N. Car. 546; Pomeroy, Constitutional Law sec. 643; Federalist pp. 373—387, letters 47 and 48.) The only remaining provision which we think it can possibly be claimed granted any power to the general assembly to fill offices is section 1, article 15, which provides: 'All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law.' * * * As applied to town officers, the language used certainly cannot be construed as an intention on

the part of the people to surrender their right of local self-government and as granting the power to the general assembly to elect or appoint local officers in the various towns of the state. * * * Section 3, article 6, provides that 'such other county and township officers, as may be necessary, shall be elected or appointed in such manner as may be prescribed by law.' We have not placed any new or forced construction on the constitution, nor have we advanced any new or strange theory of our state government, but are adhering to the well recognized theory of our government, and walking in the same beaten path that all have walked since the adoption of the constitution. Since its adoption, and before, the people of the counties, townships, cities, and towns have exercised the exclusive right of selecting and choosing their local officers, the legislature has recognized their right to do so, and prescribed the manner of election, and now, for the first time, the general assembly has claimed to itself the power of selecting such officers for two cities of the state. We have quoted and considered all the provisions of the constitution granting power to the legislative department of the state government, and are clearly of the opinion that the legislature is granted no such power as is exercised in the passage of this act, in providing for the election of and in electing the officers contemplated by the act; but, indeed, it is not earnestly contended by counsel that any such power is by express terms granted, but it is contended, as stated in the outset, that by the creation of the departments of government by the constitution all power vested in the legislature that was not, by express terms, reserved to the people or granted to the executive or judicial departments, and that the burden rests on him who asserts that a law is unconstitutional to point out the provisions of the constitution that forbid its passage." After briefly arguing that a statute might be declared unconstitutional even though it might be impossible to indicate any express provision of the con-

stitution as being one with which such statute might conflict the opinion continues as follows: "The conclusion we unhesitatingly reach is, that the right of local self-government in towns and cities of this state is vested in the people of the respective municipalities, and that the general assembly has no right to appoint the officers to manage and administer municipal affairs; that the right of the general assembly ends with the enactment of laws prescribing the manner of selection and duties of the officers. There is a class of officers whose duties are general, but who act for the state in localities, which the general assemblies of some states have exercised the right to appoint, and courts have upheld the right to make such appointments; but this class of officers are constabulary or peace officers, those whose duties are to preserve the peace. In this case we do not deem it necessary to consider that portion of the law relating to peace officers or to determine the right of the general assembly to appoint officers of that character under our constitution. The right of the state, however, to exercise such power must rest on the theory that the state owes protection to its citizens wherever they may be within the borders of the state, alike upon highways in a sparsely populated territory as upon the streets of a densely populated city, and to discharge such obligation has the right to exercise control over the peace officers of the state; but the law in question provides for taking exclusive control of the fire department within certain cities, appointing the officers and controlling the department and compelling the cities to pay all of the expenses. Although some authority may be found to support such right on the part of the legislature, we think it is in conflict with our system of state government and derogatory to the rights of the people."

A very full consideration has been given *State v. Denny, supra*, because it was in argument relied on as distinctly sustaining the contention of relator's counsel that the law which we now have under review must be declared

unconstitutional because it deprives the citizens of Omaha of the right of local self-government. It is quite clear that the fact the legislature had arrogated to itself the right to name the three commissioners by whom the city officers were to be appointed and might be removed had great weight with the court, for by that tribunal this was described as an executive and not a legislative function. Moreover, even under these circumstances, the court very strongly intimated that the appointment by commissioners of the police officers of the city as part of the constabulary force of the state might be upheld,—a proposition afterwards sanctioned in *State v. Kolsem*, 130 Ind. 434. It was doubted in *State v. Denny, supra*, whether the consideration with respect to police officers tended to countenance the control of the fire department by state commissioners, but in this state the relations of the fire departments of cities to the state has been held to be the same as the relation of police forces of cities. (*Gillespie v. City of Lincoln*, 35 Neb. 34.) As we understand the opinion in *State v. Denny, supra*, the right of local self-government was discussed somewhat incidentally, and alone might not have been sufficient to have brought the court to the conclusion which was reached; and even if we are wrong in this conception of the gist of the argument, the intimation of that court was very strongly that appointments of police officers by state authorities could be justified on a ground which in this state would justify like appointments in the fire departments. As these two classes embrace the subject-matter herein in controversy the case of *State v. Denny, supra*, cannot be considered as very satisfactorily supporting the contention of counsel for the relator with respect to the city's right of local self-government.

It was urged that the supreme court of Michigan had repeatedly upheld the right of local self-government in a manner and to an extent which should be followed in the case at bar.. The opinion in one of the cases cited (*Commissioners v. Detroit*, 28 Mich. 228) was written by

Judge Cooley, and as he has referred therein to the other cases in that state we shall accept his description of their scope. In *Commissioners v. Detroit, supra*, there was under consideration a statute whereby the legislature of Michigan had created a board of park commissioners for the city of Detroit. This board had power and authority to adopt plans for a public park or boulevard, or both, with the necessary avenues or approaches thereto, for the city of Detroit, and for these purposes the board might select the needful lands, either wholly or in part, within the city or any of the adjacent townships, and might acquire and purchase lands at a cost of not to exceed $300,000. When the site of a park or boulevard should be selected the board might lay before the city council estimates of the expenses necessary to carry out its plans, and the said council was thereupon required to provide the money for such expenses by the issue and sale of city bonds. The action was for a mandamus to compel the issue and sale of bonds, the preliminaries thereto having, as alleged, been complied with. On this subject there was in the opinion this language: "The proposition that there rests in this or any other court the authority to compel a municipal body to contract debts for local purposes against its will is one so momentous in its importance, and so pregnant with possible consequences, that we could not fail to be solicitous when it was presented that its foundations should be thoroughly canvassed and presented, and that we might have before us in passing upon it all the considerations that could be urged in its support. * * * In *People v. Hurlbut*, 24 Mich. 44, we considered at some length the proposition which asserts the amplitude of legislative control over municipal corporations, and we there conceded that when confined, as it should be, to such corporations as agencies of the state in its government, the proposition is entirely sound. In all matters of general concern there is no local right to act independently of the state; and the local authorities cannot be permitted to determine for themselves whether

they will contribute through taxation to the support of the state government, or assist when called upon to suppress insurrections or aid in the enforcement of the police laws. Upon all such subjects the state may exercise compulsory authority, and may enforce the performance of local duties, either by employing local officers for the purpose or through agents or officers of its own appointment. The same doctrine was declared in *People v. Mahaney*, 13 Mich. 481, and in *Bay City v. State Treasurer*, 23 Mich. 503. * * * Whoever insists upon the right of the state to interfere and control by compulsory legislation the action of the local constituency in matters exclusively of local concern, should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify, on principle, a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the state, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish a park or boulevard for the recreation and enjoyment of its citizens. The one law would rest upon the same fallacy as the other, and the reasons for opposing and contesting it would be the same in each case." There has been sufficient quoted from *Commissioners v. Detroit, supra*, to disclose how slightly it tends to countenance the principle herein contended for, and the principle on which this case was decided was determinative of the controversy in *People v. Lynch*, 51 Cal. 15. Section 2, article 10, of the constitution of the state of New York in force at the time the cited cases from the courts of that state were decided was in the following language: "All county officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties or appointed by

the boards of supervisors or other county authorities, as the legislature shall direct. All city, town, and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct." It is very clear that the above provisions as to the election or appointment of city, town, and village officers render inapplicable the cases cited to sustain the proposition that there exists a right of local self-government independently of constitutional authority. Indeed, an inference might very plausibly be drawn that the legislature could have provided for the government of cities, towns, and villages in the absence of the constitutional restriction noted, and that the existence of such a constitutional restriction raises a presumption of its necessity.

It is probable we may have omitted mention of some cases relied upon in the voluminous briefs of counsel for the relator, but we believe we have noted those most confidently relied upon, and shall now address ourselves to a review of the cases cited by the opposing counsel.

In *Commonwealth v. Plaisted*, 148 Mass. 375, there was under consideration a statute whereby the governor of the state of Massachusetts, with the advice and consent of the council, was required to appoint from the two principal political parties three citizens of Boston, who should constitute a board of police of said city. The police of the city was to be appointed, and was subject to removal by this board. Referring to this act of the legislature the court said: "It is also suggested, though not much insisted on, that the statute of 1885, c. 323*, is unconstitutional, because it takes from the city the power of self-

government in matters of internal police. We find no provision of the constitution with which it conflicts, and we cannot declare an act of the legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guarantied by any provision of the constitution. While the constitution recognizes our system of town governments as an inherent part of our general system of government, so that the legislature could not abolish the town system without coming in contact with some part of its provisions, yet in most respects it leaves the power and duty of providing laws for the government of the towns and cities in the discretion of the legislature. * * * The several towns and cities are agencies of government largely under the control of the legislature. The powers and duties of all the towns and cities, except so far as they are specifically provided for in the constitution, are created and defined by the legislature, and we have no doubt that it has the right in its discretion to change the powers and duties created by itself and to vest such powers and duties in officers appointed by the governor, if in its judgment the public good requires this, instead of leaving such officers to be elected by the people or appointed by the municipal authorities."

In the year 1860 the legislature of Maryland by statute provided for a new police system, and to carry it into effect named certain commissioners, upon whom were conferred the powers necessary for that purpose. Contrary to the views expressed in *State v. Denny*, *supra*, the court of appeals of Maryland sustained the exercise of this appointing power by the legislature. (*Baltimore v. State*, 15 Md. 376.) In the opinion there was the following language: "It is conceded that the legislature was not under any obligation to confer the power of appointment on the executive; by this clause of the constitution the power was placed there, in the event of a different mode not being prescribed in the law. But, it is said, it

ought to have been delegated to the people or local authorities of the city of Baltimore. In the absence of any such requirement of the legislature, we do not perceive that they were under a duty to make such delegation of the appointing power. The constitution surely designed to repose some discretion in the legislature, both over the mode of appointment and the propriety and necessity of passing any law on the subject to which the exercise of that power might relate. It seems difficult to suppose that the people, through the constitution, would intrust to that branch of the government nearest to the source of power the right to create an office and to indicate others to appoint the officers, and be unwilling to place the appointment with the legislature itself. The constitution must receive an interpretation according to the sense in which the people are supposed to have understood its language; but it ought, also, to be construed with reference to the previous legislation of the state. (*State v. Wayman*, 2 G. & J. [Md.] 285.) And when such power has been exercised by the legislature from the earliest period of the government, is it unreasonable to suppose that the people were aware that the same thing might occur again unless prohibited by the constitution? If there is no prohibition, express or implied, it would result from this view that the people intended the legislature should continue to exercise the power."

By an act of the legislature of Kentucky there was established a board of police for the city of Louisville and county of Jefferson. This board was elected by the voters of the city as provided in the aforesaid act, and its right to select police officers pursuant to the provisions of the act in question was denied by the mayor of said city. The question thereby raised was not identical with that presented to us, but in the consideration of the question which was presented there was employed this language: "It is now a well settled and universally recognized American doctrine that the state legislature represents the sovereignty of the people of the state in all

things not delegated to the federal government, nor prohibited by the United States constitution to the states, nor prohibited by the state constitution." (*Police Commissioners v. City of Louisville*, 3 Bush [Ky.] 597.)

In *Diamond v. Cain*, 21 La. Ann. 309, there was under consideration an act of the legislature whereby was created a board of commissioners of the city of New Orleans empowered to remove and appoint the police force of said city. The mayor to whom had been intrusted the powers which were superseded by the provisions of said act insisted that it was unconstitutional, and on that theory appointed a chief of police. The contest was by quo warranto proceedings instituted by the claimant of this office by virtue of the mayor's appointment, against the claimant appointed by the aforesaid board of commissioners, and without the statement of any particular principle applicable to the facts of the case at bar it was held by the supreme court that the appointee of the board was entitled to hold the office in dispute.

In *State v. Hunter*, 38 Kan. 578, there was questioned by quo warranto proceedings the validity of an act of the legislature of Kansas by virtue of which the executive council of that state was authorized to appoint a board of police commissioners, by which board there were required to be appointed a police judge, a marshal, a chief of police, and other police officers. The right of the defendant depended upon the validity of his appointment by said board to fill the office of police judge of the city of Leavenworth. In the opinion there was this language: "The point has been made, though not much contended for, that police government by commission is illegal. In effect, it is said to be opposed to the fundamental theory of self-government, and denies to the people of the district the right to select their own officers from their own number. Whatever may be said regarding the policy of placing the police administration of cities in a board of police commissioners who are chosen by state officers, rather than through the electors of the cities,

there can be no doubt that the legislature has the power to do so. The constitution imposes no limitations upon the legislature in respect to the agencies through which the police power of the state shall be exercised. It may be conferred upon the officers of local municipalities chosen by the people resident therein, or, if deemed expedient, it may be vested in officers or persons otherwise selected. Cities are but agencies of the state created to aid in the conduct of public affairs. The functions of cities and their officers are prescribed by the legislature, and it rests in the sovereign discretion of that body to say how much of the police power shall be exerted by the municipality."

Daley v. City of St. Paul, 7 Minn. 311, was an action for the recovery of damages for the establishment of a public street or road by commissioners appointed by the legislature of the state, and it was held that in the appointment of such commissioners the legislature had not acted outside the scope of its powers, and accordingly the city was liable for the damage awarded.

In *State v. Covington*, 29 O. St. 102, the rights of the defendants, as members of the board of police commissioners and of the board of health for the city of Cincinnati, were challenged by quo warranto proceedings and a demurrer to an answer justifying the title of defendants under the provisions of said act was overruled. The review of the authorities would not be complete if there was omitted a quotation from the case last cited of language applicable to certain provisions of our constitution. Section 26—the closing section of our bill of rights—is as follows: "This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people." In *State v. Covington, supra*, McIlvaine, J., said: "The principal objections urged by counsel for relator against the validity of this statute are based on the first clause of section 2, article 1, of the constitution, which declares 'all political power is inherent in the

people,' and the 20th section of the article, which is as follows: 'This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.' The first of these declarations enunciates the foundation principle of our government, to-wit, that the people is the source of all political power; but it was not intended as a denial of the power or right of delegation and representation. If this were not otherwise palpable, it would be made so by the second declaration above named, to-wit, 'and all powers not herein delegated remain with the people.' This last clause means exactly what its words import; but even from them a plain implication arises that all the powers in and by the constitution delegated do not remain with the people but are vested in the agents and officers of the government, to be exercised by them alone. Among the powers delegated by the constitution is the following, article 2, section 1: 'The legislative power of the state shall be vested in the general assembly.' Now, whatever limitations upon the power thus delegated to the general assembly may be found in other provisions of the constitution, it is quite clear that section 20 of the first article does not impose any limitations upon it whatever. That section only declares that powers not delegated remain with the people. It does not purport to limit or modify delegated powers. It cannot be doubted that the terms of the constitution whereby the legislative power of the state is vested in the general assembly are comprehensive enough to authorize the enactment in question. Rules and regulations for local municipal government of cities and villages are subjects of, and are as clearly within the scope of, legislation as are those which concern the state at large. Cities and villages are agencies of the state government. Their organization and government are under the control of the state, and every law which affects them must emanate from the general assembly, where the legislative power of the state is vested. Now,

it is true that the terms in which this grant of power is made to the general assembly are restrained and limited by many inhibitory provisions contained in the instrument; but we find no express inhibition against such legislation as is contained in this statute. The question, therefore, is, is there an implied inhibition against it? It is claimed by counsel for the relator, as we understand their arguments, that such inhibition is implied from the provisions quoted above from the bill of rights, especially when they are considered in connection with the history and practice of the state at and previous to the adoption of the constitution. The circumstances referred to by counsel, it is claimed, would show that previous to the adoption of the present constitution in 1851 the police of the several cities and villages within the state had been elected by the electors resident therein or appointed by boards or officers elected by the electors. And, therefore, it is to be inferred from the above declaration in the bill of rights, to-wit, 'and all powers not herein delegated remain with the people,' that the power to change the mode of election or appointment of the police force of cities and villages was intended to be withheld from the general assembly. To this argument we desire to express our unqualified dissent. By such interpretation of the constitution the body of laws in force at the time of its adoption would have become as permanent and unchangeable as the constitution itself, for such argument would apply with equal force to every subject of legislation concerning which no special direction is contained in the constitution. Indeed, the true rule for ascertaining the powers of the legislature is to assume its power under the general grant ample for any enactment within the scope of legislation, unless restrained by the terms or the reason of some express inhibition."

The persistency with which we have been urged to recede from the views expressed in *State v. Seavey, supra*, has induced us to re-examine the grounds upon which

that case was decided. The importance of the question involved should be accepted as our sufficient apology for the extended discussion into which we have necessarily been led in the accomplishment of this purpose. We are now more than ever satisfied of the correctness of the proposition laid down in *State v. Seavey, supra*, that "The state is the unit of political power and is responsible, through its legislature and executive, for the preservation of the peace, morals, education, and general welfare of the people, and in the discharge of the duties necessary for these purposes they are limited only by the supreme constitution of the government, the laws passed pursuant thereto, and our own constitution and laws."

For the reasons given in *State v. Covington, supra*, the legislature, in the exercise of its powers in the respect challenged in this case, did not violate any provision of our bill of rights.

SULLIVAN, J., and IRVINE, C., concurring.

JOHN W. ALLSMAN V. EUGENE RICHMOND.

FILED JUNE 23, 1898. No. 8160.

1. **Conflicting Evidence:** REVIEW. The finding of a jury on conflicting evidence will not be disturbed unless clearly wrong.
2. **Evidence of Agency.** The facts stated in the opinion *held* ample to sustain a finding that an agency existed embracing the right to make the contract on which the action was grounded.
3. **Assignment of Error:** EVIDENCE. An assignment of error in this court that the district court erred in admitting the evidence of certain witnesses will be overruled if any of the evidence given by such witnesses was competent.
4. ———: INDEFINITENESS. Alleged errors will not be reviewed unless assigned in the petition in error with such definiteness as to clearly indicate the particular ruling complained of.
5. ———: ———. An assignment of error that "the court erred in overruling the motion for a new trial" is too indefinite where there are several grounds of error set forth in such motion.

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

Joshua Palmer and *E. S. Abbott*, for plaintiff in error.

J. D. Pope and *F. I. Foss, contra.*

SULLIVAN, J.

In this action Eugene Richmond sued John L. Allsman and John W. Allsman to recover for services rendered in training, driving, and caring for a racing stallion during the racing season of 1894. The cause was tried before a justice of the peace of Saline county and resulted in a judgment against both defendants. From this judgment John W. Allsman alone appealed and filed in the district court a general denial to the petition. Upon the issues joined a trial was had to a jury and the plaintiff was again successful. The defendant John W. prosecutes error to this court, and among the assignments insists that the verdict is not sustained by sufficient evidence.

The horse was owned by John W., and managed by his son, John L., with whom the contract of hiring was originally made. The theory of the defense was that the elder Allsman had given his son the exclusive use of the stallion for the season of 1894, and that the latter was to have complete charge of him, be responsible for his entire care and management, and receive his entire earnings. Much evidence was adduced in support of this theory, while the plaintiff, to establish the liability of John W., testified as follows:

On the 28th of July, 1894, I made an agreement with John L. Allsman to train and drive his horse, "Charles Birch." He represented to me that he was the owner of the horse and I was to receive $25 a month and my expenses during the racing season of 1894. I took the horse and went to work with him. Some three or four days after that I was in the stall with the horse and a

gentleman came in and was looking at the horse. I did not know him, or who he was. He commenced to talk about the horse, and I went on to tell him what the horse was and what his name was, like I would to any stranger —liked to recommend him. He says, "I know all about this horse. I know this horse." He says, "I own this horse." I said, "This young man that I hired to said he owned the horse—J. L. Allsman." He said, "He is my son, but I own the horse." I said, "I hired to him, thinking he owned the horse, because he represented to me that he did." He says to me, "I let this boy manage the horse this summer for the simple reason that I am no horseman myself and know nothing about it;" that he did not know about horses, "but," he says, "any bargain you make with this young man," Logan he called him, "is all right and satisfactory with me." So under this consideration I went on with the horse. * * *

Q. Were you at the races in Edgar?

A. No, sir.

Q. Did you have any conversation with Mr. J. W. Allsman in reference to the races at Edgar?

A. Yes, sir.

Q. What was that conversation?

A. The date the entries were closed for the races at Edgar, he and another son of his, Ed they called him, I did not know his name,—he came up there and came to me and says, "Now, Richmond, I came up to ask your advice about entering this horse in the races at Edgar." He says, "Logan wants to start him from there," and I told him that I would not consent to enter him there unless I saw you and asked your advice about it. I told him I did not think it was right to do it, because I did not think the horse was in condition to go as hard as he would have to race there,—to go as hard as he would have to. I knew that there were horses there enough faster than this horse the way he was; that the horse was not in shape to go as hard as he would have to go, and I said I did not think it would pay. He says, "I

think so too." I told him I would not advise to enter the horse there. He says these boys had the management of this horse and have had their way heretofore about him. He says, "I have made up my mind I would have my way this year;" he says, "this horse belongs to me and I propose to do as I think best." He says, "If you say not to enter him there, that he is not in shape, I will not do so." I told him that it was not best, so he did not enter him, and he was not entered there.

Q. He was not entered there?

A. No, sir; he was not entered there.

The plaintiff also produced as a witness Mr. Holland, the secretary of the Friend Fair Association, who testified that the horse had been entered for the Friend races, during the season of 1894, by J. W. Allsman, who paid the entrance fee. It was also shown by the testimony of Mr. Pope that J. W. Allsman, while on the race track at Friend, paid delinquent dues of the previous year, amounting to $29.50, in order to gain the horse admission to the races. This evidence is all disputed, but it seems to have commended itself to the jury. They based their verdict upon it, and we think they were justified in doing so. It entirely warrants the conclusion that J. L. Allsman, in handling the horse and in hiring the plaintiff, was transacting his father's business. It is ample to sustain a finding that an agency existed embracing the right to make the contract on which this action is grounded.

Another assignment of error is stated in this language: "The court erred in admitting the evidence of J. J. Holland and his book, and J. D. Pope, John L. Allsman, and Eugene Richmond." This assignment is altogether too general to demand consideration. Much of the evidence of the witnesses named was received without objection and most of it was clearly competent and relevant to the questions in dispute. In *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380, and in *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, it was held that an assignment

of error based on the admission of all the evidence of a certain witness cannot be sustained if any part of the evidence of such witness was properly received. The rule of practice thoroughly established by the decisions of this court is that alleged errors will not be reviewed unless assigned in the petition in error with such definiteness as to clearly indicate the particular ruling complained of. (*Bloedel v. Zimmerman*, 41 Neb. 695; *City of Omaha v. Richards*, 49 Neb. 244; *Farwell v. Cramer*, 38 Neb. 61; *Phœnix Ins. Co. v. King*, 54 Neb. 630.)

It is also assigned for error that "the court erred in overruling the motion for a new trial." To which of the four grounds alleged in the motion for a new trial this assignment is directed we can only conjecture. It is too indefinite to merit attention and is overruled on the authority of *City of Chadron v. Glover*, 43 Neb. 732; *Glaze v. Parcel*, 40 Neb. 732; *Stein v. Vannice*, 44 Neb. 132; *Conger v. Dodd*, 45 Neb. 36; *Pearce v. McKay*, 45 Neb. 296; *Moore v. Hubbard*, 45 Neb. 612. The judgment of the district court is right and is

AFFIRMED.

L. E. GRUVER, ADMINISTRATOR, APPELLEE, V. JAMES H. WALKUP, IMPLEADED WITH JOHN F. CARLSON, APPELLANT.

FILED JUNE 23, 1898. No. 8116.

1. **Mortgage Foreclosure:** ACTION BY ADMINISTRATOR. An administrator may maintain an action to foreclose a real estate mortgage executed to secure the payment of purchase-money notes, one of which was made to his intestate, a married woman, as an inducement for releasing her dower and homestead rights in the mortgaged premises.

2. ———: ———: NOTE. And the fact that the note made to the intestate was, by her direction, delivered to her husband and never came into her personal possession, is no impediment to the maintenance of such action.

3. **Mortgage:** CONSIDERATION: DOWER AND HOMESTEAD RIGHTS. The relinquishment by a married woman of dower and homestead

rights in her husband's land is a sufficient consideration for the execution to her of a note and mortgage representing a portion of the price for which such land was sold.

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

C. Hollenbeck, for appellant.

L. E. Gruver, contra.

SULLIVAN, J.

John F. Carlson and Mary E. D. Carlson were married in the year 1889 and from that time until March 15, 1893, lived together on a quarter section of land owned by the former and situated in Saunders county, in this state. At the date last named the land was sold to James H. Walkup, subject to incumbrances for the sum of $3,300. Of this the sum of $300 was paid in cash. The balance of the purchase price was represented by four promissory notes secured by a mortgage on the premises. One of these notes, being for the sum of $1,000, was made payable to Mrs. Carlson. Both Carlsons were named as mortgagees in the mortgage. All the notes were delivered to Mr. Carlson, who retained possession of them until the trial of this cause in the district court. In May, 1893, Mrs. Carlson died intestate and the appellee L. E. Gruver was shortly afterwards appointed administrator of her estate. Claiming the $1,000 note as part of the assets of the estate of Mrs. Carlson, the administrator commenced this action in the district court of Saunders county to foreclose said mortgage and made John F. Carlson a party defendant. Carlson filed an answer asserting title to the note and denying that Mrs. Carlson ever had any interest or ownership therein. From a judgment in favor of the administrator Carlson appeals. There is scarcely any dispute about the facts. The account of the transaction given by Carlson is as follows: "Well, we had a talk over it, me and my wife, to sell that place where we lived, and buy a place somewhere else

better. She did not like to live there, and we was talking it over, that I should sell my farm and buy some place else. So she wanted one note in her name,—to secure that I should buy a place to suit her,—and the note was made out to her and for her, and it was understood I should use the same money to buy another place, and I got the note and put it in the bank and I had it in my possession all since. She never asked me for the note any more. She took sick a couple of months after. She never asked me for the note." The witness further said, when questioned in regard to the delivery of the notes: "I don't remember. There was no talk about it that I know of, that I should receive the notes." Mr. Seeley, who prepared the papers, said that Mrs. Carlson instructed him to turn all the papers over to her husband. It further appears that Carlson applied to the county court of Saunders county to be appointed administrator of Mrs. Carlson's estate, so that he might in that capacity collect the note in question; and that when presenting his application he stated to the county judge "that the land was his and the money his, but she [Mrs. Carlson] refused to sign the deed, and he made the note to her."

Appellant contends that Mrs. Carlson gave no consideration for the note and that it was never delivered to her. But it seems to us the evidence upon both these points is quite sufficient to sustain the decree. Mrs. Carlson had an inchoate right of dower and a homestead interest in the premises, of which she could not be divested without her consent. These rights were valuable, and her relinquishment of them by joining with her husband in the conveyance to Walkup was, certainly, an ample consideration for the execution to her of the $1,000 note. The authorities so hold and there is no discord among them on the question. (*Yazel v. Palmer*, 81 Ill. 82; *Sykes v. Chadwick*, 85 U. S. 141; *Citizens Bank v. Bolen*, 121 Ind. 301.)

Mrs. Carlson's motive for demanding the note and the use to which she intended to apply it are not material to

the questions under consideration. If it was made to her as an inducement to the execution of the deed, it became her property, whatever her motive and intention may have been.

The note was made payable to her by an express agreement of all the parties to the transaction. It was executed in her presence and was for a time apparently subject to her manual control. It passed into the custody of her husband with her consent and by her authority. He did not receive it for himself, but for her and as her agent; and it seems he asserts title to it now, not as a contract executed to him in his wife's name, but because he furnished the consideration for which it was given. This claim is not supported by the record, and if it were, it would not establish his title to the note. Walkup did not promise to pay this note to Carlson, and Carlson could not enfore it against him without showing a title derived from the payee. The judgment of the district court is clearly right and is

AFFIRMED.

JOHN W. WEHN, JR., APPELLEE, V. WILLIAM H. FALL ET AL., APPELLANTS.

FILED JUNE 23, 1898. No. 8154.

1. **Vendor and Vendee:** TIME TITLE VESTS. A contract for the purchase of land made *bona fide* for a valuable consideration vests the equitable interest therein in the vendee from the time of the execution of the contract, although the money is not then paid.

2. ———: LIEN OF JUDGMENT: APPLICATION OF PAYMENT. The mere docketing of a judgment against a vendor of real estate is not notice to the vendee in possession, and does not impose on him a duty to apply deferred installments of the purchase price in satisfaction of such judgment.

3. ———: ———: ———. But a judgment of the district court, against a vendor of land who retains the legal title, attaches as a lien to such land, and, as against a vendee in possession with actual notice, may be enforced to the extent of the unpaid purchase price.

4. **Counter-Claim**: CORPORATIONS: LIABILITY OF STOCKHOLDERS. In an action by a stockholder of an insolvent corporation to enjoin an execution sale of real estate which had been purchased by him from the members of a firm against whom the defendant had recovered the judgment on which the execution was issued, the answer charged that all the stockholders of such corporation were liable for the payment of the debt which was the basis of the judgment, and asked that they be brought in and required to pay the same. *Held*, Not to constitute a counter-claim within the meaning of section 99 of the Code of Civil Procedure.

5. **Corporations**: LIEN OF CREDITORS. Creditors of an insolvent corporation do not acquire any specific lien on the corporate assets.

6. **Action Against Dissolved Corporation.** Under the provisions of section 68, chapter 16, Compiled Statutes 1897, an action against a dissolved corporation may be commenced and prosecuted to final judgment.

7. ———: LIABILITY OF STOCKHOLDERS: CREDITORS. And until the legal remedy has been exhausted a creditor of an insolvent and dissolved corporation cannot obtain satisfaction of his claim by suit against a stockholder who has in any way come into possession of corporate assets.

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

Hainer & Smith, for appellants.

A. W. Agee and *H. M. Kellogg, contra.*

SULLIVAN, J.

In January, 1888, the Phillips Building & Loan Association drew a check on the Bank of Phillips in favor of Samuel Spanogle for $495. Spanogle indorsed the check to Jerome H. Smith, who deposited it for collection with the First National Bank of Aurora. In due time the Aurora bank presented it for payment to the Phillips bank, which, being then unable to meet its obligations, was compelled to refuse payment. Smith thereupon sued John Fonner, A. J. Spanogle, Samuel Spanogle, and Charles L. Crane, as members of the firm of John Fonner & Co. and owners of the Bank of Phillips. This suit ripened into a judgment in the district court of Hamilton county on the 12th day of February, 1889. On January

30, 1888, the firm of John Fonner & Co. suspended its banking business at Phillips and turned over its entire assets to Chris Schlotfeldt, of Grand Island, with written authority to sell the same and apply the proceeds in payment of the partnership indebtedness. Schlotfeldt accepted the trust or agency, and, on March 9, 1888, contracted with the plaintiff, John W. Wehn, Jr., to sell him the real estate in controversy, being a town lot in the village of Phillips, in Hamilton county. Wehn was given immediate possession of the property, but did not obtain a deed therefor nor pay any part of the purchase price until after Smith had recovered his judgment against the members of the firm of John Fonner & Co. Upon this judgment an execution was issued, and Fall, as sheriff of Hamilton county, was proceeding thereunder to sell the real estate in question when this action was commenced to enjoin the sale. A temporary injunction was granted and on the final hearing made perpetual.

It is first insisted on behalf of the appellants that the instrument executed by John Fonner & Co. was an irregular assignment and of no validity. Whether or not it was intended as an assignment is quite immaterial. Between the parties to the transaction it was valid. It conferred on Schlotfeldt power to take possession of the assets of the bank and sell the same. Consequently the contract made with Wehn for the sale of the lot in Phillips was within the scope of his authority and was a binding contract. It thus appears that Wehn was a purchaser of the lot and in possession of the same without having paid any part of the purchase price when Smith's judgment attached as a lien. Under these circumstances Smith became entitled to intercept the purchase-money and have the same applied in satisfaction of his judgment upon giving Wehn notice of his rights. It is not claimed that there was any actual notice, and constructive notice from the docketing of the judgment, we think, was not sufficient. In *Courtnay v. Parker*, 16 Neb. 311, it is said: "Where a judgment is recovered against one who has

agreed to sell land, but made no deed nor received the whole of the purchase-money, it is a lien on the vendor's interest in the land, and a purchaser under the judgment is entitled to the money remaining unpaid." Neither the question of notice or possession was considered in that case. In *Olander v. Tighe*, 43 Neb. 344, the rule on this subject is stated in the syllabus as follows: "A judgment recovered in the district court against the vendor of land which is situate in the county in and for which the court is held, who has not, at the time of the recovery of the judgment, executed and delivered a deed for the land or received all the purchase-money, is a lien upon the interest of the vendor in the land, viz., the unpaid purchase-money; and a levy of an execution issued upon such judgment on the land, and a sale thereunder, will pass to the purchaser the interest of the vendor." In this case it was held that the rights of the judgment creditor were superior to the rights of a vendee in possession who had paid a portion of the purchase price after the recovery of the judgment; but it does not appear from the statement of facts that the purchaser was without actual notice, and the question of notice is not considered or discussed. The question was, however, very thoroughly considered in the case of *Filley v. Duncan*, 1 Neb. 134, and the conclusion reached that while a judgment recovered against the vendor of lands is a lien to the extent of the unpaid purchase price due from the vendee in possession, "the entry of such judgment will not, of itself, compel the vendee in possession under contract to make subsequent payments to the creditor." Discussing this question Mr. Freeman in his work on Judgments, section 364 [4th ed.], says: "While it is everywhere conceded that a judgment lien accruing against a vendor after the making of the contract of sale extends to all his interest remaining in the land, and entitles the purchaser at the sale to all sums still to be paid by the vendee, yet it is well settled that the latter, if in possession of the lands sold, is not bound to ascertain, before making each pay-

ment, that no judgment has been obtained against his vendor. Whoever takes and keeps possession of land, by these acts of ownership gives such notice of his rights to the whole world that no one can safely assume to act in ignorance of them. He is so far exempted from the operation of the registry acts that a deed made by his grantor can in no event prejudice his interests; and so far exempted from the operation of the law charging all persons with notice of the lien arising from the docketing of a judgment that such docketing, while he is in possession of the land, is not notice to him of the charge thereby created on the purchase-money remaining unpaid. He may, therefore, from time to time, pay to this vendor such sums as fall due; and he will always be entitled to the benefit of such payments, unless it can be shown that they were made with actual knowledge of a lien on the vendor's interest in the land. This construction of the law seems to have been dictated by a consideration of the hardship to be inflicted on the vendee in possession by establishing a different rule." In support of the rule thus announced the author cites *Filley v. Duncan, supra; Parks v. Jackson*, 11 Wend. [N. Y.] 442; *Moyer v. Hinman*, 13 N. Y. 180; *Hampson v. Edelen*, 2 Har. & J. [Md.] 54. No case is cited as holding a contrary doctrine. In section 438 of 1 Black on Judgments it is said: "At any rate, it appears to be well settled that the docketing of the judgment is not notice of the lien to the purchaser in possession, since, after he has taken his contract for the purchase, he is not bound to keep the run of the dockets; and payments subsequently made by him to the judgment debtor, pursuant to the contract, without actual notice of the judgment, are valid as against its lien upon the land." (See also to the same effect 12 Am. & Eng. Ency. Law [1st ed.] 113.)

There is another question in the case. The appellant Smith in his answer alleged that the Phillips Building & Loan Association was indebted to him as drawer of the check on which his judgment against the members of the

firm of John Fonner & Co. is based; that said association has dissolved and divided its entire assets among the stockholders; that Wehn and a number of other persons named in the answer were stockholders at the time of the dissolution and received some portion of the corporate property. There was a prayer that the persons alleged to be stockholders be made parties to the action and required to pay the amount due on the check. Proceedings were afterwards had in the case which resulted in a trial of issues formed by said stockholders pleading to the matters contained in Smith's answer. The findings and judgment of the court were in favor of the stockholders. The only question presented for decision by the petition was whether Smith's judgment was a lien on Wehn's real estate. The primary and controlling question presented by the answer was whether the loan association was under a contractual liability as drawer of the check. Between these questions there was no such legal relationship as to justify their trial in the same action. But the court having tried them together and found in favor of the stockholders, we will inquire whether the conclusion reached on the merits was correct. The assets of a corporation, which, of course, includes unpaid stock subscriptions, constitute a fund to which creditors may resort for the satisfaction of their claims. But to reach assets in the hands of a stockholder creditors must pursue the remedy prescribed by law. By section 4, article 11 (Miscellaneous Corporations), of our constitution 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." Of this provision of the constitution it was said by RAGAN, C., delivering the opinion of the court in *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175: "We think, therefore, that the

creditors of a *de jure* corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment, and until an execution issued upon such judgment has been returned wholly or in part unsatisfied." But it is contended that the constitutional provision above quoted is not applicable to this case for the reason that, the corporation being insolvent and having ceased to exist, the recovery of a judgment against it was neither necessary nor possible. A creditor of an insolvent corporation does not acquire any specific lien on its assets, and no sufficient reason is perceived for holding that he may proceed against one having possession of such assets without first reducing his claim to judgment. The reason for the rule which requires the creditors of an insolvent individual to obtain judgment on their claims before attempting to reach property transferred by him in fraud of their rights seems to be entirely applicable where the debtor is an insolvent corporation against which a suit may be maintained. (*Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371.) There was in this case no impediment in the way of a suit against the corporation. Section 68 of chapter 16, Compiled Statutes 1897, provides for the bringing of actions against dissolved corporations and makes ample provision for the service of process upon them. What we conceive to be the correct rule on this subject is stated in 3 Thompson, Private Corporations, section 3355, as follows: "Where the ordinary theory of equitable remedies prevails, under which it is necessary, before resorting to a court of equity, for the complainant to exhaust his remedies in a legal forum, the mere insolvency of the corporation does not dispense with the necessity of a creditor reducing his demand to a judgment at law against it before bringing a suit in equity to charge its shareholders. Nor will it be any excuse for not obtaining such a judgment at law that the charter has expired by limitation, providing the law governing the corporation is such that this fact does not prevent the

obtaining of a judgment at law against it. * * * As has been said in a leading case, a judgment can no more be recovered against a dead corporation than against a dead man. But according to the usual theory, a *de facto* dissolution of a corporation, which consists usually in a permanent suspension of its business and abandonment of its franchises, by reason of insolvency, is no obstruction to obtaining a judgment at law against it, and therefore does not relieve the creditor of the necessity of obtaining such a judgment before applying for equitable relief." A recent case decided on facts almost identical with those in the case before us and fully sustaining Judge Thompson's statement of the rule is *Lamar v. Allison*, 28 S. E. Rep. [Ga.] 686. (See also *Swan Land & Cattle Co. v. Frank*, 39 Fed. Rep. 456.) Our conclusion is that the answer of Smith did not state a cause of action against the stockholders of the Phillips Building & Loan Association, and the entire judgment of the district court is, therefore,

AFFIRMED.

ROBERT F. KLOKE, ADMINISTRATOR, V. JENNIE B. MARTIN.

FILED JUNE 23, 1898. No. 8221.

1. **Credibility of Witnesses:** WEIGHT OF EVIDENCE. It is the peculiar function of the jury to determine the credibility of witnesses and the weight to be accorded to their testimony.

2. **Parent and Child:** SERVICES: REMUNERATION. Personal services rendered by a child to a parent are presumed, in the absence of special circumstances, to have been gratuitously rendered; but this presumption may be overcome by sufficient evidence tending to establish a contract for remuneration.

3. **Married Woman:** CONTRACT: SEPARATE ESTATE. The contract of a married woman, made with reference to, and upon the faith and credit of, her separate estate, is valid and enforceable.

4. **Instructions:** ASSIGNMENTS OF ERROR. An assignment of error in the motion for a new trial that "the court erred in refusing to give the first, fifth, sixth, eighth, and ninth instructions asked

for by said administrator" was properly overruled for the reason that at least one of such instructions did not contain an accurate statement of any legal proposition applicable to the case.

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

J. F. Losch and *M. McLaughlin*, for plaintiff in error.

T. M. Franse and *Uriah Bruner, contra.*

SULLIVAN, J.

Margaret Conlin died testate in Cuming county and the defendant Robert F. Kloke was appointed administrator of her estate with the will annexed. The plaintiff Jennie B. Martin was a daughter of the deceased and filed against the estate a claim for personal services alleged to have been rendered in accordance with the terms of an express contract with her mother. The claim was disallowed in the county court and plaintiff appealed to the district court, where she obtained a verdict and judgment for the sum of $841.86.

The petition in error filed here is supported by a brief, in which a reversal of the judgment is claimed on the ground that it is unwarranted by the evidence and because the court refused to instruct the jury as defendant requested. The defendant produced no witnesses at the trial, and there is no conflict in the evidence; but it is insisted that the testimony given on behalf of the plaintiff is so inherently improbable as to be unworthy of credence. Upon that point men of fair intelligence and wholly impartial might not agree. It was the function of the jury, who saw the witnesses and observed their demeanor, to decide the question of credibility. They have done so, and we are not prepared to say that their decision was incorrect. That the services were rendered is not denied; and that they were rendered in pursuance of an express contract for payment out of the property of which Mrs. Conlin should die seized is shown by the

positive evidence of two witnesses who claim to have been present when the arrangement was made. There is also proof, which seems to be entirely free from suspicion, showing that Mrs. Conlin, a short time before her death, sent the plaintiff $100 as a partial payment of some indebtedness which she recognized as then existing. It is true, of course, that services rendered by a daughter to her mother are presumed, in the absence of special circumstances, to have been rendered gratuitously; but this presumption is not conclusive and may be overcome by sufficient evidence of a contract for remuneration. (*Dodson v. McAdams*, 96 N. Car. 149; *Poorman v. Kilgore*, 26 Pa. St. 365; *Weir v. Weir*, 3 B. Mon. [Ky.] 645.) And in this case the jury have found that the presumption is overborne by the proof.

A further argument advanced by the counsel for defendant on this branch of the case is that the contract in question being for necessaries was obligatory on the husband of Mrs. Conlin and of no force or effect as to her. The cases cited in support of this proposition are certainly not applicable here. By section 2, chapter 53, Compiled Statutes 1897, a married woman is authorized to enter into any contract with reference to her separate estate to the same extent and with like effect as a married man may in relation to his property. She may even become surety for her husband and bind her property for the payment of his debts. (*Godfrey v. Megahan*, 38 Neb. 748; *Grand Island Banking Co. v. Wright*, 53 Neb. 574; *Smith v. Spaulding*, 40 Neb. 339; *Briggs v. First Nat. Bank*, 41 Neb. 17.)

The complaint grounded on the refusal of the court to give certain instructions tendered by the defendant cannot be considered. The assignment in the motion for a new trial is as follows:

"6. The court erred in refusing to give the first, fifth, sixth, eighth, and ninth instructions asked by the said administrator."

The rule is thoroughly established that an assignment

directed generally against a group of instructions is insufficient and will be considered no further than to ascertain that the court's action as to one of such instructions was not erroneous. (*Pythian Life Ass'n v. Preston*, 47 Neb. 392; *McCormal v. Redden*, 46 Neb. 776.) One of the instructions included in the assignment was a peremptory direction to the jury to return a verdict for the defendant, and the refusal to give it was not error. The judgment of the district court is

AFFIRMED.

ANHEUSER-BUSCH BREWING ASSOCIATION, APPELLEE, V. BENNETT HIER, APPELLANT.

FILED JUNE 23, 1898. No. 10053.

1. **Courts:** JURISDICTION. A cardinal principle governing courts in the administration of justice is that the power to make valid orders is only co-existent with jurisdiction of the cause.
2. **Judgment.** A personal judgment against a party who is no longer in court is absolutely null.
3. ———: PAYMENT: RESTITUTION: REVERSAL. An order for the restitution of money, paid pursuant to the direction of an erroneous judgment, cannot be made after such judgment has been reversed and the action dismissed.

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

F. I. Foss and *Norman Jackson*, for appellant.

E. S. Abbott, contra.

SULLIVAN, J.

The Anheuser-Busch Brewing Association brought an action in the district court for Saline county to subject to the payment of a judgment recovered by it against Bennett Hier certain money belonging to the latter and held by Albertus N. Dodson in his official capacity as

clerk of said court. In that action the plaintiff had judgment, in obedience to which Dodson paid to it the sum of $584.55 out of the funds of Hier then in his hands. Afterwards an appeal was prosecuted to this court, where the judgment was reversed and the cause dismissed. (*Anheuser-Busch Brewing Ass'n v. Hier*, 52 Neb. 424.) Hier then moved for a restitution of the money paid to the plaintiff while the judgment was in force. The district court denied the motion on the ground that it no longer possessed jurisdiction of the cause. The correctness of this ruling is the only question presented for decision by this appeal.

Appellant's right to have restitution of the money on reversal of the judgment cannot be doubted. (6 Am. & Eng. Ency. Law [1st ed.] 835; *Eames v. Stevens*, 26 N. H. 117; *Flemings v. Riddick*, 5 Gratt. [Va.] 272; *Bickett v. Garner*, 31 O. St. 28.) And had the record disclosed the fact of payment this court would have made an appropriate order for the protection and enforcement of that right. But we were not informed that any payment had been made under the erroneous judgment, and no application was made for a vacation or modification of the absolute order of dismissal entered here. So when the motion for restitution was presented the cause was not pending and the district court was without jurisdiction of the parties. After the cause was dismissed the litigants were no more subject to the orders of the court than they were before the action was instituted. (*Stone v. Smoot*, 39 Ill. 409; *Whatley v. Slaton*, 36 Ga. 653; *Morgan v. Campbell*, 54 Ill. App. 244; *American Burial Case Co. v. Shaughnessy*, 59 Miss. 398; *Crawford v. Cheney*, 12 Vt. 567; *Brooks v. Cutler*, 18 Ia. 433; *Williamson v. Williamson*, 1 Met. [Ky.] 303.) In the last mentioned case it was held that a motion for apportionment of costs could not be entertained after the case had been dismissed; and in *Morgan v. Campbell, supra*, it is said: "By the order dismissing the cause the parties were out of court, jurisdiction of the court over them was gone, and

they stood as they were before the suit was commenced." In the case of *Fleming v. Riddick, supra,* it was held that the court possessed inherent power to compel the restitution of money collected by one of the litigants from the other under the authority of an erroneous judgment, and that it might exercise such power after the judgment was reversed and the action dismissed. It is apparant that this decision is the product of an intemperate zeal to avoid the unjust consequences of the court's error. We cannot accept it as authority. It is illogical. It fails to recognize the cardinal principle that the power to make valid orders cannot survive the loss of jurisdiction. It ignores the self-evident proposition that a personal judgment against a party who is no longer in court is absolutely and utterly void. The law sets bounds to the authority of courts to correct their own errors, and every act performed by them beyond those limits is plain usurpation and should be condemned, however commendable the motives that inspired it. Judicial lawlessness cannot be defended on the specious plea that the end to be accomplished justified it. The judgment is

AFFIRMED.

MISSOURI PACIFIC RAILWAY COMPANY v. EMMA D. PALMER.

FILED JUNE 23, 1898. No. 8181.

1. **Failure to File Reply:** TRIAL: REVIEW. Where, in the trial of a cause, both parties treat an affirmative defense as traversed, it will be so considered in this court although the plaintiff filed no reply either before or after judgment.

2. **Evidence:** SYMPATHY. Competent evidence bearing on the issues cannot be excluded from the jury because it may incidentally arouse their sympathies or influence their prejudices.

3. ———: VALUE OF SERVICES. One may testify to the value of his own services although his information in regard to the matter is chiefly derived from others adequately informed on the subject.

4. **Witnesses:** CONCLUSIONS. A non-expert witness may testify to a conclusion when, from the nature of the subject under investigation, it is not possible to lay before the jury all the facts from which such conclusion is drawn.

5. **Evidence Not Within Issues.** It is not error to exclude testimony concerning a matter upon which no issue has been raised by the pleadings.

6. **New Trial:** ASSIGNMENT OF ERROR: FORM. The trial court is justified in overruling an assignment of error in the motion for a new trial unless it can be sustained in the form in which it is presented.

7. **Parent and Child:** NECESSARIES. A widow is the natural guardian of her minor child and as such is ordinarily liable for necessaries furnished it.

8. **Account Rendered:** CORRECTNESS: PRESUMPTIONS. Where the relation of debtor and creditor exists, an account rendered and not objected to within a reasonable time is to be regarded as *prima facie* correct.

9. **Weight of Evidence:** REVIEW. A judgment will not be reversed on account of a mere difference of opinion between this court and the trial judge or jury regarding the weight of evidence.

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

B. P. Waggener, James W. Orr, W. P. McCreary, and *C. S. Hutchinson,* for plaintiff in error.

A. H. Bowen, contra.

SULLIVAN, J.

The plaintiff brought this action in the county court of Adams county to recover for services rendered and expense incurred in nursing and caring for her infant child who had been injured by a passing locomotive on defendant's line of road where it crosses a highway near plaintiff's premises. From a judgment rendered against it in the county court the defendant appealed to the district court, where, on a trial to a jury, it was again unsuccessful. The testimony shows that the plaintiff was a widow; that on the morning of April 10, 1893, she left the child in question, then about two years and two

months old, in charge of its sister, who was eight years of age, and went to the barn to hitch up her horses, intending to remove a straw embankment from the house in which she lived; that she had no one to assist her, and while engaged in harnessing the team the child wandered away to the railway crossing, some twenty-eight rods distant, where it was injured. The child lay between the ties outside the rail and was struck on the head and its skull fractured. A surgical operation and six months' careful nursing were required to effect a cure.

The first ground on which defendant claims a reversal of the judgment is that the defense of contributory negligence was conclusively established, inasmuch as the allegations of the answer in relation thereto were not formally denied. No reply was filed, either before or after the trial, but the evidence was taken without objection and apparently on the assumption that the plaintiff's negligence was an issue of fact to be decided by the jury. According to a familiar rule of practice, under such circumstances, the reply is deemed waived. Both parties having treated the affirmative defense as traversed, we will so consider it. (*Western Horse & Cattle Ins. Co. v. Timm*, 23 Neb. 526; *Schuster v. Carson*, 28 Neb. 612; *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64; *Killman v. Gregory*, 91 Wis. 478, 65 N. W. Rep. 53; *Warren v. Chandler*, 67 N. W. Rep. [Ia.] 242.)

The admission of the following testimony given by the plaintiff is assigned for error:

Q. Where is the father of that child?

A. He is dead.

Q. How long?

A. Four years.

Q. He died prior to the time of the accident?

A. Yes, sir. * * *

Q. What did you come out there to hitch up the team for?

A. I went out to hitch up the team to haul the em-

bankment away from the house for fear the house would catch on fire. * * *

Q. What was the condition of it as to moisture?

A. It was dry. * * *

Q. Are you able to employ, or were you at that time able to employ, people to assist you in working your farm or taking care of your children?

A. No, I was not.

This evidence was all relevant. Part of it went to establish plaintiff's right to maintain the action by showing that she was the natural guardian of the child, and the balance tended to disprove the imputation of contributory negligence. Competent evidence bearing on the issues cannot be excluded from the jury because it may incidentally arouse their sympathies or influence their prejudices.

It is also claimed that the court erred in permitting plaintiff to testify as to the value of her services while nursing and caring for her injured child. In this we think there was no error. One who has rendered services to another may give evidence of the value of such services, although it appears that the witness has qualified himself for that purpose by inquiring of others adequately informed on the subject. In *Printz v. People*, 42 Mich. 144, it was decided, in a prosecution for the larceny of a cloak, that the owner, who had worn it and had priced similar articles, might give evidence of its value. It was held in the case of *Spear v. Drainage Commissioners*, 113 Ill. 632, that witnesses not specially qualified might testify about the ordinary affairs of life and especially in respect to questions of value. And Earl, J., delivering the opinion of the court in *Mercer v. Vose*, 67 N. Y. 56, said: "I can conceive of no case where one has himself rendered a service to another when he will not be competent to give evidence of its value. Knowing the precise nature of the service rendered, he must have some knowledge of its value, and he is thus competent to give his opinion. It may not be worth much. Its weight, how-

ever, is for the jury." Mrs. Jackson, a witness technically qualified, also testified on the subject and fixed the value of plaintiff's service higher than she had herself fixed it. This evidence was not disputed; so, in any view of the matter, we do not see that defendant has a substantial grievance on account of the admission of Mrs. Palmer's testimony. While Mrs. Jackson was on the stand she was asked, "Could any professional nurse have rendered as good or better services for this child during the time you knew it, after this accident, than did her mother, the plaintiff in this case," to which question she answered, "I think not." It is insisted that the admission of this evidence over defendant's objection was error. We do not think it was. After reading the testimony of this witness we must assume that she was a woman of fair intelligence; that she was particular to observe the manner in which Mrs. Palmer cared for the child, and competent to judge whether her work in the particular instance was equal to that of a professional nurse the value of whose services she had undertaken to fix. This clearly was a proper case in which to receive the conclusion of the witness. From the nature of the subject under investigation it was not possible to lay before the jury all the facts from which the conclusion was drawn, and it was therefore proper to permit the witness to state the result of her observations.

Error is assigned on the refusal of the court to allow Dr. Chapman, a witness called by the plaintiff, to testify on cross-examination as to whether the child had received proper treatment at the hands of the attending physician. The action of the court in this regard was entirely proper. No such issue was raised by the pleadings and the matter was entirely beyond the scope of a legitimate cross-examination.

The giving and refusal of instructions is made the basis of a complaint which cannot be considered on the merits. In the motion for a new trial the fifth and sixth assignments of error are as follows:

"5th. The court erred in giving first, third, fourth, fifth, and sixth paragraphs of instructions asked by plaintiff and the modifications thereof made by the court.

"6th. The court erred in refusing to give the instructions marked 'A' and 'four,' 'eleven,' 'fifteen,' and 'seventeen' asked by the defendant."

Some of the instructions given were properly given, and at least one of the instructions refused was properly refused. Consequently neither assignment could be sustained in the form in which it was presented to the trial court for its action thereon. When errors relating to instructions are assigned *en masse*, either in the petition in error or motion for a new trial, it is the settled doctrine of this court that "a little leaven leaveneth the whole lump." (*Flower v. Nichols*, 55 Neb. 314; *McCormal v. Redden*, 46 Neb. 776; *Pythian Life Ass'n v. Preston*, 47 Neb. 374; *Kloke v. Martin*, 55 Neb. 554.)

Bills rendered to the plaintiff for medicines and medical attendance were received in evidence over defendant's objection; and it is now urged that the admission of these statements was error, because they were mere secondary evidence of matters contained in books of original entry. We think counsel mistake the purpose for which this evidence was offered and received. The plaintiff, as the mother and natural guardian of the child, was legally liable for the payment of all necessary expense reasonably incurred in effecting a cure. These bills being received and retained by her without objection, established, *prima facie*, her liability to pay them, and, in the absence of countervailing proof, was conclusive of the extent of her liability to the persons by whom the bills were rendered. In all cases where the relation of debtor and creditor exists an account rendered and not objected to within a reasonable time is to be regarded as, at least, *prima facie* correct. (*Hendrix v. Kirkpatrick*, 48 Neb. 670; *Wiggins v. Burkham*, 10 Wall. [U. S.] 129; *Sergeant v. Ewing*, 30 Pa. St. 75; *Pauly v. Pauly*, 107 Cal. 8.)

It is finally insisted that there was no sufficient proof of negligence on the part of defendant's servants and that the plaintiff's own fault proximately contributed to the accident. There was competent testimony tending to establish the alleged failure to give the statutory signal at the crossing, and there was, also, testimony from which it might be inferred that a proper lookout had not been maintained. The circumstances would scarcely justify an inference of contributory negligence. The whole matter was submitted to the jury on substantially conflicting evidence, and their verdict has the approval of the trial judge, who saw the witnesses and was in a better position to pass on their credibility than we are. A judgment will not be reversed on account of a mere difference of opinion between this court and the trial judge or jury regarding the weight of evidence. (*City of Harvard v. Crouch*, 47 Neb. 133.) The judgment is

AFFIRMED.

HARRISON, C. J.

I concur in the conclusion reached, but do not agree to some statements herein in regard to the admissibility of testimony.

LAVINA A. BOALES ET AL., APPELLEES, V. E. I. FERGUSON, ADMINISTRATOR, APPELLANT.

FILED JUNE 23, 1898. No. 8196.

1. **Administration of Estates:** DISTRIBUTION. An administrator who undertakes, without an adjudication of heirship, to distribute funds in his hands as the residue of an estate administered by him, assumes the responsibility of making distribution to the proper persons.

2. ———: INTERLOCUTORY ORDERS. Interlocutory orders made by the county court adjusting the current accounts of an administrator are only *prima facie* correct; and such accounts are subject to re-examination and correction at any time before the allowance of the administrator's final report.

3. **Unconstitutional Acts:** DATE OF INVALIDITY. An unconstitutional

act of the legislature is as ineffectual as though it had never been passed. Its invalidity dates from its enactment and not from the time it is adjudged to be in conflict with the supreme law.

4. **Administration of Estates:** ORDERS UNDER VOID STATUTE: CURATIVE ACT. The curative act of 1895 (Session Laws, ch. 32) was intended to legalize orders, judgments, and findings of the county court which depended for their validity on the decedents' act of 1889 (Session Laws, ch. 57), and has no relation to orders, judgments, and findings which were valid independent of that act.

5. **Estoppel:** PLEADING. To be available as a defense to an action an estoppel *in pais* must be pleaded.

6. **County Courts:** JURISDICTION. The county court possesses exclusive original jurisdiction in probate matters, and questions relating to the settlement of estates must be adjudicated there in the first instance.

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

The opinion contains a statement of the case.

J. D. Pope, for appellant:

An unconstitutional statute has the force of law until declared void by the court of last resort. (*Miller v. Dunn*, 72 Cal. 462; *Sessums v. Botts*, 34 Tex. 335; *People v. Salomon*, 54 Ill. 40; *St. Louis & S. F. R. Co. v. Evans*, 85 Mo. 307; *Brandhoeffer v. Bain*, 45 Neb. 781.)

A vested right created by reason of the passage of an act cannot be disturbed though the act be declared unconstitutional. (*Webster v. Reid*, 1 Morris [Ia.] 467*; *Williams v. Johnson*, 96 Am. Dec. [Md.] 615.)

The order directing the administrator to distribute all money in his hands was valid. (*Miller v. Dunn*, 1 Am. St. Rep. [Cal.] 67; *Manly v. State*, 7 Md. 135; *Ward v. State*, 40 Miss. 108; *Lewis v. Watrus*, 7 Neb. 477; *Hansen v. Bergquist*, 9 Neb. 278.)

Appellees not having appealed from the order of distribution are estopped from claiming that William Praul was not an heir, and that the payments were unauthor-

ized. (*Bazzo v. Wallace*, 16 Neb. 293; *Doty v. Sumner Bros.*, 12 Neb. 378; *Horn v. Miller*, 20 Neb. 98; *Cecil v. Cecil*, 19 Md. 72; *Leaverton v. Leaverton*, 40 Tex. 218.)

Appellees are estopped by reason of participation in the distribution. (*Alexander v. Walter*, 50 Am. Dec. [Md.] 688; *Weinstein v. National Bank of Jefferson*, 69 Tex. 38; *New York Rubber Co. v. Rothery*, 1 Am. St. Rep. [N. Y.] 822; *Grant v. Cropsey*, 8 Neb. 205; *Newman v. Mueller*, 16 Neb. 523; *Tarver v. Tankersley*, 51 Ala. 197; *Loring v. Steineman*, 1 Met. [Mass.] 204; *Whipple v. Farrar*, 3 Mich. 436; *Goshen v. Stonington*, 4 Conn. 209.)

Thomas Ryan, James W. Dawes, and *F. I. Foss, contra.*

SULLIVAN, J.

After the enactment of chapter 57, Session Laws of 1889, known as "Baker's Decedents' Law," and before it was declared unconstitutional by this court, Emily A. Praul died intestate, leaving an estate in Saline county which the appellant E. I. Ferguson proceeded to administer under the direction and by the authority of the county court of that county. Surviving the deceased were her husband, William Praul, and four children, the issue of a former marriage. On the assumption that the new decedents' law was valid and that, under its provisions, he was entitled to one-third of the money belonging to the estate in the hands of the administrator, Praul, on April 2, 1891, petitioned the county court for an order of distribution. Such an order was made. Fairly construed, it directed the administrator to distribute forthwith among the heirs at law of Emily A. Praul all funds of the estate then in his possession. Acting as he supposed under the sanction of this order, Ferguson paid to Praul on November 18, 1891, the sum of $1,530, and on August 17, 1892, the further sum of $167.59. Accounts rendered in the course of administration, including these sums among the items disbursed, were presented by the administrator to the county court and were by it examined and approved.

It is claimed by appellant that the order directing distribution and the orders approving these accounts remain in full force and are conclusive of the matters here in controversy. We do not think so. There was no adjudication of heirship. It was not judicially determined that Praul was an heir of his deceased wife and entitled to participate in the distribution of her estate. The decree was to make distribution to the heirs as provided by law. The heirs were not named, nor the amounts due them respectively determined, as contemplated by the statute, which provides (Compiled Statutes 1897, ch. 23, sec. 290): "In such decree the court shall name the persons, and the proportions or parts to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same." The administrator, having voluntarily assumed the responsibility of executing this indeterminate decree, must now bear the consequences of errors committed in its execution. It was the business of the court to decide who the heirs were and the amount of their respective interests in the estate. The appellant was not required to take upon himself this judicial function, but having assumed it of his own accord, he must answer to those who have suffered by his error.

But counsel contend that inasmuch as the new decedents' law had not been declared unconstitutional when the payments to Praul were made, Ferguson was justified in assuming that it was valid and in acting on that assumption. To this proposition we cannot assent. The "Baker Law" was enacted in violation of the constitution. It was never in force, and the decision of this court in *Trumble v. Trumble*, 37 Neb. 340, was a mere judicial declaration of a pre-existing fact. The court did not annul the statute, for it was already lifeless. It had been fatally smitten by the constitution at its birth. Speaking of such a law Mr. Justice Field, in *Norton v. Shelby County*, 118 U. S. 425, said: "It confers no rights. It imposes no

duties. It affords no protection. It creates no office. It is in legal contemplation as inoperative as though it never had been passed." Discussing the same question Judge Cooley says: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it. Contracts which depend upon it for their consideration are void. It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made; and what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force." (Cooley, Constitutional Limitations 188.) Among the numerous cases holding this doctrine are *Osborn v. Bank of United States*, 9 Wheat. [U. S.] 738; *Sumner v. Beeler*, 50 Ind. 341; *Fisher v. McGirr*, 1 Gray [Mo.] 1; *Meagher v. Storey Co.*, 5 Nev. 244; *Campbell v. Sherman*, 35 Wis. 103.

Another point discussed by counsel relates to the effect of the orders approving the administrator's accounts. The county court having directed payment to be made to the heirs of the intestate, and the administrator having made payment to one who was not an heir, is he protected by the interlocutory orders approving his reports showing the unauthorized disbursement? We do not think he is. This court, in *Bachelor v. Schmela*, 49 Neb. 37, has distinctly settled the question adversely to the contention of appellant. It was there decided that these *ex parte* adjustments made in the course of the administration, without notice of any kind to parties interested, are only *prima facie* correct and may be re-examined and corrected at any time before the allowance of the administrator's final report. It follows from what has been already said that the orders of the county court here considered would, standing alone, afford no protection to Ferguson in dealing with Praul as one of the heirs of the intestate; but it is insisted if that be true these same

orders, when reinforced by the provisions of chapter 32 of the Session Laws of 1895, do afford a complete and perfect protection. But we are unable to see that this act has any bearing whatever upon the question. Its purpose, as declared in the title, was to legalize orders, judgments, decrees, and findings made under the provisions of the decedents' act of 1889. In other words, the legislative design was to give force and effectiveness where they did not before exist. The orders and decree made by the county court in the administration of the Praul estate were never of doubtful validity; they needed no legislative quickening, and were, therefore, not affected by the curative act. Its provisions did not touch them. Had there been an attempt to define the word "heirs" as used in decrees of distribution, or had the decree in this case adjudged Praul to be an heir and fixed his interest in the estate, the relevancy of the argument based on the act of 1895 would be more obvious.

A final ground upon which appellant relies for a reversal of the judgment against him is that the appellees are estopped by their acts and conduct from questioning his authority to make the payments to Praul. It is sufficient to say in answer to this contention that no estoppel *in pais* has been pleaded. The appellees ask a modification of the judgment to the extent of being allowed to recover interest on the sums paid by the administrator to Praul, and also to recover further the sum of $700 claimed to have been paid him on account of an alleged estate by curtesy in the lands of his deceased wife. These questions do not properly arise in this case. This is not an action to recover moneys assigned to the appellees by a decree of distribution. The sole purpose of the litigation in its inception was to determine the administrator's right to credit for the amounts paid by him to Praul under the decree of distribution. The county court possesses exclusive original jurisdiction in probate matters, and the questions now presented by the appellees for decision cannot be considered until they have been first

submitted to that court. The judgment of the district court is

AFFIRMED.

MARTIN N. BARBER, APPELLEE, V. DAVID CROWELL ET AL., APPELLANTS.

FILED JUNE 23, 1898. No. 8209.

1. **Mortgage:** DEFINITION. A mortgage is a mere security in the form of a conditional conveyance.
2. **Partnership:** LIEN IN FIRM NAME. A lien on real estate to secure an indebtedness may accrue to a partnership in its firm name.
3. ———: TITLE TO REALTY. A partnership, as such, possesses no capacity to take a conveyance of the legal title to real estate.
4. **Petition to Foreclose Mortgage:** PARTIES. A petition in a suit to foreclose a real estate mortgage executed to "Western Trust & Security Company" and by it sold and assigned to the plaintiff did not fail to state a cause of action, although the mortgagee's character as a legal entity did not affirmatively appear.

APPEAL from the district court of Dodge county. Heard below before MARSHALL, J. *Affirmed.*

Vesta Gray, for appellants:

Upon the face of the petition it is apparent that an allegation necessary to constitute a cause of action is omitted. The grantee named in the mortgage in question is not an individual or natural person, as the word "company" and abstract terms, comprising the name, plainly indicate. It may be a partnership name, or a corporation name, presumptions in favor of either of which do not exist. If the grantee is a partnership then the mortgage deed is void. A partnership is not a person, either natural or artificial, and it cannot in law be the grantee in a deed or hold real estate. (*Woodward v. McAdam*, 35 Pac. Rep. [Cal.] 1016; *Jackson v. Cory*, 8 Johns. [N. Y.] 385; *Douthitt v. Stinson*, 63 Mo. 268; *State v. Chicago, M.*

& S. P. R. Co., 56 N. W. Rep. [S. Dak.] 894; *Burlington & M. R. R. Co. v. Lancaster County*, 4 Neb. 307; *School District v. School District*, 12 Neb. 242.)

Munger & Courtright, contra:

A mortgage of realty is a mere pledge creating a lien but conveying no title. (*Davidson v. Cox*, 11 Neb. 250; *Buchanan v. Griggs*, 18 Neb. 129.)

SULLIVAN, J.

This was an action in the district court of Dodge county to foreclose a real estate mortgage securing the payment of four promissory notes executed by the defendants David Crowell and Fannie A. Crowell to plaintiff's assignor, the Western Trust & Security Company. A demurrer to the petition on the ground that it did not state facts sufficient to constitute a cause of action was overruled, and the correctness of that decision is the only question for determination here.

The allegations of the petition in relation to the execution and assignment of the notes and mortgage are as follows: "On July 18, 1889, the defendants, for a valuable consideration, made, executed, and delivered to Western Trust & Security Company their four promissory notes in writing of that date, whereby they promised to pay to Western Trust & Security Company, or order, $1,200 on August 1, 1892, with interest thereon at nine per cent per annum, payable annually, according to the tenor of three interest notes, both principal note and interest notes drawing interest at ten per cent from maturity, a copy of which principal note is hereto attached, marked 'Exhibit A,' and made a part hereof. To secure the payment of said notes said defendants on said day executed and delivered to said Western Trust & Security Company a mortgage deed and thereby conveyed to said Western Trust & Security Company lots 1, 2, 3, and 4, in block 10, R. Kittle's Addition to the city of Fremont, Dodge county, Nebraska. Said notes and mortgage

have, for a valuable consideration, in the ordinary course of business, and before maturity, been sold and assigned to plaintiff and plaintiff is now the owner and holder thereof." The alleged defect in the petition is its failure to affirmatively show that the Western Trust & Security Company possessed legal capacity to take the mortgage. We entirely agree with counsel that there is no ground whatever for a presumption that the mortgagee was a corporation; but, in view of the conceded fact that it received the notes and mortgage and sold and assigned them to the plaintiff, we cannot admit that there is any solid basis for the claim that it may have been a mere fiction. An ideal thing—a figment of the imagination—could not have done so much. Such commercial activity is not at all characteristic of those incorporeal entities that are wont to disport themselves in the realm of thought. They give little heed to trade and traffic, and reck not of negotiable instruments or collateral securities. They produce no legal results and are,

> "Like spirits that lie in the azure sky,
> When they love but live no more."

But, on the assumption that the mortgagee was a partnership or unincorporated association, it is contended that it could not take title to real estate, and that the mortgage was, therefore a nullity. It is undoubtedly true that a conveyance of land will be ineffectual to pass the legal title unless made to a grantee having capacity to receive it; and it is also true that a partnership possesses no such capacity. But a mortgage is not a conveyance. It is a mere security in the form of a conditional conveyance, and the interest which it vests in the mortgagee is not essentially different from that created by a mechanic's lien or an ordinary judgment. (*Davidson v. Cox*, 11 Neb. 250; *Buchanan v. Griggs*, 18 Neb. 121.) In the former case it was said: "In this state, a mortgage of real estate is a mere pledge or collateral security creating a lien upon the mortgaged property, but conveying no title nor vesting any estate, either before or after

condition broken." That a lien on real estate to secure an indebtedness may accrue to a partnership in its firm name has been decided in *Foster v. Johnson*, 39 Minn. 380, and in *Chicago Lumber Co. v. Ashworth*, 26 Kan. 212. The judgment of the district court is

AFFIRMED.

FAIRBANKS, MORSE & COMPANY V. MAY DAVIS ET AL.

FILED JUNE 23, 1898. No. 8186.

Action for Balance Due on Account: OVERPAYMENT: JUDGMENT FOR DEFENDANTS: INSTRUCTIONS: REVERSAL. An instruction in which it was erroneously assumed that there was evidence which might entitle the defendant to a verdict for a sum claimed, followed by a verdict accordingly, *held* to show such prejudicial error as against the plaintiff that the judgment must be reversed, even though in form the judgment entry was that defendant recover of plaintiff the amount found due by the verdict less that same amount.

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

J. S. Hoagland, for plaintiff in error.

Grimes & Wilcox, contra.

RYAN, C.

In the district court of Lincoln county, Fairbanks, Morse & Co. sought to recover judgment for a balance of $229.50 against May Davis and Romie Chapman, as members of the dissolved partnership firm of Davis & Chapman. In the answer the account was admitted to be correct, but it was pleaded that certain described notes and accounts had been turned over by the defendants and accepted by plaintiff in full payment and settlement of said account due plaintiff, and that plaintiff had collected the whole of said notes and accounts, but had failed to give the defendants credit therefor or pay to

defendants any part thereof, and that plaintiff had been therefore overpaid $51, for which sum defendants prayed judgment. These affirmative averments were denied in the reply.

The error relied upon, it is urged, was preserved by an exception to the third instruction given by the court on its own motion. In this instruction the court correctly stated the effect of receiving the notes and accounts as payment. This statement was followed by this language: "And if you further find from the evidence that plaintiff agreed to return any surplus which might be collected on said notes and order over and above said plaintiff's claim, and if you further believe that such a surplus was collected by plaintiff, then you should find the amount of such surplus was collected by plaintiff, then you should find the amount of such surplus in favor of the defendant." In the petition in error the third, fourth, and sixth instructions given by the court were grouped in one assignment of error, but as the fourth instruction must stand or fall with the third, and as the sixth, without warrant of evidence, assumed that some of the notes were payable to plaintiff, we shall only consider the language above quoted from the third. There was no evidence which tended to show that plaintiff was under any obligation to account to defendants for anything above the amount due from defendants to plaintiff, and if there had been, there was no proof of any such surplus. The instruction was, therefore, erroneous. That the jury was misled by it is quite evident from the fact that there was a verdict in favor of defendants in the sum of $51. The court undertook to cure this error by entering judgment in favor of defendants for the sum of $51 less $51, and taxed the costs to plaintiff. We cannot say that this counteracted the erroneous effect of the instructions complained of, for, as there was no evidence to justify a finding of anything being due defendants, we cannot say that that was the exact error committed. The jury might as justifiably have disregarded the evidence in some

other respect as in regard to the amount of the surplus collected. Possibly the theory of the court in practically entering a remittitur of $51 may have been most nearly in accordance with the actual facts, but judgments of courts should rest upon proofs and not upon mere conjecture. For the error in giving the third instruction the judgment of the district court is reversed.

REVERSED AND REMANDED.

A. M. COLLINS MANUFACTURING COMPANY ET AL. V. M. A. SEEDS DRY PLATE COMPANY ET AL.

FILED JUNE 23, 1898. NO. 8182.

Proceedings in Error: PARTIES. In error proceedings for the review of a final order by which the inseparable interests of several defendants are affected, all persons interested must be made parties to such proceedings as plaintiffs or defendants.

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

B. N. Robertson and *W. D. McHugh*, for plaintiffs in error.

Cavanagh & Thomas and *C. F. Breckenridge, contra.*

RYAN, C.

This action was brought in the district court of Douglas county by certain unsecured creditors of the Heyn Photo Supply Company against that company and twelve other parties, in whose favor it had executed chattel mortgages, for the appointment of a receiver to dispose of the property mortgaged and pay out the proceeds under the direction of said court. The order granting the relief prayed is assailed by the petition in error of five of the mortgagees who were defendants in the district court. The other defendants in the district court

are named as defendants in the petition in error. One of them, the Western Collodion Company, refused to accept service of summons in error, and a purported acknowledgment of service on its behalf, on motion, has been stricken from the files on a showing that it was unauthorized. No service on this company has ever been made of the summons in error; neither has such service been waived. There is, therefore, such a defect of parties that this court, in the face of objections, cannot consider the questions presented. (*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.) As the rights of all the defendants in the district court were inseparably connected, this proceeding must be, and accordingly it is,

DISMISSED.

WILLIAM DUESMAN V. DAVID A. HALE.

FILED JUNE 23, 1898. No. 10108.

Trusts: CONFLICTING INTERESTS OF PERSONS FOR WHOM TRUSTEE ACTS: UNDISCLOSED INTEREST OF TRUSTEE: BURDEN OF PROOF. Where a person acted in a fiduciary relation to two parties to a contract having antagonistic interests to each other, and one of these parties was unaware of such person's fiduciary relation to the other, such person, when he seeks in an action at law to assert an advantage to himself as against the party ignorant of the dual capacity in which the claimant had acted, must show that the advantage claimed was not inequitable to the party against whom the claim is asserted.

ERROR from the district court of Platte county. Tried below before WESTOVER, J. *Reversed.*

James G. Reeder and *A. M. Post*, for plaintiff in error.

C. J. Garlow and *Reed & Gross, contra.*

RYAN, C.

In this case there was a verdict for the plaintiff in accordance with a peremptory instruction, and this proceeding in error is prosecuted for the reversal of the judgment thereon rendered by the district court of Platte county. Plaintiff in error was held liable as one of the subscribers of the contract set out in the opinion in *Hale v. Ripp*, 32 Neb. 259, and afterwards considered in *Ripp v. Hale*, 45 Neb. 567. In the case under review we need not discuss the defense considered in the two opinions just referred to. In the answer it was admitted that the defendant signed the contract sued upon. This contract was in this language:

"HUMPHREY, NEBRASKA, June 1, 1888.

"We, the undersigned, hereby agree to pay the several sums opposite our names as follows; to deposit in the bank said sums, and it is to be paid over at the completion of a depot on the F., E. & M. V. R. R. at Humphrey. The object is to pay for the east forty acres of land belonging to said Henry Gebecke and deeding the same to said R. R. Co.

"JACOB RIPP.	$200.
"D. A. HALE.	$100.
"WILLIAM DUESMAN.	$50.
"F. M. COOKINGHAM.	$100."

There were fourteen other subscribers whose names we omit.

It was alleged in the answer that about the date of said subscription plaintiff and others, to advance the interests of the village of Humphrey, acting in concert, set about devising ways and means to induce the Fremont, Elkhorn & Missouri Valley Railroad Company to erect and maintain a depot and station at or near said village; that before the signing of said paper plaintiff, designing and intending to defraud the other parties to said paper, falsely and fraudulently represented to them

that he had been informed by the company that if the parties would raise a fund for a certain described forty-acre tract and with said fund purchase said land and convey it to the company, it would erect and maintain a depot and station at said village, otherwise that it would not do so; that to accomplish his fraudulent purpose plaintiff caused said paper to be circulated and advised the defendant and other parties to sign said paper in amounts set opposite their names for the purpose of inducing said company to erect and maintain said station and depot at said village, and at the same time it was mutually agreed by and between plaintiff and the parties to said paper that the fund so subscribed should be collected and deposited in one of the banks of said village and should be used in purchasing the land described in said paper, and that upon the completion of a depot and station by the said company at said village the said land should be bought with the said fund and conveyed to the said company for station and depot purposes only, upon condition that the said company would forever hold the same for said purpose and no other; that by these inducements defendant was persuaded to aid and did subscribe the amount sued for; that afterward plaintiff, in pursuance of his said design, procured a conveyance of the land to himself, as agent of the company, and has since become the absolute owner thereof in fee simple; that immediately upon the procurement of the said conveyance of said land plaintiff entered upon, and ever since has been in possession of, the whole of it, except about five acres, and the defendant alleged that the conveyance to plaintiff as agent was colorable only and was further made to deceive the parties to said paper, for the whole of said land was paid for by plaintiff and was purchased by him in his own right and for his exclusive use and benefit; that immediately after the purchase of said land plaintiff conveyed about seven acres thereof to said railroad company for $1,000, but has always retained the balance thereof, and while pretending to act

in concert with and in behalf of the other subscribers to the agreement set out in the petition, in the promotion of the object therein mentioned, he was, without the knowledge of his fellow subscribers, acting as the agent of the Fremont, Elkhorn & Missouri Valley Railroad Company, both in the procuring of the subscription and in the location of said depot and station; that while pretending to act for and on behalf of such other subscribers, but in fraud of their rights, he purchased the forty-acre tract at a price largely in excess of its value or of the price for which it might have been purchased, and that while pretending to act for and in behalf of this defendant and such other subscribers he executed to, and received from, the railroad company the conveyance referred to of about thirty-two acres of the forty-acre tract. It was further alleged in the answer that each and all the representations of plaintiff made to induce the subscribers to sign said paper were false and untrue, as the plaintiff knew at the time of making them.

By his reply plaintiff admitted his ownership of the forty-acre tract, less about seven and one-half acres, and that he paid the purchase price for said tract and that it was conveyed to him as agent for the railroad company but he denied that this, or any other of his acts, was for the purpose of deceiving the subscribers to said paper, and alleged that his purchase was for the general good of the citizens and residents of Humphrey and to thereby induce the said railroad company to erect and maintain a depot and station, and that what he did was done for the benefit of the public generally and to hurry the matter of the erection of said depot station, and in reliance upon the faith and credit of the subscription paper and the assignment thereof and the belief that the same would be promptly paid, and because the owner of the land refused to convey until the whole amount of the purchase-money was paid to him.

From the evidence it is very clear that the arrangement whereby the railroad company was induced to build

and maintain a station and depot in consideration of the conveyance to it of only about seven and one-half acres of land, and by virtue of which plaintiff became the owner of the remainder of the forty-acre tract in his own right, was unknown to any of the co-subscribers of Hale. It was testified by Mr. Hale as follows: "Was present when subscription contract was prepared and stated that the railroad company demanded forty acres of land as a condition for the removal of its side track and stock yards from Brookfield to Humphrey." In explanation of this it is proper to say that earlier in giving his testimony Mr. Hale had described the necessity of a discontinuance of the station at Brookfield that one might be established at Humphrey. It is quite clear that when Mr. Hale represented to the signers that forty acres would be required to secure the location of a depot at Humphrey he thought it would be necessary so to do, but that, subsequently, the railroad company was satisfied to do as they were asked to do in consideration of the conveyance to it of but about seven and one-half acres. The result of this is that Mr. Hale has become the owner in fee simple of thirty-three of the forty acres and is now seeking to hold his co-subscribers to the full payment for the entire forty-acre tract. It is not disclosed by any of the evidence the capacity in which Mr. Hale was the agent of the railroad company, nor when that agency began or ended. It may be true, as claimed, that the railroad company was under obligations to Mr. Hale for services rendered in its behalf, but this it devolved on Mr. Hale to show. The condition of the issues in this case is not as it was in *Ripp v. Hale, supra*, wherein HARRISON, J., said that the land was conveyed to Hale, not for himself, but as agent for the company, and what the company did with the land could not, and did not, affect the liability of the defendant upon the subscription, nor tend in any manner nor to any extent to aid the jury in a determination of any of the issues submitted to them. It must be assumed that Mr. Hale, though an

agent of the railroad company, acted in good faith when he represented that what it was desired to accomplish could only be brought about by a conveyance to the railroad company of the entire forty-acre tract. This subscription was procured upon the faith superinduced by this representation that the location at Humphrey could only be effected by the donation of the entire tract. Mr. Hale was acting as agent for the donee, was, as he testified, seeking to accomplish a common purpose with his co-subscribers, and to them made the representation which influenced their subscriptions. The advance by him of the $2,000 with which to purchase the forty acres was neither at the instance nor upon the representation of any subscriber that such advance was necessary; indeed, he, as agent of the railroad company, could not in reason be assumed to act upon the representation of parties whom he knew not to have equal means of information with himself. It was his duty, if less than forty acres were acquired, to acquaint his co-signers with that fact, and he should not be permitted to profit at their expense by withholding information which should have been imparted to them. Under analogous conditions this principle was applied in *Jansen v. Williams*, 36 Neb. 869, and in *Campbell v. Baxter*, 41 Neb. 729. (See also *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463.) We do not assume that Mr. Hale was guilty of the corrupt misconduct imputed to him, but he was confessedly acting in a fiduciary capacity for two parties whose interests were antagonistic. In the transaction he seems to have gained an advantage personal to himself and, as one class of beneficiaries allege, at their expense. The relations sustained by him to both parties for whom he was acting devolved upon him the burden of showing that he derived no advantage to himself at the expense of the party whom he sued. Whether the proofs were sufficient to meet this requirement was a question of fact which should have been submitted to the jury. (*Hale v. Ripp, supra.*) For the reason that by a peremp-

tory instruction this question was withdrawn from the jury the judgment of the district court is reversed.

REVERSED AND REMANDED.

SULLIVAN, J., not sitting.

HARRISON, C. J.

I agree that the peremptory instruction was not proper and the judgment should be reversed.

LOUIS REIN V. W. W. KENDALL, SHERIFF.

FILED JUNE 23, 1898. NO. 8218.

1. **Chattel Mortgages:** LEVY OF ATTACHMENT: PRIORITY. A chattel mortgage made and filed for record in accordance with an agreement between the parties thereto that the mortgagor would give security of that kind, *prima facie* vested the mortgagee with the right of possession of the property mortgaged as against an officer levying on the said property in the interval of time between such filing and the mortgagee's acquisition of knowledge that such filing had actually taken place.

2. ———: FRAUDULENT INTENT: EVIDENCE. The question of fraudulent intent in the making and acceptance of a chattel mortgage is a question of fact as between the parties thereto and an officer who levies on the mortgaged property notwithstanding the record of said instrument and in defiance of the rights of the mortgagee asserted thereunder; and to sustain an attack on the mortgage as fraudulent against creditors there must be some evidence of the *mala fides* charged.

ERROR from the district court of Howard county. Tried below before THOMPSON, J. *Reversed.*

Henry Nunn, for plaintiff in error.

Frank J. Taylor and *F. H. Woods, contra.*

RYAN, C.

Plaintiff Louis Rein replevied from the sheriff of Howard county 100 bushels of wheat and a cast-iron land

roller. The sheriff's possession was by virtue of a writ of attachment which had been issued and levied in an action brought against John Dobry, in whose possession the property was when the levy was made. Plaintiff's right of possession was asserted under and by virtue of a mortgage signed by the owner of the property in dispute November 14, 1893, and by him filed for record in the proper office on the day following its date. The levy of the attachment referred to was before the mortgagee knew that the mortgage had been signed or filed of record, though there is no contradiction of the evidence of the mortgagor and mortgagee that it had been agreed between them before the mortgage was made that it should be executed upon chattels of the mortgagor, and there was no contradiction of the testimony of the mortgagor that some of the property was mentioned which was afterwards mortgaged. The defendant in error defends the judgment of the district court on two grounds: First, that the filing did not amount to a delivery, because there was no knowledge by the mortgagee of the actual existence of the mortgage before the levy of the attachment, against which, therefore, it was inoperative; and, second, the mortgage was fraudulent as to creditors of Dobry.

The rule in relation to the presumption arising from the filing for record of a mortgage is the same as that with reference to the filing of a deed by the grantor, and such recording of the latter has been held to afford *prima facie* evidence of title in the grantee. (*Bowman v. Griffith*, 35 Neb. 361; *Issitt v. Dewey*, 47 Neb. 196; *Gustin v. Michelson*, 55 Neb. 22.) In *Brown v. Westerfield*, 47 Neb. 399, it was held that it was not essential to the validity of a deed that it should be delivered to the grantee personally, but that it was sufficient if the grantor delivered it to a third person, unconditionally, for the use of the grantee, the grantor reserving no control over the instrument. The filing of the mortgage for record, therefore, was sufficient to evidence, *prima facie*,

a delivery of the mortgage as against the levy of an attachment on the property mortgaged after the mortgage had been recorded.

There was no evidence from which a fraudulent intent on the part of the mortgagor or mortgagee could be inferred. The debt secured was *bona fide*, and there was no relation between the parties from which a presumption against the fairness of the transaction could properly be inferred. The mortgagee received other security in the form of collaterals about the same time the mortgage was made, but his testimony showed in the trial that he had not therefrom collected a sufficient sum in the aggregate to satisfy the indebtedness due him. At any rate his right of present possession at the time of the trial was dependent upon the condition of affairs at the commencement of the action. (*Kavanaugh v. Brodball*, 40 Neb. 875; *Brown v. Hogan*, 49 Neb. 746.) "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact and not of law," etc. (Compiled Statutes, ch. 32, sec. 20. See also the authorities cited on the proposition in *Shaw v. Robinson*, 50 Neb. 403.) As the record of the mortgage, *prima facie*, vested the mortgagee with an interest in the mortgaged property such as to entitle him to the possession thereof, and as there was no evidence of a fraudulent intent in giving or accepting said mortgage, the judgment of the district court must be, and accordingly is, reversed.

REVERSED AND REMANDED.

SULLIVAN, J., dissenting.

DICK HILLIGAS V. STATE OF NEBRASKA.

FILED JUNE 23, 1898. No. 9998.

Larceny: CONVICTION. The evidence in this case examined, and *held* insufficient to sustain the verdict of the jury.

ERROR to the district court for Merrick county. Tried below before ALBERT, J. *Reversed.*

W. T. Thompson, for plaintiff in error.

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

RYAN, C.

In the district court of Merrick county plaintiff in error was convicted upon a charge of larceny of three calves, and was thereupon sentenced to imprisonment in the penitentiary at hard labor for the period of three and one-half years.

H. Wieger was the owner of seventeen calves previous to and on May 26, 1897. From these, three were stolen in the night-time between May 25 and May 26, 1897. Two days afterward Wieger found these three calves in the possession of Mr. McGinley, who had, on said May 26, purchased them, with four others, from one Charles Gregory. Mr. Wieger resided at that time in Merrick county and Mr. McGinley resided in Buffalo county about sixty miles westward from Mr. Wieger's residence. About May 14, 1897, Hilligas, the plaintiff in error, was hired by George Fleebe, a farmer living six and one-half miles eastward from the farm of Mr. McGinley. At that time, and previously, Charles Gregory was likewise an employé of Mr. Fleebe. On May 24, 1897, Gregory contracted to sell and deliver to McGinley seven calves, which were to be of a stated description. On that same day plaintiff in error, accompanied by Gregory, drove a team owned by plaintiff in error eastward from the farm

of Mr. Fleebe. One of the horses composing this team was of a dark color and the other black. The wagon had a double top box and the harness was a heavy double harness. In the further progress of the evidence this team, wagon, and harness were described by each witness, by whom they were referred to in the above descriptive terms, and we may therefore assume the identity thereby indicated. In the afternoon of May 25, 1897, plaintiff in error, with the above described outfit, and accompanied by some unknown person, drove northward along the farm of H. Wieger. On the morning of May 26, 1897, at about half past seven o'clock, plaintiff in error was seen driving westward on a road a mile north of the road running along the farm of McGinley and at a point seven miles east of the east line of McGinley's farm prolonged northward. At this time plaintiff in error was accompanied by another person, not identified, but who was not Gregory. At this time plaintiff in error had in the wagon only three calves—at least the witness who testified as to this circumstance saw but three. If these had corresponded in description with the three sold to McGinley on the same day by Gregory, the connection of the plaintiff in error with the larceny might have been satisfactorily established. The testimony of the witness just referred to, however, was that the three calves he saw in the wagon were red and white spotted. The calves which were stolen from Mr. Wieger were by him described as follows: "One roan bull calf, one a black heifer calf, and the third a dark steer calf." The seven calves which Gregory had contracted to sell were delivered by him to Mr. McGinley in the afternoon of May 26, 1897. There was no one with him at the time, and on the following day he and the plaintiff in error were seen together eating lunch near a stream, wherein they explained they were about to fish. The team, wagon, and harness above referred to were with Gregory and plaintiff in error on this occasion. The above is a complete synopsis of the evidence which tended to in-

criminate the accused, and while some of it tends to the justification of suspicions of his complicity, we do not think there was sufficient to remove every reasonable doubt upon that point. If the three calves seen by Carr in the possession of the accused had been of the description of those stolen, a very strong showing would have been made, but there was a discrepancy which was irreconcilable. There was no proof that with the three calves seen by Carr in the wagon there were others, from which fact the jury logically, or otherwise, could assume that all seven might have been in the wagon and that Carr saw some of those not stolen from Wieger. Again, there was no testimony that some of the calves purchased by McGinley of Gregory were spotted red and white. Perhaps if the description of the calves seen by Carr corresponded with the description of some of those sold to McGinley this would not have been sufficient to justify an assumption that the accused had assisted in the larceny of a still different description of calves, to-wit, those stolen from Wieger; but it would have shown, at least, that the defendant was engaged in a common, unlawful enterprise with Gregory. For the reasons above given we are of the opinion that the verdict was without the support of sufficient evidence to sustain it, and accordingly the judgment of the district court is reversed.

REVERSED AND REMANDED.

GEORGE H. JEWETT ET AL. V. FANNIE E. MCGILLICUDDY.

FILED JUNE 23, 1898. No. 8200.

Interest: CONSTRUCTION OF CONTRACT. A written instrument whereby the makers promised to pay in six months after date the sum of $5,000, with interest at six per cent per annum, *held* to draw interest from its date, notwithstanding the fact that in said instrument there was a condition that it should not become due and payable until the payee should render a true and just ac-

count of all moneys received and disbursed by him as Indian agent under his bond and until such account had been accepted, and on such acceptance there had been a discharge of him from all liability for moneys, by the government of the United States of America.

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

The opinion contains a statement of the case.

Charles Offutt, for plaintiffs in error:

Under the terms of the writing, liability for the money mentioned therein was not to accrue until the payee's discharge as Indian agent. (*Mathews v. Keble*, 3 L. R. Ch. App. Cas. [Eng.] 701; *Roffey v. Greenwell*, 10 Ad. & E. [Eng.] 222; *Morse v. Rice*, 36 Neb. 217; *Upton v. Ferrers*, 5 Ves. Jr. [Eng.] 801; *Blaney v. Hendricks*, 2 W. Bl. [Eng.] 761.)

Where parties to a contract fix a definite time in the future when liability shall accrue, interest runs from that time, and not from the date of the instrument. (*Bell v. Arndt*, 24 Neb. 261; *Durfee v. O'Brien*, 16 R. I. 213; *Morse v. Rice*, 36 Neb. 212; *Kinard v. Glenn*, 29 S. Car. 590.)

Interest from date will not be awarded in any event unless such was clearly the intention of the parties. (*Kinard v. Glenn*, 29 S. Car. 590; *Billingsly v. Cahoon*, 7 Ind. 184.)

McCabe, Wood, McGilton & Elmer, contra:

The instrument bears interest from date. (11 Am. & Eng. Ency. Law, p. 403, and cases cited; *Kennerly v. Nash*, 1 Stark. [Eng.] 452; *Domen v. Dibden*, 1 R. & M. [Eng.] 381; *Richards v. Richards*, 2 B. & Ad. [Eng.] 447; *Dewey v. Bowman*, 8 Cal. 145; *Gholson v. King*, 79 N. Car. 162; *Green v. Kennedy*, 6 Mo. App. 577; *Kilgore v. Powers*, 5 Blackf. [Ind.] 22; *Kimmell v. Burns*, 84 Ind. 370; *Bogan v. Calhoun*, 19 La. Ann. 472; *Dickinson v. Tunstall*, 4 Ark. 170; *Hopper v. Richmond*, 1 Stark. [Eng.] 507; *Inglish*

v. Watkins, 4 Pike [Ark.] 199; *Whitton v. Swope*, 1 Litt. [Ky.] 160; *Ely v. Witherspoon*, 2 Ala. 131; *Conners v. Holland*, 113 Mass. 50; *Campbell Printing Press & Mfg. Co. v. Jones*, 79 Ala. 475; *Pitzer v. Barret*, 34 Mo. 84; *Salazar v. Taylor*, 33 Pac. Rep. [Colo.] 369; *Adairs v. Wright*, 14 Ia. 22; *Payne v. Clark*, 23 Mo. 259; *Francis v. Castleman*, 4 Bibb [Ky.] 282; *Collier v. Gray*, 1 Overt. [Tenn.] 110; *Smith v. Goodlett*, 21 S. W. Rep. [Tenn.] 106; *Goodwin v. Goodwin*, 65 Ill. 497; *Brewster v. Wakefield*, 1 Minn. 260; *Main v. Casserly*, 67 Cal. 127; *Hackenberry v. Shaw*, 11 Ind. 392; *Horn v. Nash*, 1 Ia. 204; *Parvin v. Hoopes*, 1 Morris [Ia.] 387; *Daggett v. Pratt*, 15 Mass. 177; *Flanders v. Chamberlain*, 24 Mich. 306; *Brewster v. Wakefield*, 69 Am. Dec. [Minn.] 343.)

RYAN, C.

In this case there was judgment in the district court of Douglas county upon a writing of the following forms:

"$5,000.00. SIDNEY, NEBRASKA, April 10, 1883.

"For value received, six months after the fulfillment of certain conditions hereinafter specified, by the person to whom this note is made payable, we, or either of us, promise to pay to Valentine T. McGillicuddy the sum of five thousand dollars, with interest at the rate of six (6) per cent per annum until paid. The consideration and the conditions upon which this note is given are such, that the same shall not become due and payable until the said Valentine T. McGillicuddy, who accepts this note and its conditions, shall have rendered a true and just account of all moneys received and disbursed by him as Indian agent at Pine Ridge, under his bond, dated February 14, A. D. 1883, to the government of the United States, and not until the same has been accepted and he is fully discharged from all reliability for moneys by the said government of the United States of America.

"This note is only transferable to Mrs. F. E. McGilli-

cuddy, wife of Valentine T. McGillicuddy, and not transferable by her to any other person or persons.

"GEORGE H. JEWETT.
"JAMES H. PRATT.
"C. FERRIS."

To an intelligent understanding of the position of plaintiffs in error, against whom judgment was rendered, it is necessary that there be considered the following findings made by the trial court:

"2. That simultaneously with the execution of said writing, and as a part consideration therefor, said Valentine T. McGillicuddy paid to the defendant George H. Jewett the sum of $4,938.90, promising and agreeing to pay the balance of $5,000 named in said writing, but thereafter no other or further payment, and that for the remainder of the consideration for said writing of April 10, 1883, and the delivery of said money to said Jewett, the defendant Jewett himself became surety on the bond of the said Valentine T. McGillicuddy to the United States of America and procured for the said McGillicuddy all other sureties required upon, or who, in fact, did sign said bond, which said bond, so signed and procured by said Jewett, was in the sum of $30,000, for the faithful discharge of his, the said Valentine T. McGillicuddy's, duties as Indian agent at Pine Ridge, in the state of Nebraska, conditioned that the said Valentine T. McGillicuddy render a true and just account of all moneys received and disbursed by him as Indian agent, and the defendants herein, James H. Pratt and C. Ferris, for the purpose of securing the obligation of George H. Jewett on the contract set forth in finding 1, signed said writing as sureties for said George H. Jewett.

"3. That said bond by said Valentine T. McGillicuddy, as Indian agent at Pine Ridge, was duly accepted by the United States of America, was dated February 14, 1883, and that said Valentine T. McGillicuddy continued to act as such Indian agent under said bond until in the year 1889; that on the 9th day of July, 1889, said Valen-

tine T. McGillicuddy, having theretofore rendered a true and just account of all moneys received and disbursed by him as Indian agent at Pine Ridge under his said bond, said account of said McGillicuddy as such Indian agent was by the United States government accepted, and said Valentine T. McGillicuddy was, on said July 9, 1889, fully discharged from all liability for moneys by said government of the United States of America and that, on July 30, 1889, said Valentine T. McGillicuddy gave the defendant due notice of his discharge as aforesaid."

The district court construed the writing sued upon as an obligation to pay six per cent interest from date until the rendition of judgment, and seven per cent per annum interest thereafter. Plaintiffs in error insist that the agreement above copied did not begin to bear interest until "after the fulfillment of certain conditions hereinafter specified." In other words, it is contended that the "six months after the fulfillment of certain conditions" not only fixed the time when payment was to be made, but as well defined the earliest period during which it is was contemplated that interest should accrue, and this contention is not without a certain support in some of the authorities relied on by plaintiff in error. Our statute on the subject of interest seems to have been framed to meet some of the propositions accepted in those authorities and to render clear the entire subject,—a very laudable undertaking, as can be fully realized from an examination of the cases relied upon by the parties to this litigation. Section 4, chapter 44, Compiled Statutes, referring to the rate of interest allowed to be collected, contains this language: "On money due on any instrument in writing, * * * and on money loaned or due and withheld by unreasonable delay of payment, interest shall be allowed at the rate of seven per cent per annum." It is provided by section 1 of said chapter: "Any rate of interest which may be agreed upon, not exceeding ten dollars per year upon

one hundred dollars, shall be valid upon any loan or forbearance of money, goods, or things in action." The case of *Morse v. Rice*, 36 Neb. 212, was governed by the above quoted provision of section 4, chapter 44, Compiled Statutes, as to an unreasonable delay of payment, for, when a certificate of deposit is payable on demand, a failure to pay upon demand may well be classed as an unreasonable delay in its payment. The use of the term "on any instrument of writing," etc., relieves us of many of the difficulties which troubled the courts in cases cited by plaintiffs in error. We are of the opinion that the district court properly allowed six per cent per annum interest on the contract sued upon until the date of the judgment under consideration. In the motion for a new trial and in the petition in error there was complaint that seven per cent interest was allowed on the judgment, but as this point was not urged in argument it is presumed to be waived. The judgment of the district court is

AFFIRMED.

CHARLES A. GLAZE V. W. W. KEITH ET AL.

FILED JUNE 23, 1898. No. 8187.

1. **Justice of the Peace:** SETTING ASIDE VERDICT. A justice of the peace has no jurisdiction to set aside the verdict of the jury in a case tried before him and grant a new trial, except upon the grounds that the verdict was obtained by fraud, partiality, or undue means.

2. ———: VERDICT. In a justice court the jury returned the following verdict: "We, the jury, impaneled and sworn in the above entitled cause, do find that the plaintiff had no cause of action until the assignor and executor of the lease had settlement on old account." *Held*, A verdict for the defendant.

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

J. S. Hoagland, for plaintiff in error.

Grimes & Wilcox, contra.

RAGAN, C.

Keith & Thorn sued Charles A. Glaze before a justice of the peace in Lincoln county. The case was submitted to a jury, which returned the following verdict: "We, the jury, impaneled and sworn in the above entitled cause, do find that the plaintiff had no cause of action until the assignor and executor of the lease had settlement on old account." This verdict the justice of the peace, on motion of Keith & Thorn, set aside upon the ground that the verdict found that Keith & Thorn had no cause of action and that the justice of the peace was of opinion that they had. To the setting aside of the verdict and granting Keith & Thorn a new trial Glaze excepted. The case was submitted to a second jury, which brought in a verdict in favor of Keith & Thorn, upon which the justice rendered a judgment, and Glaze, to reverse this judgment, prosecuted a proceeding in error to the district court of Lincoln county, which affirmed the judgment of the justice of the peace, and Glaze has brought the judgment of the district court here for review.

A justice of the peace has no jurisdiction to set aside the verdict of a jury in a case tried before him and grant a new trial unless it is made to appear that the verdict was obtained by fraud, partiality, or undue means. (Code of Civil Procedure, sec. 983; *Templin v. Synder*, 6 Neb. 491; *Cox v. Tyler*, 6 Neb. 297; *Vaughn v. O'Conner*, 12 Neb. 479; *State v. King*, 23 Neb. 540.) The verdict returned by the jury was, in effect, a verdict in favor of Glaze, and upon that verdict the justice of the peace should have entered a judgment in his favor. The judgment of the district court is reversed and the cause remanded with

instructions to that court to set aside the judgment of the justice of the peace.

REVERSED.

ANDREW TRAYNOR V. LORENZO V. MORSE ET AL.

FILED JUNE 23, 1898. No. 8213.

1. **Real Estate Agents:** ACTION FOR COMMISSIONS: VERDICT FOR PLAINTIFFS. Evidence examined, and *held* to sustain the finding of the jury.
2. ———: ———: INSTRUCTIONS. Instructions of the court complained of by the plaintiff in error examined, and *held* to be correct.

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

Hall, McCulloch & Clarkson, for plaintiff in error.

Warren Switzler, contra.

RAGAN, C.

This case was in this court once before. (See *Morse v. Traynor*, 26 Neb. 594.) The action is by Morse & Bruner against Traynor to recover commissions for effecting the sale of some real estate belonging to Traynor or his wife. The trial in the district court resulted in a judgment in favor of Morse & Bruner, to review which Traynor has filed a petition in error here.

We think the record establishes the following facts: That in 1887 Morse & Bruner were real estate agents in the city of Omaha; that Traynor placed his property in their hands for sale at a price of $10,000; that for effecting a sale the real estate agents were to be paid the usual commissions charged by real estate agents; that some time early in 1887 Traynor notified Morse & Bruner that he had raised the price of the property to $12,000 net to him, and that in June, 1889, Morse & Bruner, through a subagent of theirs named Seay, intro-

duced to Traynor a man named Stewart, who purchased this property for $12,500. On the trial Traynor contended that before the sale of the property to Stewart he had taken it out of the hands of Morse & Bruner for sale. We do not think the evidence sustains this contention of Traynor.

Another contention of Traynor at the trial was that prior to the sale of the property to Stewart he had notified Morse & Bruner that he had raised the price of the property to $14,000. Morse & Bruner claimed that they had never received such notice, and if the finding of the jury includes a finding that Morse & Bruner had not received such a notice, the evidence sustains that finding.

But the principal point litigated upon the trial was this: Traynor claimed that when Stewart was introduced to him by Seay and the price of the property inquired about he said to Stewart and Seay that the price of the property was $14,000; that one of these parties then replied that he understood Morse & Bruner held it for sale at $12,500, and thereupon he, Traynor, answered that if he could get $12,500 net for the property it would be all right, and that he did sell the property to Stewart for $12,500 net. Morse & Bruner's contention on this issue was that Traynor did not use the word "net," but sold the property to Stewart for $12,500. The court instructed the jury as follows: "You are further instructed that if at the time of the sale, on June 4, 1887, the plaintiffs had received notice to sell the property at $14,000, and if George Seay, as the agent of Morse & Bruner, introduced the Stewarts to the defendant and by defendant's direction and consent the sale was effected at $12,500, the defendant would be liable to pay a commission to the plaintiffs, unless Seay, acting for the plaintiffs, agreed with defendant that the sale should be made at $12,500 net, in which event plaintiffs cannot recover." The defendant requested the court to instruct the jury as follows: "The jury are in-

structed that if they believe from the evidence that the property was still in the hands of Morse & Bruner for sale, and that the price at that time had been given to Morse & Bruner as $14,000, and that when Seay came to Traynor the price was fixed at $12,500 net, you will find for the defendant, although you may find that the property was still in the hands of Morse & Bruner, and that Seay was a subagent of theirs." The court modified the instruction thus: "Provided you find from the evidence that Seay consented and agreed to a sale at $12,500, net." The action of the court in giving the instruction first quoted, and in modifying the second one, it is insisted by counsel for plaintiff in error, was erroneous. In view of the facts as disclosed by the evidence in this case we have reached the conclusion that the court did not err in giving the first instruction, nor in modifying the second. Morse & Bruner had this property for sale at $10,000. The price was then raised to $12,000 net, and subsequently, as claimed by Traynor, the price was raised to $14,000; and if Morse & Bruner brought and introduced to Traynor a purchaser ready, able, and willing to purchase this property at any one of these three prices, and Traynor consented to and did sell the property to such purchaser at any one of these prices, then his liability for commissions to the real estate agents attached in the absence of an agreement on the part of the real estate agents to forego his commission. The judgment of the district court is right and is

AFFIRMED.

WILLIAM T. NELSON, ADMINISTRATOR, V. SWIFT & COMPANY.

FILED JUNE 23, 1898. No. 8222.

Death by Wrongful Act: NEGLIGENCE: EVIDENCE. The record examined, and *held* to contain no evidence which would support a verdict in favor of the plaintiff in error; and the action of the district court in peremptorily instructing the jury to return a verdict for the defendant in error approved.

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

E. C. Lane and *Lane & Murdock*, for plaintiff in error.

I. R. Andrews, contra.

RAGAN, C.

Swift & Co., an Illinois corporation, is engaged in the business of packing meats at South Omaha, Nebraska, at which place it owns a building seven stories high. An elevator shaft extends from the basement to the top of this building, a distance of some ninety feet, and up and down this shaft an elevator is operated in connection with the business which is conducted in that building. December 1, 1892, Henry Tollman was in the employ of Swift & Co., and fell down the shaft from the fifth floor to the basement, and was killed. His administrator then brought this suit against Swift & Co. for damages, alleging that the intestate's death was caused by the negligence of Swift & Co. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict in favor of Swift & Co., upon which a judgment of dismissal of the administrator's action was entered, and to reverse which he has filed here a petition in error.

The record contains not one word of evidence which shows, or from which it can be rationally inferred, that

this poor boy's untimely death was the result of the negligence of this corporation. Young Tollman was at work on the fifth floor of this building. It became necessary for him to transport to the sixth floor about thirty pounds of "sausage casings." These were in a pan under a bench or table at which Tollman was at work. He took a hook, applied it to the pan or a handle on the pan, and dragged it toward the elevator shaft. What happened after that time cannot be better told than to use the language of the witness called in behalf of his administrator, who said: "Understand me right. He had the pan with him, then he opened the door—the door opening into the shaft of the elevator. The elevator wasn't there. He shut the door. He rang the bell. (When the elevator was desired at any floor the man in charge of the elevator was signaled by a bell to bring it to the floor where needed.) Then he opened the door again,—understand me well what I state to you,—and that was the last of him I seen." It would subserve no useful purpose whatever to set out any more of the testimony, and it must suffice to say that it does not disclose what caused this boy to fall down that elevator shaft. That he stepped into or fell down the shaft and was killed all agree, but the cause of the step or fall is not disclosed by the record. The court was right in its peremptory instruction to the jury, for had it returned a verdict that Tollman's death resulted from the negligence of Swift & Co., it would have had no support in the evidence. The judgment of the district court is

AFFIRMED.

THOMAS M. ROBERTS V. HARVEY S. HOPPER.

FILED JUNE 23, 1898. No. 8202.

Intoxicating Liquors: ACTION AGAINST SALOON-KEEPER: DAMAGES RESULTING FROM INTOXICATION: EVIDENCE. In a suit against a licensed saloon-keeper to recover damages which the plaintiff

alleged he had sustained by reason of disposing of his property while intoxicated from the drinking of liquors furnished by the saloon-keeper, it is error for the court to charge the jury that they may award the plaintiff such damages as he has sustained by reason of disposing of his property while intoxicated, in the absence of an admission, or some evidence, of the value of the property disposed of.

ERROR from the district court of Burt county. Tried below before HOPEWELL, J. *Reversed.*

H. E. Carter, for plaintiff in error.

H. Wade Gillis, contra.

RAGAN, C.

In the district court of Burt county Harvey S. Hopper brought suit against Thomas M. Roberts, a licensed saloon-keeper. Hopper alleged that Roberts had sold him intoxicating liquors which he had drunk and from drinking which he had become intoxicated, and that while he was thus intoxicated, and by reason thereof, he was thrown from a buggy, had his collar bone broken, and was otherwise severely injured; that at the time he became intoxicated he was the owner of a team and harness worth $180, which was incumbered for $70, and that while he was intoxicated, and by reason thereof, he disposed of said team and harness for less than their value; that during the months of August and September, 1893, he had paid Roberts for intoxicating liquors between $30 and $50. He prayed damages for the injury received by being thrown from the buggy, in the sum of $2,000; for loss sustained in the disposal of his team and harness, $80; and money spent for intoxicating liquors, $30. He had a verdict and judgment, which Roberts has brought here for review on error.

Roberts requested the district court to instruct the jury that there was no evidence before them that Hopper had sustained any loss in disposing of his team and harness. The court refused to give this instruction, but

charged the jury that if Hopper had disposed of his team and harness for less than they were worth by reason and because of being intoxicated by drinking intoxicating liquor bought of Roberts, then to the extent that Hopper was thereby damaged he was entitled to recover. The record shows that Hopper, while intoxicated from drinking liquors purchased of Roberts, disposed of his team and harness, and that he realized for them $25 or $30; but there is not in the record one syllable of evidence as to the value of the team and harness or either of them. For aught that the record discloses the $25 or $30 received by Hopper for the team and harness may have been their actual value. The court erred in not instructing the jury that there was no evidence that Hopper had sustained any damages in the disposition of his team and harness, even though he may have disposed of them while intoxicated from the drinking of liquors purchased of Roberts. The judgment of the district court is reversed.

REVERSED AND REMANDED.

L. C. CALKINS, APPELLANT, V. SARAH E. MILLER, ADMINISTRATRIX, ET AL., APPELLEES.

FILED JUNE 23, 1898. No. 8183.

1. **Summons:** SERVICE BY PUBLICATION: TIME TO ANSWER. Service by publication is irregular, and should be quashed on motion, when the published notice requires the party to answer on or before the second instead of the third Monday after the fourth publication of the notice.

2. ———: ———: ———. The published notice takes the place of a summons, and must inform the defendant on what date he is required to answer, and he must be required to answer on the date fixed by the Code. The statute is mandatory. Neither the courts, nor the clerks of the court, are invested with any discretion with respect to the time which a notice by publication shall be published, what it shall contain, nor on what date the defendant shall be notified that he is required to answer.

3. **Mechanic's Lien**: FORECLOSURE: LIMITATION OF ACTIONS. An action to foreclose a mechanic's lien must be commenced within two years after the filing of a claim for lien in the office of the register of deeds.

4. ———: ———: ———. Such an action is commenced at the date of the summons which is served upon the defendant.

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

A. A. Welch and *W. D. Funk,* for appellant.

Barnes & Tyler and *Carter & Brown, contra.*

RAGAN, C.

October 28, 1892, L. C. Calkins filed with the register of deeds of Knox county a verified account of items of material which he alleged he had furnished one H. N. Miller in pursuance of an oral contract with him for the erection of an improvement upon the latter's real estate, and claimed a lien upon said real estate for the material so furnished. October 16, 1894, Calkins filed a petition in the district court of said Knox county against Miller and a number of others, the object of which was to have established and foreclosed a lien upon the real estate of Miller for the material furnished to him for the erection of said improvement. At the date of filing this petition Calkins filed with the clerk a *precipe* for a summons for all the parties made defendants. The clerk neglected to issue a summons as requested until October 30, 1894, on which date he issued a summons, which was personally served on Miller and another. October 15, 1894, Calkins filed an affidavit for constructive service upon a number of parties made defendants to the action brought against Miller. October 18, 1894, he caused a notice of the pendency of this suit to be first published, which notice fixed the answer day of the parties attempted to be constructively summoned for the second Monday in November, 1894, to-wit, November 19, instead of the third Monday, to-wit, Novem-

ber 26, 1894, as required by the statute. The parties upon whom Calkins attempted to obtain constructive service appeared specially and moved the court to quash the constructive service or the service by publication, because the answer day was fixed by the notice published for the second instead of the third Monday after the service by publication was complete. This motion the court sustained. After the service of summons upon him, Miller died, and the action was revived in the name of his administratrix. She and the other party personally served with summons answered the action of Calkins and pleaded as a defense thereto that his action accrued more than two years prior to the date of the summons which was served upon them. To this answer Calkins replied, alleging the filing of his petition October 16, 1894, the filing of the *precipe* for a summons, and that the fact that the summons which was personally served was not dated and issued until October 30, 1894, arose from the neglect of the clerk of the court. To this reply Miller and the other parties personally served demurred. The demurrer was sustained and Calkins' action dismissed. Calkins has appealed.

1. The court did not err in quashing the service or attempted service by publication. Section 110 of the Code of Civil Procedure provides that the answer day of a defendant constructively served shall be the third Monday after the service by publication is complete. The published notice takes the place of a summons and must inform the defendant on what date he is required to answer, and he must be required to answer on the date fixed by the Code. It is mandatory. Neither the courts nor the clerks of the court are invested with any discretion with respect to the time which a notice for publication shall be published, what it shall contain, nor on what date the defendant shall be notified that he is required to answer. (*Crowell v. Galloway*, 3 Neb. 215.) In *Wilkins v. Wilkins*, 26 Neb. 235, it was distinctly ruled that where service was had by publication only, and the notice required the party to answer on or before

the second Monday after the service was complete, instead of the third, such a service was irregular and would be set aside on motion. This ruling was followed and reaffirmed in *Scarborough v. Myrick*, 47 Neb. 794.

2. Whether the court erred in sustaining the demurrer of the parties personally served depends upon the question as to whether Calkins' action, when brought, was barred by the statute of limitations. By section 3, chapter 54, Compiled Statutes, it is provided that the verified items of an account of labor and material filed with the register of deeds by a person who claims a lien upon real estate for labor and material furnished by him for the erection of an improvement upon such real estate in pursuance of a contract with the owner thereof shall operate as a lien for the period of two years after the filing of such verified items of account. Calkins filed his claim for a lien October 28, 1892. This claim then ceased to be a lien October 28, 1894, unless the running of the statute had been arrested by the commencement of an action to establish and foreclose the lien prior to that date. Section 19 of the Code of Civil Procedure provides that an action shall be deemed commenced at the date of the summons which is served upon the defendant. Here the summons that was served upon Miller and the other party personally served was dated October 30, 1894. Calkins' action then was commenced October 30, and at that date was barred; and the court did not err in its ruling on the demurrer and in dismissing the action. (*Monroe v. Hanson*, 47 Neb. 30; *Baker v. Sloss*, 13 Neb. 230; *Aultman v. Cole*, 16 Neb. 4; *Burlingim v. Cooper*, 36 Neb. 73.) The case last cited was an action to foreclose a mechanic's lien, and it was held: "If a summons is issued before the expiration of the two years from the filing of the lien, it may be served afterwards within the statutory time; but if not issued until after the expiration of two years, an action to enforce the lien will be barred." The decree of the district court is right and is

AFFIRMED.

ADDISON C. BEACH, APPELLEE, V. E. L. REED ET AL., APPELLANTS.

FILED JUNE 23, 1898. No. 8207.

1. **Homestead:** EXTENT AND VALUE. A debtor's homestead exemption is limited in quantity to two contiguous lots in an incorporated city, town, or village; if outside such corporation, to 160 acres of land; and in either case, in value, to $2,000.

2. ———: LIEN OF JUDGMENT: MORTGAGE. A money judgment of a district court becomes a general lien upon all the lands of the debtor in the county, at least, from the date of its rendition, and a mortgage executed upon such lands thereafter will not invest the mortgagee with a lien superior to the judgment for anything more than the debtor's homestead interest.

3. ———: FORECLOSURE OF MORTGAGE: REFORMATION OF DECREE: SHERIFF'S DEED. On the facts disclosed by the record *held* that a mortgagee who purchased the real estate sold at judicial sale to satisfy the decree foreclosing his mortgage was not entitled to have the foreclosure decree and sheriff's deed reformed so as to include therein lands not adjudged by the foreclosure decree to be subject to the lien of the mortgage.

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

E. H. Wooley, for appellants.

Beeson & Root, contra.

RAGAN, C.

In December, 1889, E. L. Reed was the owner of considerable real estate in Cass county, included in which were certain lots, blocks, and irregular tracts in the town of Weeping Water, upon one of which lots or tracts he resided with his family. In that month F. M. Gibson recovered a judgment against Reed for something like $6,000, which became a lien upon all the real estate of Reed in said county, subject, however, to his rights of homestead exemption. In 1891 Reed, being indebted to Addison C. Beach, executed to him a mortgage upon a

tract of land in said Cass county, described by metes and bounds, and being one of these blocks or tracts of land in the town of Weeping Water. Subsequently Beach brought a suit to foreclose this mortgage, making Gibson a party defendant. Gibson appeared and answered the petition of Beach, and claimed that his judgment was a first lien upon all the lands of Reed in said Cass county. Beach contended, among other things, that the mortgage given him by Reed was the first lien upon so much of Reed's real estate as constituted his homestead; and that the tract of land embraced and described in the mortgage constituted such homestead. The district court adopted Beach's contention and made findings that Beach's mortgage was a first lien upon the tract of land occupied by Reed as a homestead; that this tract of land was the one described in the mortgage from Reed to Beach; and that the tract of land described in the mortgage was in fact lot 14 of Reed's Addition to the city of Weeping Water, and entered a decree that Beach's mortgage was a first lien upon said lot 14, and ordering it sold to pay the amount found due Beach on the mortgage debt, which was something near $6,000. Reed stayed the execution of this decree for nine months, at the expiration of which time Beach caused the property described in the decree as lot 14 in Reed's Addition to the city of Weeping Water to be advertised and offered at public sale. At this sale Beach purchased the property, and after the sale was confirmed obtained a deed therefor and took possession thereof. In the execution or order of sale, in the appraisal proceedings, in the notice of the sale, in the sheriff's report of the sale, and in the sheriff's deed this property was described as in the decree, as being lot 14 in Reed's Addition to the city of Weeping Water. Subsequent to the entering of the mortgage foreclosure decree in favor of Beach, Gibson caused an execution to be issued and levied upon all the lands of Beach in said Cass county, except lot 14 in Reed's Addition to the city of Weeping Water. These lands were

duly appraised, advertised, and sold by the sheriff and purchased by Gibson, the sale confirmed, and a deed executed and delivered to him. After these two sales had been made it was discovered that a part of the building in which Reed resided was not on this lot 14 in Reed's Addition to the city of Weeping Water, and that some of the outbuildings used by Reed in connection with his homestead were not on said lot 14, and thereupon Beach brought this suit in the district court of Cass county, praying that the foreclosure decree rendered in his favor against Reed might be reformed so as to describe the lands, upon which the mortgage foreclosed in that case was a lien, by metes and bounds, following the description in the mortgage itself; and that the deed executed to him by the sheriff in pursuance of the sale had under the foreclosure decree might be reformed so as to convey to him the lands as described in his mortgage. On final hearing the court entered a decree as prayed, and Gibson has appealed.

We do not know of any principle of law or equity upon which this decree can stand. The decree entered in the mortgage foreclosure case which determined that Beach's mortgage was a first lien upon the land occupied by Reed as a homestead, and that that homestead was lot 14 in the town of Weeping Water, was not the result of either fraud or mutual mistake. The decree was so entered at the instigation of Beach and his counsel. By that decree Beach was given a first lien upon the entire tract of land upon which Reed resided. This tract of land embraced something more than four acres, and was worth at the time it was sold about $4,500, and was sold for $2,700, and Beach received the benefit of the sale. By the decree then entered as Beach asked to have it entered he obtained more than he was entitled to. Reed's homestead interest was limited, being in an incorporated village, in quantity to two contiguous lots and, in value, to $2,000. But by the decree property worth $4,500 was, at the instigation of Beach, decreed to be Reed's homestead, and

Beach's mortgage made a first lien upon this property. If Beach's mortgage was a first lien upon the homestead interest of Reed, the extent of that lien was $2,000. The decree, the order of sale, the notice of sale, the report of the sale, and the sheriff's deed having all been framed upon the theory that Beach's homestead was this lot 14, and so framed at the instigation of Beach, by becoming the purchaser at the sale at which this homestead was sold, he acquired all that he asked for in the foreclosure decree—all and more than he was entitled to under the law. That some of the outbuildings used by Reed were not actually upon this lot 14, and that some part of the house in which Reed resided was not on this lot 14, are wholly immaterial. By virtue of the judicial sale made in pursuance of the mortgage foreclosure decree Beach obtained all of lot 14 in Reed's Addition to the city of Weeping Water. This at his own instigation was declared and decreed to be Reed's homestead. It was his homestead, at least to the extent of $2,000 in value; but Beach, by virtue of the decree of the court in the mortgage foreclosure case and the sale which occurred in pursuance thereof, acquired this entire homestead of the value of $4,500. This he still has, and so far as this record discloses he proposes to retain, and by this proceeding seeks to have other property that once belonged to Reed added to it. Beach has already received about $2,500 worth of property out of the Reed estate to which he was not entitled; and if the property he purchased at the judicial sale did not have upon it all the buildings which he thought were upon it, we do not know of any principle of equity that authorizes the courts to make good to a purchaser at judicial sale the loss he may sustain which results from his own laches. The decree of the district court is reversed and the proceeding is dismissed.

REVERSED AND DISMISSED.

JAMES LATIMER V. STATE OF NEBRASKA.

FILED JUNE 23, 1898. NO. 9867.

1. **Criminal Law**: PRELIMINARY EXAMINATION. The district courts are without jurisdiction to try on information one accused of a felony, except he be a fugitive from justice, unless he has been first accorded the privilege of a preliminary examination.

2. ———: ———. The preliminary examination provided for by the Criminal Code is in no sense a trial of the person accused.

3. ———: ———: PLEA. When one is charged with having committed a crime, is arrested, and brought before a magistrate, it is not essential that he should be asked to plead, or plead to the complaint.

4. ———: ———. The object of a preliminary examination is to ascertain whether the crime charged has been committed, and, if so, whether there is probable cause to believe the accused committed it, and, if so, to insure his appearance in the district court to answer the complaint of the state therefor.

5. ———: ———. The statute awarding one accused of a crime the right to a preliminary examination was enacted for the benefit of the accused.

6. ———: ———: WAIVER. A preliminary examination is a right accorded—a personal privilege granted—and one which the accused may waive.

7. ———: ———: ———. If the accused, on being arrested and brought before an examining magistrate, voluntarily pleads that he is guilty of the crime charged against him, he thereby waives his right to a preliminary examination.

8. ———: ———: ———: RECOGNIZANCE. Where an accused, on being brought before an examining magistrate, waives a preliminary examination, then the magistrate should recognize him to appear in the district court and enter upon his docket the proceedings that actually occurred, and a duly certified transcript of this record, filed in the office of the clerk of the district court, will invest that court with jurisdiction to try the accused on information for the crime with which he was accused before the examining magistrate.

9. **Robbery**: DRUNKENNESS: EVIDENCE: INSTRUCTIONS. On the trial of one for robbery the evidence tended to show that the accused was intoxicated at the time it was alleged he committed the crime, but there was no evidence that he premeditated the commission of the crime and then became intoxicated. The court charged the jury that no state of mind resulting from drunken-

ness short of actual insanity or loss of reason was any excuse for a criminal act. *Held*, That the court erred.

10. ———: ———: QUESTION FOR JURY. The taking of money or property from the person or custody of one assaulted, with a felonious intent on the part of the accused to steal the same, is an essential ingredient of the crime of robbery; and whether the accused at the time of the assault, by reason of being intoxicated, was incapable of controlling his will and forming and entertaining a felonious intent is a question for the jury's consideration in determining whether the accused is guilty of the crime charged.

11. **Criminal Law**: CHARACTER OF ACCUSED. Previous good character of the accused in a criminal prosecution is a fact which he is entitled to have submitted for the consideration of the jury, precisely as any other circumstance favorable to him, without any disparagement by the court. *Johnson v. State*, 34 Neb. 257, followed.

ERROR to the district court for Stanton county. Tried below before EVANS, J. *Reversed.*

J. H. Brown and *Brome & Burnett*, for plaintiff in error.

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

RAGAN, C.

The prosecuting attorney of Stanton county filed an information in the district court thereof in which he charged Edwin Melick, James Latimer, and Robert Forsythe with having forcibly and violently assaulted one Louis Mick, and with forcibly and feloniously, and against his will, taking from him the sum of $38 in money, with the intent to feloniously steal the same. It seems that Melick and Forsythe pleaded guilty to this information and were sentenced to the penitentiary for six years, although this fact is not disclosed by the record. Latimer pleaded not guilty to the information, was tried by a jury, found guilty, and sentenced to a term of seven and one-half years in the state penitentiary. To review this judgment Latimer has filed in this court a petition in error.

1. To the information Latimer filed a plea in abatement, alleging that he had not been accorded a preliminary examination of the crime with which he stood charged in the information. To this plea the state filed a replication, and the issues made by such plea and replication were tried to a jury, which returned a verdict in favor of the state, upon which the district court entered a judgment that the information be not abated. It is not claimed by the prisoner that a complaint was not filed against him before an examining magistrate charging him with the identical offense with which he was charged in the information; but the issue of fact raised by the plea in abatement and the state's replication thereto was whether the prisoner had in fact been accorded a preliminary examination. The evidence shows without contradiction that a complaint was filed before the county judge of said county charging Forsythe, Melick, and Latimer with having committed the crime of robbery, and that the three parties were arrested on a proper warrant and brought before the county judge. A transcript of the proceedings had before that officer was put in evidence, and disclosed that the three parties were asked by the county judge whether they were guilty or not guilty of the crime charged in the complaint, and that they then and there entered a plea of guilty. Whereupon the magistrate adjudged that they enter into a recognizance for their appearance before the district court in said county at the first day of its next term to answer such charge.

The evidence on behalf of Latimer tended to show that though he was arrested and brought before the county judge with Forsythe and Melick, he was not asked whether he was guilty or not guilty of the crime charged in the complaint, and that he did not plead thereto. The evidence is undisputed that no witnesses were sworn or examined before the county judge. In other words, that officer did not make any judicial inquiry as to whether the crime of robbery had been committed and whether

there was probable cause for believing the accused committed it. We are of opinion that the evidence in the record establishes, beyond all question, that Latimer, when brought before the county judge, informed that officer that he was guilty of the crime with which he stood charged in the complaint.

The first question, then, is whether Latimer, by pleading guilty before the county judge, waived a preliminary examination. The district court charged the jury trying the issues made by the plea in abatement and the replication thereto that if Latimer, when brought before the county judge, pleaded guilty to the crime charged against him in the complaint, such plea amounted to a waiver by Latimer of his right to a preliminary examination, and it was upon this instruction that the jury found that Latimer had had a preliminary examination. We think the instruction of the district court was correct. Section 585 of the Criminal Code provides: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as provided by law before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination." Because of this provision of the Criminal Code the district courts are without jurisdiction to try, on information, one accused of crime, except he be a fugitive from justice, unless he has been first accorded the privilege of a preliminary examination. (*White v. State*, 28 Neb. 341; *Coffield v. State*, 44 Neb. 417.)

But the preliminary examination provided for by said section 585 of the Criminal Code is in no sense a trial of a person accused of crime. It is not even necessary that the person charged with having committed a crime on being brought before a magistrate should be asked to plead, or enter a plea of guilty, or not guilty, to the complaint. The object of the preliminary examination is to ascertain whether the crime charged has been committed, and if so, whether there is probable cause to be-

lieve that the accused committed it. (*In re Garst*, 10 Neb. 78; *State v. Robertson*, 55 Neb. 41.) The statute awarding one accused of crime the right to a preliminary examination was enacted for the benefit of the accused. The preliminary examination is a right accorded—a personal privilege granted by law to every one accused of crime—but it is a privilege which the accused may waive. (*Coffield v. State*, 44 Neb. 417.)

In the case at bar Latimer was accorded the privilege —the right—of a preliminary examination. He did not demand the taking of evidence, and the judgment of the county judge as to its effect; but upon inquiry as to whether he was guilty of the crime with which he was charged in the complaint he voluntarily stated to the magistrate that he was guilty; and by so doing he waived the swearing and examination of witnesses, waived the right given him by statute to have the county judge make a judicial inquiry as to whether the crime of robbery had been committed, and as to whether the accused probably committed it.

2. But it is insisted that the district court erred in entering a judgment that the information be not abated, as the court was without jurisdiction to try the accused on that information, because the record of the examining magistrate certified to the district court does not recite that he found that the crime of robbery had been committed and that there was probable cause for believing that the accused committed such crime; in other words, that in order to invest the district court with jurisdiction to try the accused of a crime on information, the proceedings of the examining magistrate certified to the district court must contain a statement that that officer found that the crime charged in the information had been committed and that there was probable cause for believing that the accused committed it, and that the magistrate reached such conclusions after the examination of witnesses. We cannot subscribe to this contention. In support of it counsel for Latimer have

cited us to *People v. Smith*, 25 Mich. 497, *People v. Chapman*, 62 Mich. 280, and *People v. Evans*, 40 N. W. Rep. [Mich.] 473. None of these cases is in point here. A statute of Michigan required the evidence taken on a preliminary examination to be reduced to writing and signed by the witnesses, and the examining magistrate to transmit this evidence to the district court with the proceedings had by him on the preliminary examination. In the *Smith Case* cited by counsel the information was quashed; but in that case the accused had not waived a preliminary examination. One had been in fact held, and the court quashed the information, not because the record of the examining magistrate did not contain a finding that a crime had been committed and there was probable cause for believing the accused committed it, but because the depositions or evidence reduced to writing on the preliminary examination were not signed by the witnesses as required by the Michigan statute. In the *Chapman Case* the information was quashed because it was filed before the filing in the district court of the depositions of the witnesses who testified before the examining magistrate. In the *Evans Case* a preliminary examination was held and the proceedings certified to the circuit court by the examining magistrate. An information was then filed against Evans, to which he pleaded in abatement that the justice before whom the examination was held had not stated in his return that any offense, not triable before a justice of the peace, had been committed; nor had such justice, by said return, stated that there was probable cause to believe the respondent guilty of the crime charged, nor of any offense or crime; but that, on the contrary, said justice expressly declared that he did not believe that said offense had been committed or that respondent was guilty thereof, and that he only required respondent to recognize to appear for trial in the circuit court in deference to and by reason of the intense public feeling in reference to and against respondent. On the day this plea

was filed in the circuit court the examining magistrate filed an amended return of the proceedings had before him, in which it was recited: "It appeared to me that an offense not cognizable by a justice of the peace had been committed, and that there is probable cause to believe the prisoner guilty thereof." When this amended return was filed in the circuit court that tribunal overruled the plea in abatement interposed to the information. Evans was put upon trial and convicted, and the supreme court held that the circuit court erred in overruling the plea in abatement; and that the record of an examining magistrate must show that a crime had been committed and that there was reasonable ground to believe that the accused had committed it, in order to invest the circuit court with jurisdiction to try the accused on information. But the *Evans Case* is not an authority for the contention of counsel here. Evans did not waive a preliminary examination, and the case does not decide—nor any other that I have been able to find—that notwithstanding an accused waives a preliminary examination, still the record of the examining magistrate must disclose that he examined witnesses and made a finding that the crime charged had been committed and that there was probable cause to believe the accused committed it, in order to invest the district court with jurisdiction to try the accused for the crime on information. If one is charged before a magistrate with the commission of a felony, arrested and brought before this magistrate, and a preliminary examination is held, then it may be that the district court has no jurisdiction to try the accused, on information for the crime with which he is charged, unless the proceedings had before the examining magistrate disclose that he found, after hearing the evidence produced on said examination, that a crime had been committed and that there was probable cause for believing the accused committed it; but, where the accused appears before the magistrate and expressly waives his right to a preliminary examination, or vol-

untarily says to the magistrate that he is guilty of the crime with which he is charged, we know of no law which makes it the duty of the magistrate to then proceed to call and examine witnesses and make an inquiry as to whether a crime has been committed, and if so, whether the accused probably was the guilty party. If the accused, on being brought before the examining magistrate, waives his right to a preliminary examination, or pleads guilty to the crime with which he is charged, then the magistrate should recognize him to appear in the district court and enter upon his docket the proceedings that actually occurred; and a duly certified transcript of this record filed in the office of the clerk of the district court will invest that court with jurisdiction to try the accused on information for the crime with which he was accused before the examining magistrate. (*Hedges v. State*, 18 O. St. 420; *State v. Ritty*, 23 O. St. 562.)

3. The evidence in this case tends to show that at the time Latimer committed the crime with which he was convicted he was intoxicated; but there is no evidence in the record which tends to show that he formed the intention of committing this robbery and then voluntarily became intoxicated. The court gave to the jury the following instruction twice: "The jury are instructed that voluntary intoxication or drunkenness is no excuse for crime committed under its influence; nor is any state of mind resulting from drunkenness short of actual insanity or loss of reason any excuse for a criminal act." It is the law that when one is charged with a crime he is not entitled to go acquit of the charge simply by showing that at the time he committed the offense he was intoxicated; but we do not understand that, though it appears that when one committed a crime he was intoxicated, the jury are not at liberty to give any weight to this fact, unless it appears that the accused at the time was actually insane. One might be so drunk as not to be conscious of what he was doing, so drunk as to have no

control of his will, and yet not be actually insane. In the case at bar the accused was on trial for robbery; and the intent with which he assaulted and took from the prosecuting witness his money was an essential ingredient of the crime for which the prisoner was on trial. The court, in effect, said to them that the evidence before them on the subject of the prisoner's intoxication should count for nothing, unless it established that at the time of the assault the prisoner was actually insane. The instruction given by the district court in this case was given by the district court in *O'Grady v. State*, 36 Neb. 320, and the judgment of the district court was reversed. The feature of the instruction which we are discussing was not commented on by the court in the opinion in that case; but the judgment of the district court was reversed because the court in the instruction also told the jury that if the prisoner's intoxication was voluntary, then evidence of his intoxication could not be considered for the purpose of proving that he did not premeditate or intend to commit the crime with which he was charged. But the court did not approve of the other part of the instruction which, in effect, forbade the jury to give any weight to the evidence of intoxication, unless it established that the prisoner, at the time he committed the offense, was, by reason of such intoxication, actually insane. The doctrine of this court is that while voluntary intoxication is not of itself a complete defense for one who is charged with the commission of a crime, still the evidence that the accused was intoxicated when it is alleged he committed the crime is admissible as a circumstance tending to show that the act of the accused was not premeditated. (*Hill v. State*, 42 Neb. 503; *Head v. State*, 43 Neb. 30; *Debney v. State*, 45 Neb. 856; *Ford v. State*, 46 Neb. 390.) In the case at bar the prisoner was entitled to have the jury consider the evidence which tended to show that he was intoxicated at the time it was alleged he committed the crime, for the purpose of ascertaining and determining the status and condition

of the prisoner's mind at that time. If he was so drunk at that time that he was not conscious of what he was doing, so drunk that he had no control of his will, and was incapable of forming and entertaining a felonious intent, then his act did not render him guilty of robbery, and it was for the jury to determine whether he was at the time so drunk as to be unconscious of his act, incapable of controlling his will, and forming and entertaining a felonious intent; and though he might have been by reason of his intoxication in such state of mind, it does not follow that he was then actually insane. We think the court erred in refusing to give the instrucion asked and in giving the one quoted.

4. As this case is to be tried again we have thought it our duty to call the attention of the district court to its charge on the subject of the prisoner's good character. The prisoner produced before the jury evidence of good character previous to the time of the alleged commission of the crime for which he was on trial. On this subject the district court gave to the jury three instructions, as follows:

"3. The court instructs the jury that good character is no excuse for crime; that it is only a circumstance bearing indirectly upon the question of the guilt of the accused which you are to consider; and this you will consider in connection with all the other facts and circumstances of this case; and if, notwithstanding you believe from the evidence that the defendant has proved a good character, you still believe beyond a reasonable doubt, from the evidence, that the accused is guilty of the crime charged in the information filed against him, then it is your duty so to find and your verdict should be guilty.

"4. The court instructs the jury that good character raises the presumption that the accused was not likely to have committed the crime with which he is charged; but the force of the presumption depends upon the strength of the opposing evidence to produce conviction

of the truth of the charge. And if the evidence establishing the charge is of such a nature as not, upon principles of reason and good sense, to be overcome by the fact of good character, then the fact that the defendant may have proven himself to have had a good character will be unavailing and immaterial."

"14. The court instructs the jury that evidence of a person's good character is competent evidence in favor of the party accused, as tending to show that he would not be likely to commit the crime charged against him. And in this case, if the jury believes from the evidence that prior to the commission of the alleged crime the defendant had always borne a good character among his acquaintances and in the neighborhood where he lives, then this is a fact proper to be considered by the jury, with all the other evidence in the case, in determining the question whether the witnesses who have testified to the fact tending to criminate him have been mistaken or have testified falsely or untruthfully; and if, after a careful consideration of all the evidence in the case, including that bearing on his previous good character, the jury entertain a reasonable doubt of the defendant's guilt, then it is their sworn duty to acquit him. If, however, the jury believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime in question, as charged in the information, it will be your sworn duty to find the defendant guilty, even though the evidence may satisfy your minds that the defendant, previous to the commission of the crime, has sustained a good reputation and character."

When one is accused of crime evidence of his previous good character is admissible, in his behalf, upon the theory that being of good character it is improbable that he would have committed the crime with which he is charged; and it is for the jury to weigh and consider, and give such effect as they think it entitled, this evidence, in considering and determining whether the accused is guilty of the crime with which he is charged. But this

evidence is not submitted to the consideration of the jury for the purpose of enabling them to determine whether witnesses who have testified for the state have been mistaken or testified falsely, as the court told the jury in instruction No. 14. Another criticism of the instructions is that they savor of argument in favor of the state, and their effect is to caution the jury not to let the evidence of the accused's good character have too much weight in their deliberations. "Good character is an important fact with every man; and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases when it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character." (Judge Cooley in *People v. Garbutt*, 17 Mich. 9.) In the case at bar there was before the jury evidence of the prisoner's good character, and it was the province of the jury to consider this evidence, as all the other evidence in the case, and to give it such weight as they deemed it entitled, and they should have been left free and untrammeled in this respect. In *Johnson v. State*, 34 Neb. 257, it was distinctly ruled: "Previous good character of the accused in a criminal prosecution is a fact which he is entitled to have submitted for the consideration of the jury precisely as any other circumstance favorable to him, without any disparagement by the court." To the same effect see *Vincent v. State*, 37 Neb. 672.

The judgment of the district court is reversed and the cause remanded with instructions to grant the prisoner a new trial.

REVERSED AND REMANDED.

ISAAC SYLVESTER V. CARPENTER PAPER COMPANY ET AL.

FILED JUNE 23, 1898. No. 8146.

Contract: EVIDENCE. Where negotiations take place between parties which result in their reaching an agreement in reference to the subject-matter of the negotiations, and the parties subsequently reduce their agreement to writing, sign and deliver the same, then, in the absence of fraud or mistake or an ambiguity in the writing, it constitutes the best and the only competent evidence of the contract originally made.

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

Brome, Burnett & Jones, for plaintiff in error.

Byron G. Burbank, L. D. Holmes, and *E. C. Page, contra.*

RAGAN, C.

In January, 1892, Isaac Sylvester, of Omaha, Nebraska, owned a printing outfit on which Marder, Luse & Co., of Chicago, held a chattel mortgage to secure a debt owing to them by Sylvester. At said time there existed in Omaha a corporation known as the Carpenter Paper Company. January 16, in said year, Sylvester, the Carpenter Paper Company, and Marder, Luse & Co. signed an agreement in writing, in words and figures as follows: "This memorandum of mutual agreement, made between Isaac Sylvester, of Omaha, Douglas county, Nebraska, and Marder, Luse & Co., an incorporation, of Chicago, Cook county, Illinois, parties of the first part, and the Carpenter Paper Company, an incorporation of Omaha, Douglas county, Nebraska, party of the second part, witnesseth: The said parties of the first part, for and in consideration of one dollar, in hand paid, and the covenants and agreements of the second party, hereafter mentioned, hereby agree to lease to the said party of the second part all of the printing machinery, and material, engine, shafting, belting, office furniture, and fixtures,

now in the office of the said Isaac Sylvester, and on a part of which Marder, Luse & Co. have a chattel mortgage, for the term of twenty-seven months from and after the time when said machinery shall be set up and in running order on the fourth floor of No. 1118 Howard street, Omaha. The said party of the second part hereby agrees to pay to Marder, Luse & Co. at Omaha, Nebraska, the sum of $25 per month for the use of said machinery and material, first payment to be made when machinery is set up as above provided, and monthly thereafter. They also agree to furnish, without charge, teams, wagons, and drivers for the removal of the above described property." January 22, 1892, Sylvester and the Carpenter Paper Company entered into an agreement in writing as follows: "The said Isaac Sylvester, for and in consideration of one dollar ($1) in hand paid, and the covenants and agreements of the Carpenter Paper Company hereinafter mentioned, hereby agrees to enter the employment of said party of the second part, and work under its direction, in connection with a printing and ruling department which they propose to add to their business, and to give the same his undivided and faithful attention during the term of twenty-seven months, if so desired by the said party of the second part. The said Carpenter Paper Company agrees to pay the said Isaac Sylvester for said services during such term as his work shall be satisfactory the sum of one hundred dollars ($100) per month, forty dollars of the same being paid direct to himself, ten dollars to be applied to his indebtedness to the said party of the second part until settled, and the remainder of fifty dollars per month to be paid to Marder, Luse & Co. until their past due claim is settled, and party of the second part hereby reserves the right to cancel this agreement at any time when the services of the first party are not satisfactory. It is mutually agreed that the above is to take effect as soon as the printing office of the said party of the first part is transferred to the fourth floor of 1118 Howard street, of

this city, and is set up ready for business." About February 1, 1892, the printing material leased to the Carpenter Paper Company was, by virtue of the writing bearing date January 16, 1892, transferred to its possession, and so remained until taken from them by the writ of replevin issued in this action. About the time the Carpenter Paper Company came into possession of the printing material under its lease Sylvester began work for it and so continued for a few months, when he was discharged or quit. March 5, 1894, Sylvester brought this action in replevin against the Carpenter Paper Company and Marder, Luse & Co. to recover the printing outfit delivered to the Carpenter Paper Company in pursuance of the contract of January 16, 1892. The action was brought, however, within less than twenty-seven months after January 16, 1892. The jury, in obedience to an instruction of the district court, returned a verdict in favor of the parties made defendants, upon which a judgment was entered against Sylvester, to review which he has filed here a petition in error.

1. The evidence shows without conflict that about February 1, 1892, the Carpenter Paper Company, in pursuance of the writing of January 16, 1892, took possession of the printing outfit and remained in possession thereof until this suit was brought, during all of which time it made the monthly payments promised to Marder, Luse & Co. There is no evidence in the record that at the time this suit was brought the debt of Sylvester to Marder, Luse & Co. had been discharged; nor is there any evidence in the record which shows, or tends to show, that Sylvester, at the time this suit was brought, was entitled to the possession of the property in controversy here if the writings of January 16 and 22 constitute the contracts between the parties.

2. On the trial of the case Sylvester offered to prove that in the early part of January, 1892, and prior to the making of these writings, the paper company proposed to him to employ him, together with his printing outfit,

for twenty-seven months at $125 per month, which proposition he accepted; that as a matter of fact there never existed two contracts between himself and the paper company—one contract with reference to leasing the printing outfit, and a separate contract for his personal services; and that the writings of January 16 and 22 were mere memoranda entered into by the parties for the purpose of evidencing the consent of Marder, Luse & Co., the mortgagees of the printing outfit, to the possession thereof by the paper company; and that the agreement of all three of the parties was that when the printing outfit should come into possession of the paper company, one contract should be drawn to the effect that the paper company should have the right to the possession and use of the printing outfit for twenty-seven months and the personal services of Sylvester for the same length of time; that the paper company should pay for such personal services and for the use of the printing outfit $125 per month, part of which sum should be applied monthly to the discharge of Sylvester's debt to the paper company, part to the discharge of his debt to Marder, Luse & Co. and the remainder of the monthly payment should go to Sylvester, and that the agreement should contain a provision that either party to the contract might terminate it at his pleasure.

The exclusion by the court of this offer of proof is the principal argument relied upon here for a reversal of the judgment under review. We do not think the court erred in excluding the offer. There is no claim made by Sylvester in this case, by pleading or otherwise, that the contracts of January 16 and 22, or either of them, are the result of fraud or mistake upon the part of any one. His contention is that one contract existed between himself and Marder, Luse & Co. on the one side, and the Carpenter Paper Company upon the other, by the terms of which it employed him for a given time at a given salary, he to furnish tools and appliances—namely, the printing outfit—with which to do the work for which he was em-

ployed. But the agreements of the parties as evidenced by what they have reduced to writing were two in number. One of these agreements was a lease by Sylvester of his printing outfit to the Carpenter Paper Company for a given time, the mortgagee of the printing outfit consenting thereto in consideration that the lessee should make to it certain payments monthly. The other writing evidenced an agreement between the paper company and Sylvester, to which Marder, Luse & Co. were not parties, and this latter agreement had reference solely to personal services which Sylvester agreed to render for the Carpenter Paper Company. The writings which evidence the contract between the parties are not ambiguous, and, as already stated, it is not pretended that they were procured by fraud or are the result of a mistake in any respect whatever. To have permitted the offered evidence to go to the jury would have been to permit Sylvester to vary and contradict his plain written contract by parol testimony. He claims that the negotiations which were the subject-matter of the contract between the parties occurred early in January, 1892, and that a certain agreement was then reached; and we find that subsequent to that date the parties solemnly put into writing their agreements; and as these writings were made without fraud and without mistake we think they are not only the best evidence, but the only competent evidence, as to what the actual contract of the parties was. (*Mills v. Miller*, 4 Neb. 441; *Hamilton v. Thrall*, 7 Neb. 210; *Dodge v. Kiene*, 28 Neb. 216; *Watson v. Roode*, 30 Neb. 264; *Frey v. Drahos*, 6 Neb. 1; *Webster v. Wray*, 19 Neb. 558; *Clarke v. Kelsey*, 41 Neb. 766; *Maxwell v. Burr*, 44 Neb. 31; *Kaserman v. Fries*, 33 Neb. 427; *Mattison v. Chicago, R. I. & P. R. Co.*, 42 Neb. 545; *Commercial State Bank v. Antelope County*, 48 Neb. 496; *Waddle v. Owen*, 43 Neb. 489; *Miller v. Gunderson*, 48 Neb. 715; *Van Etten v. Howell*, 40 Neb. 850; *Gerner v. Church*, 43 Neb. 690; *Morse v. Rice*, 36 Neb. 212; *Nebraska Exposition Ass'n v. Townley*, 46 Neb. 893; *Western Mfg. Co. v. Rogers*,

54 Neb. 456.) But this record shows without controversy that the Carpenter Paper Company, Marder, Luse & Co., and Sylvester, for nearly twenty-seven months after the writings of January 16 and 22, 1892, acted upon and carried out the terms of those writings, both in letter and spirit; in other words, that the conduct of the parties themselves since January, 1892, shows unmistakably that the writings evidenced the actual contract which existed between them. For nearly twenty-seven months the Carpenter Paper Company was carrying out these agreements as embraced in the writing of January 16, 1892, was paying $25 per month to Marder, Luse & Co. to discharge Sylvester's debt, and during all this time Sylvester makes no complaint or claim that the paper company is not rightfully in possession of the printing outfit and in possession thereof in pursuance of the contract of January 16, 1892, and it is at least doubtful, if no other objections were in the way, if Sylvester is in any position to now claim that the writings of January 16 and 22, 1892, do not constitute the actual contract between himself, the paper company, and Marder, Luse & Co.

Counsel for plaintiff in error, in support of his contention that the district court erred in refusing to receive the testimony offered, cite us to *Norman v. Waite*, 30 Neb. 302, and to *Barnett v. Pratt*, 37 Neb. 349. Neither of these cases is an authority for the contention urged here. The *Norman Case* was a suit upon a promissory note in the hands of one not an innocent purchaser thereof, and the defense was that the note had been procured from the maker by a false and fraudulent representation, and that there was, therefore, no consideration for the note. In the *Pratt Case* no oral evidence was offered or received to contradict or vary a written agreement, as the writing in that case was a mere receipt for money. The judgment of the district court is

AFFIRMED.

NEBRASKA TELEPHONE COMPANY V. STATE OF NEBRASKA, EX REL. JOHN O. YEISER.

FILED JUNE 23, 1898. No. 9615.

1. **Mandamus:** OTHER REMEDY. A litigant will not be permitted to invoke the extraordinary remedy of mandamus when an express statute affords him an adequate remedy for the redress of the grievance of which he complains.
2. **Telephone Companies:** COMMON CARRIERS. A private corporation engaged in the business of operating a telephone plant is a common carrier of news and intelligence.
3. ———: ———: DUTIES: RATES. Such a public service corporation is charged with certain public duties, among which are to furnish for a reasonable compensation to any citizen a telephone and telephonic service, and to charge each patron for the service rendered the same price it charges every other patron for the same service under substantially the same or similar conditions.
4. ———: ———: ———: ———. The power—the jurisdiction—to determine what compensation a public service corporation may exact for services to be rendered by it is a legislative and not a judicial function.
5. **Jurisdiction of Courts.** The jurisdiction of the courts is limited to declaring what the law is, and they are forbidden by the constitution to perform legislative functions.

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

The opinion contains a statement of the case.

Charles Offutt and *W. W. Morsman*, for plaintiff in error:

The alternative writ contained no averment that the relator had applied to the board of transportation and exhausted the remedy there. The remedy by mandamus cannot be invoked where relator has another remedy. (*State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313; *State v. Fremont, E. & M. V. R. Co.*, 23 Neb. 117; *State v. Chicago, St. P. M. & O. R. Co.*, 19 Neb. 482; *State v. Republican Valley R. Co.*, 17 Neb. 647; *Northern P. R. Co. v. Washington Territory*, 142 U. S. 492.)

The relator has no clear, legal right to demand, nor is

the respondent under any duty, specially enjoined by law, that its rates be fixed at a sum which will produce no more than a "fair, reasonable, and just dividend" to its stockholders. (*State v. City of Omaha*, 14 Neb. 265; *State v. Nelson*, 21 Neb. 572; *State v. Cook*, 43 Neb. 318; *State v. Home Street R. Co.*, 43 Neb. 830; *State v. Merrell*, 43 Neb. 575; *Laflin v. State*, 49 Neb. 614; *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307; *Dow v. Beidelman*, 125 U. S. 680; *Chicago, M. & S. P. R. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 395; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339; *Steenerson v. Great Northern R. Co.*, 72 N. W. Rep. [Minn.] 713; *Canada S. R. Co. v. International Bridge Co.*, 8 L. R. App. 723; *Northern P. R. Co. v. Washington Territory*, 142 U. S. 492; *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58.)

The alternative writ contained no averment of facts showing that the service sought to be coerced was a duty specially enjoined by law. The peremptory writ should not have been allowed. (*Baltimore & O. R. Co. v. Maryland*, 21 Wall. [U. S.] 456; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 156; *Munn v. Illinois*, 94 U. S. 113; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164; *Chicago, M. & S. P. R. Co. v. Ackley*, 94 U. S. 179; *Winona & S. P. R. Co. v. Blake*, 94 U. S. 181; *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307; *Dow v. Beidelman*, 125 U. S. 680; *Chicago, M. & S. P. R. Co. v. Minnesota*, 134 U. S. 418; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339; *Budd v. New York*, 143 U. S. 517; *State v. Chicago, M. & St. P. R. Co.*, 38 Minn. 298; *Foreman v. Commissioners*, 67 N. W. Rep. [Minn.] 207; *State v. Young*, 29 Minn. 474; *State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313; *State v. Fremont, E. & M. V. R. Co.*, 23 Neb. 117.)

The averments of discrimination are immaterial. (*Western Union Telegraph Co. v. Call Publishing Co.*, 44 Neb. 326.)

John O. Yeiser, contra:

Corporations or natural persons engaged as (1) com-

mon carriers, (2) as public monopolies, or (3) in a business in which the public has an interest are subject to regulation and control by the state. (*People v. Budd*, 117 N. Y. 19; *Dow v. Beidelman*, 125 U. S. 680; *Wabash, S. L. & P. R. Co. v. Illinois*, 118 U. S. 568; *Budd v. New York*, 143 U. S. 537; *Chicago, B. & Q. R. Co. v. Minnesota*, 134 U. S. 455; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 217; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Brass v. Stoeser*, 153 U. S. 403; *Chesapeake & Potomac Telephone Co. v. Baltimore & Ohio Telegraph Co.*, 66 Md. 399; *Frederick v. Goshon*, 30 Md. 446; *State v. Nebraska Telephone Co.*, 17 Neb. 126; *Haugen v. Albina Light & Water Co.*, 21 Ore. 418; *Munn v. Illinois*, 94 U. S. 113.)

Telephone companies are subject to regulation by reason of the fact of their being engaged in a business partaking of all three of the elements or principles which permit of the regulation of a business by the state. (*Lough v. Outerbridge*, 143 N. Y. 271; *Stamford v. Pawlett*, 1 Cromp. & Jerv. [Eng.] 57; *Gard v. Callard*, 6 M. & S. [Eng.] 69; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *State v. Nebraska Telephone Co.*, 17 Neb. 126; *Hockett v. State*, 105 Ind. 258; *State v. Delaware & Atlantic Telegraph & Telephone Co.*, 47 Fed. Rep. 637; *Ex parte State*, 52 Ala. 231; *St. Louis, A. & T. R. Co. v. Philadelphia Fire Ass'n*, 60 Ark. 325; *Ex parte Wall*, 48 Cal. 279; *Ewing v. Oroville Mining Co.*, 56 Cal. 649; *Spinney v. Griffith*, 98 Cal. 149; *Green v. Aker*, 11 Ind. 223; *McCollom v. Pipe*, 7 Kan. 122; *St. Joseph Board of Public Schools v. Patten*, 62 Mo. 444; *Jerman v. Benton*, 79 Mo. 148; *Fusz v. Spaunhorst*, 67 Mo. 256; *Price v. Smith*, 24 S. E. Rep. [Va.] 274; *Supervisors v. Stout*, 9 W. Va. 703; *State v. Nebraska Telephone Co.*, 17 Neb. 126; *Hockett v. State*, 105 Ind. 257; *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 623; *Central Union Telegraph Co. v. Bradbury*, 106 Ind. 1; *Delaware & Atlantic Telegraph & Telephone Co. v. State*, 50 Fed. Rep. 678; *Central Union Telephone Co. v. State*, 118 Ind. 194; *People v. Budd*, 117 N. Y. 22; *Gillis v. Western Union Telegraph*

Co., 61 Vt. 465; *Bell Telephone Co. v. Commonwealth*, 3 Atl. Rep. [Pa.] 825.)

Although such business is and has been usually regulated by the legislature, nevertheless, in the absence of legislation, it has been from time immemorial, and is now, the practice and custom to regulate such business by the judiciary. (*Chicago, M. & S. P. R. Co. v. Minnesota*, 134 U. S. 458; *Munn v. Illinois*, 94 U. S. 133; *State v. Republican V. R. Co.*, 17 Neb. 647; *Dow v. Beidelman*, 125 U. S. 687; *Lough v. Outerbridge*, 143 N. Y. 271; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582; *Attorney General v. Chicago & N. R. Co.*, 35 Wis. 588; *Stern v. Metropolitan Telephone & Telegraph Co.*, 46 N. Y. Supp. 110; *Menacho v. Ward*, 27 Fed. Rep. 533; *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 331; *Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. Rep. 527; *Camblos v. Philadelphia & R. R. Co.*, 4 Brewst. [Pa.] 563; *People v. Chicago & A. R. Co.*, 130 Ill. 181; 8 Am. & Eng. Ency. Law 916; *Ruggles v. Illinois*, 108 U. S. 526; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 538; *Stamford v. Pawlett*, 1 Cromp. & Jerv. [Eng.] 81.)

A reasonable compensation was all that could be exacted by common carriers at common law. (*Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 589; *Steenerson v. Great N. R. Co.*, 72 N. W. Rep. [Minn.] 713; *Killmer v. New York C. & H. R. R. Co.*, 100 N. Y. 395; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Lough v. Outerbridge*, 143 N. Y. 271; *Ruggles v. Illinois*, 108 U. S. 531; *Munn v. Illinois*, 94 U. S. 113; *Haughen v. Albina Light & Water Co.*, 21 Ore. 411.)

Relator has no other speedy and adequate remedy at law; but a new remedy being enacted without repealing the common law, the remedy is considered cumulative and a party may elect. (*State v. Tryon*, 39 Conn. 185; *Ex parte Frank*, 52 Cal. 610; *Ruggles v. Illinois*, 108 U. S. 526; *State v. Bethea*, 43 Neb. 451; *Gooch v. Stephenson*, 13 Me. 371; *Candee v. Hayward*, 37 N. Y. 653; *Crittenden v. Wilson*, 5 Cow. [N. Y.] 165.)

The alleged duty of a common carrier is one specially enjoined by law, and may be enforced by mandamus. (*State v. Nebraska Telephone Co.*, 17 Neb. 136; *State v. Republican V. R. Co.*, 17 Neb. 656; *State v. Joplin Water Works*, 52 Mo. App. 319; *Chesapeake & Potomac Telephone Co. v. Baltimore & Ohio Telegraph Co.*, 66 Md. 400; *Central Union Telephone Co. v. State*, 118 Ind. 194; *Chicago & N. W. R. Co. v. People*, 56 Ill. 367; *State v. Delaware & Atlantic Telegraph & Telephone Co.*, 47 Fed. Rep. 633; *Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. Rep. 527; *People v. Chicago & A. R. Co.*, 130 Ill. 181; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582; *Haughen v. Albina Light & Water Co.*, 21 Ore. 423; *People v. New York C. & H. R. R. Co.*, 28 Hun [N. Y.] 543; *Stamford v. Pawlett*, 1 Cromp. & Jerv. [Eng.] 81; *Swan v. Williams*, 2 Mich. 439; *Railroad Commissioners v. Portland & O. C. R. Co.*, 63 Me. 279.)

RAGAN, C.

The Nebraska Telephone Company is a corporation organized and existing under the laws of the state, having its principal office and place of business in the city of Omaha, and owns and operates a telephone plant in that city. John O. Yeiser is by profession a lawyer and a citizen of said city of Omaha. Yeiser desired a telephone placed in his law office for his own use and requested the telephone company to furnish him an instrument properly connected, and afford him telephonic service. The telephone company refused to comply with this request unless Yeiser would pay it for such instrument and service the sum of $5 per month in advance. Yeiser claimed that this sum was an unreasonable and exorbitant charge, refused to pay the same, but tendered the telephone company $9 as compensation for the service required of it for three months and demanded that it supply him with the telephone and telephonic service for that length of time. This demand was refused and Yeiser thereupon applied to the district court for, and

obtained, a peremptory writ of mandamus directed to the telephone company commanding it to furnish Yeiser the telephone and telephonic service required by him for three months for the sum of $9. The telephone company has brought this judgment here for review.

1. Section 1, article 8, chapter 72, Compiled Statutes, provides that all charges made for any service rendered or to be rendered by the common carriers of the state shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. By section 11 of said article and chapter certain state officers are constituted a board of transportation, and section 12 of said article and chapter defines the powers and duties of said board of transportation with reference to the common carriers of the state. Construing this statute this court held in *State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313, that the board of transportation had authority to determine what were just and reasonable charges for a service rendered or to be rendered by common carriers, and that said board of transportation was invested with jurisdiction to fix, prescribe, and determine the charges which a common carrier might demand and receive for a service rendered or to be rendered by it, subject only to the limitation that the rate or charge fixed by the board should be just and reasonable. The legislature of 1897 (Session Laws, ch. 56; Compiled Statutes, ch. 72, art. 8, sec. 24) conferred upon this board of transportation the same and all the powers over the telephone, telegraph, and express companies of the state that it had over common carriers or railroad corporations of the state. In other words, if the statutes just referred to are valid, and we have placed a correct construction upon them, the legislature has conferred upon this board of transportation not only jurisdiction to inquire into charges of extortion and unjust discrimination on the part of telephone companies, and to make suitable orders for the redress of such grievances upon the complaint of the person aggrieved, but has also in-

vested the board of transportation with authority to fix and determine to what compensation a telephone company shall be entitled for any service rendered or to be rendered by it, subject to the limitation that the scale of prices fixed which the telephone company may charge for services to be rendered by it shall not be unreasonable or unjust, either to the telephone company or to its patrons.

State v. Chicago, St. P. & M. R. Co., 19 Neb. 476, was a mandamus proceeding instituted in this court to compel the respondent to build a depot, side tracks, switches, and cattle yards at a certain point on its road. But this court held that whether the railway company should be compelled to build a depot at the place requested was a question—in the first instance at least—for determination by the board of transportation; that the legislature by the statute just quoted had committed the determination of that question to that board; that because the board was a special tribunal created for the purpose of determining the question, its powers in that respect must be exhausted before the court would interfere by mandamus to compel the railroad company to build the depot. We think this case controls the one at bar. So far as the record before us discloses no application has ever been made by the relator to the board of transportation to have it determined whether the charge of $5 per month demanded by the telephone company for the use of a telephone and telephonic service is unreasonable and exorbitant, whether $3 per month for the use of a telephone and telephonic service is a reasonable charge, nor that the board has fixed a scale of reasonable charges which the telephone company may exact for a service performed or to be performed by it. It is a familiar principle that a litigant will not be permitted to invoke the extraordinary remedy of mandamus where an express statute affords him an adequate remedy for the redress of the grievance of which he complains, and this is the principle upon which the case just cited rests.

A statute of the state of Indiana required each railway company of the state to file with the auditor of the county where its principal office was situate a statement of the amount of its capital stock for the purposes of taxation. This statement was to be filed between the first of January and the first of June each year. Another statute provided that if a railway company of the state failed to file with such auditor such statement, then it should be the duty of the auditor himself to make the statement, or list for the purposes of taxation the amount of the capital stock of such railway company, determining the facts in the manner provided by statute. A railway company of the state neglected to file with the auditor of the county where its principal office was located, between the first of January and the first of June, a statement of the amount of its capital stock, and thereupon the auditor of state instituted a proceeding in mandamus to compel the railway company to make and file such statement with such county auditor. The district court awarded the mandamus as prayed. But the supreme court reversed the judgment of the district court, saying: "If it were not provided by statute that, upon failure of the railroad company to file such statement within the time required by law, the auditor of the county shall proceed to make the same, a mandamus would doubtless lie to compel the officers of the railroad to furnish the list after the time had expired; but the rule is well established that mandamus will not lie where the statute has expressly provided another adequate remedy." (*Louisville & N. A. R. Co. v. State*, 25 Ind. 181.) To the same effect are *State v. Board of Supervisors*, 29 Wis. 79, and *Marshall v. Sloan*, 35 Ia. 445.

2. The respondent in the case at bar is a private corporation. By permission of the city of Omaha it is occupying the streets and alleys of that municipality with its poles, wires, and other appliances used in the conduct of the business in which it is engaged. It is a common carrier of news and intelligence. It is a corporation

affected with a public use—a public service corporation—and as such it has assumed and is charged with certain public duties, among which are to furnish for a reasonable compensation to any inhabitant of the city of Omaha a telephone and telephonic service, and to charge each of its patrons for the service rendered or to be rendered the same price it charges every other patron for the same service under substantially the same or similar conditions. (*State v. Nebraska Telephone Co.*, 17 Neb. 126; *American Water Works Co. v. State*, 46 Neb. 194; *Western Union Telegraph Co. v. Call Publishing Co.*, 44 Neb. 326.) But the judgment under consideration determines not only that the telephone company shall render for the relator the service required by him, but fixes and determines as well what compensation the relator shall pay to the respondent for such service. This judgment then, in effect, determines, decides, and fixes the charges which the respondent may lawfully exact for services to be rendered in future by it to its patrons. Where a public service corporation has performed a service and sues to recover therefor, in the absence of an express contract for a specific compensation, the measure of its damages is a reasonable compensation for the services performed, and whether the compensation which it demands is reasonable is a judicial question. Where the legislature has fixed the compensation which a public service corporation may exact for the performance of a service, then the reasonableness of the compensation so fixed by the legislature—that is, whether the limiting of the corporation to the compensation fixed by the statute would result in a confiscation of the corporation's property—is a judicial question. (*Smyth v. Ames*, 18 Sup. Ct. Rep. 418.) But the power—the jurisdiction—to determine what compensation a public service corporation may exact for service to be rendered by it we understand to be a legislative and not a judicial function. In the case at bar the respondent had not performed services and sued to recover the compensation. If it had, the relator might have defended upon

the ground that the compensation demanded was unreasonable and the court would have had jurisdiction to determine the question. The case at bar is not a suit by the relator for damages against the respondent for its neglect and refusal to render to him for a reasonable compensation the service he demanded. In the case at bar the relator did not pay the compensation alleged to be exorbitant, which the respondent demanded, and then sue to recover back the excess. Had he done so, it may be that the court would have had the power to determine whether the compensation actually demanded and received by the respondent was unreasonable. But here the court determines that the respondent shall perform for the relator a specific service for three months for a specific sum of money. This in effect was a determination by the court that $3 per month was a reasonable compensation for the service required to be rendered by the respondent and a fixing of the compensation for such service at that price for the future.

We think the history of the legislation of the entire country shows that the power to determine what compensation public service corporations may demand for their services is a legislative function and not a judicial one. If the courts may determine what compensation a telephone company may exact for a service to be rendered in the future, we know of no reason why the courts may not determine the freight and passenger rates which the railway corporations of the state may charge for the transportation of freight and passengers; and yet the framers of our constitution recognized that this power to fix the compensation of public service corporations was a legislative one, as by that instrument they expressly confer upon the legislature the power, from time to time, to pass laws establishing reasonable rates or charges for the transportation of passengers and freight. (Constitution, art. 11, sec. 4.) And it is evident that the legislature has acted upon the theory that this power to fix the compensation of public service corporations is

one vested in it by the constitution. This is evident from its creation of the board of transportation and the powers conferred upon that board; and as late as 1897 the legislature conferred authority upon the mayor and council of cities of the metropolitan class to fix and determine by ordinance what compensation telephone companies doing business within such cities might charge and exact for services rendered or to be rendered by them. (Compiled Statutes, ch. 12*a*, sec. 131.) Fixing the compensation which public service corporations may charge for services to be rendered by them is legislating. It is lawmaking. The power of the courts is limited to declaring what the law is, and they are precluded by the constitution from performing legislative functions; and though the courts of the land have from time to time declared laws fixing the compensation which public service corporations might charge for services to be rendered by them void because the compensation fixed by the law was unreasonable in that the enforcement of the statute would confiscate the corporation's property, and thereby deprive it of its property without due process of law, we know of no court which has ever claimed that it had authority to determine what compensation would be a reasonable one for a service to be performed by such corporation.

The relator must address himself for relief from the grievances of which he complains to the legislative power of the state—to the legislature itself, to the board of transportation, to the mayor and council of the city of Omaha. If the compensation now charged and exacted by the telephone companies of the state is exorbitant and unreasonable, we must presume that the board of transportation, the mayor and council of the city of Omaha, and the legislature of the state, one and all of them, will investigate the matter and prescribe a scale of reasonable charges. The judgment of the district court is reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

AGNES S. CAMPBELL, APPELLEE, V. MATTHEW O'CONNOR ET AL., APPELLANTS.

FILED JUNE 23, 1898. No. 8197.

1. **Payment to Agent:** PROOF OF AGENT'S AUTHORITY. One claiming the benefit of a payment of a negotiable instrument, to a person other than the owner, who does not produce the instrument or have it in his possession, must show that such person had authority or apparent authority, under the law of agency, to receive payment.

2. ———: ———. The collection by a third person of installments of interest on a negotiable instrument confers no authority or apparent authority on such person to receive payment of the principal when it matures.

3. **Mortgages:** PAYMENT TO ONE NOT AUTHORIZED TO RECEIVE IT: RIGHTS OF INNOCENT PURCHASER: CONSTRUCTIVE SERVICE. A borrowed of B money wherewith to pay a mortgage on his land, and secured the same by a mortgage to B. B did not pay the money to A, but undertook to discharge the first mortgage therewith. He paid to a person not authorized to receive payment and who did not account to the holder of the first mortgage. Suit was begun to foreclose the first mortgage. After such suit was begun, but before A had answered and before the record disclosed the connection between the two mortgages, B sold his note and mortgage to a stranger without notice, and before the note secured by the mortgage had matured. *Held*, That there had been no payment of the first mortgage, and that the failure of consideration for the second was not an available defense as against the innocent purchaser. *Held, further*, That only constructive service having been had on B in the foreclosure case, and B not having appeared therein, no relief could be given in that case to the mortgagor against B.

APPEAL from the district court of Dodge county. Heard below before MARSHALL, J. *Affirmed.*

C. Hollenbeck, for appellants.

Loomis & Abbott and *W. J. Courtright, contra.*

IRVINE, C.

Agnes S. Campbell brought this suit to foreclose a mortgage alleged to have been given by Matthew O'Con-

nor and wife to secure a note for $450. The mortgage and note were made to C. H. Toncray, and were by him sold to the plaintiff, he indorsing the note and the coupons evidencing the interest thereon, but no assignment of the mortgage having been either recorded or executed. Charles H. Smith intervened, alleging the making and delivery of another note of like amount, likewise secured by mortgage on the same land, by the O'Connors to the Ætna Life Insurance Company, and its transfer before maturity to Smith for a valuable consideration. The O'Connors pleaded payment of the Campbell mortgage and, somewhat in a double aspect, pleaded that if it had not been paid no consideration existed for the Smith mortgage. There was a decree foreclosing both mortgages and the mortgagors appeal.

The facts, so far as disclosed, are not open to much doubt. O'Connor, in 1885, borrowed $450 from Toncray, executing his note with interest coupons attached, and his mortgage securing the same. Soon after Toncray, through a broker, sold the note and mortgage to the plaintiff. O'Connor, as interest matured, paid it to Toncray either directly or through a bank, and at once or in a short time thereafter received from him the coupons. Toncray had no authority to collect even the interest, and the plaintiff had no knowledge of his doing so, the broker referred to making her the payments and receiving from her the coupons, sometimes, apparently, before payment had been made to Toncray. As the note approached maturity, in 1890, O'Connor arranged with the Ætna Life Insurance Company to obtain a loan wherewith to pay the Toncray mortgage. The money was sent in the form of a check or draft to one McVicker, who was either the agent of the Ætna company or a broker acting in this instance for it, and McVicker paid the money to Toncray. There was at this time the final interest coupon overdue and in the hands of Toncray, having apparently been paid by the eastern broker. The whole amount was paid by McVicker, Toncray surrendering the coupon and

promising to obtain the principal note in a few days. Toncray afterwards entered satisfaction of the first mortgage on the margin of the record. McVicker treated the matter as completed and the Ætna mortgage was recorded. Toncray did not remit the principal to the owner of the note.

As between the plaintiff and the O'Connors the case is simple. The note was negotiable and it was paid to the payee, who had sold it, who did not produce it or have it in his possession. Under such circumstances the party claiming the benefit of the payment must show that the person to whom payment was made was authorized to receive payment. (*South Branch Lumber Co. v. Littlejohn*, 31 Neb. 606; *First Nat. Bank of Omaha v. Chilson*, 45 Neb. 257; *Bull v. Mitchell*, 47 Neb. 647; *Richards v. Waller*, 49 Neb. 639.) Conceding that the circumstances vested in Toncray apparent authority to receive payment of the interest, this conferred neither actual nor apparent authority to collect the principal. (*Bull v. Mitchell, supra; Richards v. Waller, supra.*) There were in the evidence certain features which tended to satisfy this burden, but there was direct testimony and there were significant circumstances opposed thereto, and the finding is in this respect fully warranted by the proofs.

As to the second mortgage the inference is irresistible that the Ætna company, knowing of the first mortgage and that it was lending money to discharge it, did not pay the money to O'Connor, but undertook, through a man it made its own agent for the purpose, to see to the application of the money. This man paid to Toncray, and the blunder was his and not O'Connor's. O'Connor therefore never obtained the benefit of the second mortgage, and, had it remained in the hands of the Ætna company, he would, under the evidence before us, have a perfect defense thereto. Before it became due according to its terms it was sold to Smith, and the evidence is uncontradicted that he had no connection with the Ætna company, paid full value, and had no notice of the defect.

It is true that he did not buy until after this suit was commenced, and it is argued that he took subject to the condition of affairs then existing and obtained no greater rights than his assignor. He bought, however, before the O'Connors filed their answer, and there was nothing prior to that disclosed by the record which was calculated to put him on inquiry or charge him with notice. True he would be informed by the pendency of the suit that the purported release of the first mortgage by Toncray was resisted by plaintiff claiming as Toncray's assignee, but there was nothing in that fact to indicate that the second mortgage had been made to obtain money to discharge the first, that the money had not in fact been advanced to O'Connor, or that O'Connor had any defense to the second mortgage. The district court properly protected the second mortgagee's assignee. It is apparent that O'Connor has suffered a wrong, but this was committed by the second mortgagee or its agent, and the note having passed into the hands of an innocent holder for value before maturity, relief must be sought personally against the second mortgagee. There is a conditional prayer in the answer of O'Connor for such relief, but the record shows that constructive service only was had on the Ætna company and that it did not appear in the action. No personal judgment can therefore be rendered against it.

AFFIRMED.

SIMON J. LONERGAN v. MARY A. LONERGAN, EXECUTRIX.

FILED JUNE 23, 1898. No. 8192.

1. **Pleading**: EVIDENCE. It is not error to exclude evidence irrelevan to the issues as made up, although the court may have erroneously stricken from the pleadings averments to which such evidence would be relevant. The error in such case would be in ruling upon the pleadings and not in ruling upon the evidence.

2. ———: ———: TRANSCRIPT OF FOREIGN JUDGMENT: HARMLESS ERROR. An action was brought on a foreign judgment. The

defendant pleaded matter by way of set-off or counter-claim, which was on motion stricken from the answer, and the court refused leave to file an amended answer containing the same matter. The transcript of the proceedings leading to the judgment sued on was on the trial introduced in evidence and disclosed an adjudication adverse to the defendant of all the matters so stricken out. *Held*, That the rulings on the pleadings whereby the defendant was prevented from alleging such matters, if erroneous, were not prejudicial to the defendant.

3. **Review**: PRESUMPTION OF SUPERSEDEAS: FOREIGN LAWS. No presumption arises in this state from the fact that an appeal or proceedings in error have been taken, that the judgment sought to be reviewed has been superseded, and no such presumption will be indulged in the case of the judgment of another state, unless the law of that state be in that respect proved to be different from our own.

4. **Foreign Judgment**: EFFECT. The courts of this state cannot refuse to give effect to a foreign judgment which has not been superseded, merely because it was erroneously rendered, or because it seems probable that it may be reversed by an appellate court.

5. **Pleading and Proof.** Averments not denied by the answer to a petition or a supplemental petition are taken as true, and need not be proved.

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

F. G. Hamer, for plaintiff in error.

J. A. Cordeal, contra.

IRVINE, C.

This was an action by Thomas Lonergan against Simon J. Lonergan on a judgment alleged to have been recovered in Leavenworth county, Kansas. The plaintiff had judgment and the defendant brings the case here for review.

The numerous assignments of error may be grouped into a few classes. One class relates to the refusal of the trial court to permit the defendant to introduce certain evidence for the avowed purpose of establishing a set-off or counter-claim against the demand of the plaintiff. There were no issues made by the pleadings to

which such evidence was relevant. Defendant sought to inject such issues into the case, but was precluded from doing so by rulings of the court on motions. The questions sought to be raised properly relate to these rulings and not to rulings upon the evidence as the issues were finally made up. Evidence not relevant to the issues should be excluded, even though the court may have erred in excluding from the pleadings matter which if it remained would have made such evidence relevant.

As stated, the suit was on a judgment recovered in Kansas. The defendant in his answer set up many facts from which it was claimed that a set-off or counter-claim resulted. From the answer it also appeared that the Kansas judgment had been the result of litigation between partners, and all the matter set up in the answer related to partnership transactions prior to the proceedings in Kansas. The court on motion struck from the answer these averments. Subsequently, an amended answer was filed without leave and was stricken from the files. The defendant then moved for leave to file such amended answer and such leave was refused, for the reason that the amended answer did not constitute a defense. All these rulings are complained of, but we need not review the proceedings in detail, because from the transcript of the proceedings in Kansas, subsequently offered in evidence, it appears that they took the form of an accounting between partners, all the matters stricken from the answer and the amended answer in this case were then pleaded, and the record shows an adjudication thereof. They could not, therefore, be successfully pleaded in this case, and if it was error to strike them from the pleadings it was error without prejudice to the defendant. A reply of *res judicata* and the offer in evidence of the transcript would have estopped the defendant as to such matters if they had been permitted to remain in the record. It is asserted, it is true, that the action in Kansas was an action of deceit and that the court in that action was without authority to take an ac-

count of the partnership transactions. While this would affect only the regularity of the proceedings and not the jurisdiction of the court to render the judgment, it may be observed that the defendant in that case pleaded the matters which he here tries to assert, and asked that the accounting be had.

One of the defenses not stricken out was an averment that the Kansas case had been taken to the supreme court of that state for review and that the judgment sued on had been thereby superseded. The evidence is possibly sufficient to show that the case had been appealed, but the Kansas statute offered in evidence shows that a supersedeas is there effected only by order of the supreme court, and there is no evidence of such an order. It is argued that a supersedeas should be presumed, but we think not. An appeal or a proceeding in error does not here operate as a supersedeas of itself, and the Kansas law, so far as it was proved, indicates that the same is true in that state. The burden was on the defendant to show that the judgment had been superseded.

The Kansas judgment is assailed for several reasons, but all these go to the correctness of the proceedings and not to the jurisdiction of the court or to any other matter reaching the validity of the judgment. However erroneous the judgment may have been we must enforce it when invoked here, unless it was void.

But, it is said, the proceedings were so plainly erroneous that it is clear that the supreme court will reverse the judgment. We cannot inquire into the regularity of those proceedings even on that theory. The judgment was rendered, the court had jurisdiction, no fraud in obtaining it is shown, and it does not appear that it has yet been reversed or its operation superseded. We must give it full faith and credit and not anticipate a reversal. If it should be reversed, perhaps the defendant by appropriate proceedings may have relief against the judgment here rendered and based thereon, but while it stands its correctness must be presumed.

It is said that there was a failure to prove the representative capacity of the present plaintiff. While Thomas Lonergan brought the action there was filed what is called a supplemental petition by Mary A. Lonergan, alleging his death and that she had been appointed and had qualified as executrix of his will. No order of revivor appears to have been made, but the defendant answered the supplemental petition and did not deny any of the averments from which flows the right of the present plaintiff to maintain the suit. No evidence was therefore required as to those averments. Finally it is said that the court erred in trying the case in advance of other cases set for trial. No facts appear to support such an assignment, even if its soundness in law should be conceded.

AFFIRMED.

JOHN MANFULL V. A. D. GRAHAM.

FILED JUNE 23, 1898. No. 8199.

1. **Infants**: GUARDIAN AD LITEM: JUDGMENTS. Where infant defendants have been regularly summoned, the failure to appoint a guardian *ad litem* to represent them is an error merely and does not render void the judgment entered. *Parker v. Starr*, 21 Neb. 680, followed.

2. ———: DECREE: VACATING JUDGMENT. Section 442 of the Code of Civil Procedure, providing that "it shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against it after his attaining full age; but in any case in which, but for that section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such order or judgment," does not give an infant on arriving at his majority an absolute right to have the judgment set aside, but only to show cause against it, and does not extend that right beyond those cases in which under the old practice such right was reserved in the decree.

3. ———: ———: ———: SALE OF LAND. Under section 442, above quoted, an infant is not entitled to a day in court after reaching his majority to show cause against a judgment ordering the sale of his lands.

4. **Judgment Against Infant:** PROCEEDING TO VACATE. An infant against whom an erroneous judgment has been entered may have it set aside under the provisions of sections 602 of the Code, provided his disability did not appear in the record nor the error in the proceedings. If those facts did so appear he must proceed by petition in error.

5. **Judicial Sale:** TITLE OF PURCHASER: VACATING JUDGMENT. The title of a stranger derived through a sale under a judgment is not defeated by a subsequent vacation of the judgment, whether such vacation be by proceedings in error or under section 602 of the Code.

6. **Judgment Against Infant:** ACTION TO VACATE. An original suit cannot be maintained to vacate an erroneous judgment against an infant, without at least showing a good defense to the first action.

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

Leslie G. Hurd, for plaintiff in error.

B. O. Hostetler, contra.

IRVINE, C.

Graham brought suit against Manfull and his wife to foreclose a contract for the sale of land, alleging that Manfull had failed to make the payments of purchase-money as provided. A decree was rendered directing the sale of the land to satisfy the amount found due under the contract. It is conceded that Mrs. Manfull's interest is only such as results from the marital relation. The defense interposed by Manfull was that Graham's contract required him to tender a good title in fee simple and that he was unable to do so because he claimed under a purchaser at a sale foreclosing a mortgage, and the foreclosure was ineffective. The defect in the foreclosure proceedings was that an undivided half interest was in certain minors and that no guardian *ad litem* had been appointed to represent them.

While the answer alleges a failure to serve process on the infants, the stipulation of facts on which the case was tried discloses no such defect. Where infants are

regularly summoned, the failure to appoint a guardian *ad litem* is an error only and does not render void the judgment entered. Such has been the rule with regard to insane defendants. (*McAlister v. Lancaster County Bank*, 15 Neb. 295; *McCormick v. Paddock*, 20 Neb. 486.) In the former case it was intimated that there might be a distinction as to infants, but it was afterwards held that there is no such distinction, and that the rule as to infants is the same. (*Parker v. Starr*, 21 Neb. 680.) *Parker v. Starr* establishes a rule of property, and moreover is in accord with the best considered cases. It will not now be departed from.

From the foregoing it follows that the sale made under the foreclosure decree was not void, and that it passed title to the purchaser. But it is said that the infant defendants have not yet reached their majority and may still be heard to question the regularity of the proceedings, that therefore the defendant is not required to accept a title that may be so attacked. The briefs do not indicate very clearly what procedure is still deemed open to the infants. We can conceive of no possible remedy which may remain open unless it be by virtue of section 442 or section 602 of the Code of Civil Procedure, by proceedings in error, or by original action in the nature of a bill in equity.

Section 442 provides: "It shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against it after his attaining full age; but in any case in which, but for this section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such order or judgment." For several reasons no right could be claimed by these infants under that section. In the first place the right there protected is not an absolute right to have the judgment set aside, but it is only to show cause against it. It is not here disclosed by pleadings or by proof that any such cause exists. The failure to appoint a guardian *ad litem* is not

such cause. The section quoted recognizes the old chancery rule, based not on formal defects in the proceedings, but on the theory that the infant was not bound by the answer of the guardian *ad litem*, and might show cause against a decree as well where he had been represented by guardian as where he had not, and this by showing either substantial error, or a defense which had not been interposed. The relief accorded was entirely independent of representation by guardian, and the fact that no guardian had been appointed would be immaterial under this section. Again it was not in all cases that the infant was so accorded his day in court after reaching his majority. The statute does not extend his former rights in that respect, but merely makes it unnecessary to expressly reserve the right in the decree, and allows the right to be asserted only in such cases as, according to the old practice, such express reservation would be proper. Where the decree directed the sale of the infant's lands it was under the former practice binding on the infant and he had no day in court to show cause against it. (*Booth v. Rich*, 1 Vern. [Eng.] 295; *Mills v. Dennis*, 3 Johns. Ch. [N. Y.] 367.) In this respect there was a distinction between a decree ordering a sale and a strict foreclosure.

That portion of section 602 which might be applicable is as follows: "A district court shall have power to vacate or modify its own judgments or orders, after the term at which such judgment or order was made. * * * *Fifth*, For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record nor the error in the proceedings." It will be observed that it is only where the condition of the defendant does not appear of record nor the error in the proceedings that this section applies. The object of the exception is not at first manifest. The supreme court of Ohio, construing a similar provision, said the reason seemed to be that if the defendant's condition appeared of record it would attract the attenton of the court and so insure due scrutiny.

(*Carey v. Kemper*, 45 O. St. 93.) We think, however, that a better reason is that proceedings in error may be brought within one year after such a disability is removed, and if the condition of the defendant and the error are disclosed by the record such proceedings afford a remedy. Otherwise section 602 becomes available. This seems to be the construction implied in *Jennings v. Simpson*, 12 Neb. 558, from the citation therein of *Yaple v. Titus*, 41 Pa. St. 195. In the present case whether the condition of the infants appeared of record is not disclosed, but that fact is not material. If it was disclosed and the foreclosure decree should ultimately be reversed on error the purchaser would be protected by the express terms of section 508 of the Code of Civil Procedure. (*McAusland v. Pundt*, 1 Neb. 211; *Green v. Hall*, 43 Neb. 275.) If, on the other hand, their condition did not appear of record we still think that section 508 applies, and that the title of the purchaser would not be defeated or affected by a subsequent vacation of the judgment. Vacating judgments under section 602 is referred to under the title of "reversals" by the court rendering the judgment, and we do not think that section 508 in using the word "reversal" contemplated only a reversal by an appellate court. It meant a reversal by any court authorized to set aside the judgment. Its policy was to protect purchasers at sales under judgments which had been rendered by courts of competent jurisdiction in the premises, no matter how erroneous might be the proceedings leading to the judgment. Independent of any statute a title so derived is not defeated by a subsequent vacation of the judgment. (*Allman v. Taylor*, 101 Ill. 185; *England v. Garner*, 90 N. Car. 197.)

A sufficient reason why the title is not hazarded by an original action is that the defendant suggests no equity in favor of the minors or no defense to the foreclosure. This would be necessary to maintain an original case and it would indeed be necessary to a proceeding under section 602.

As it was not shown that the plaintiff's title was defective or even threatened, the judgment of the district court was right.

AFFIRMED.

W. B. VAN SANT ET AL., V. DENNIS M. FRANCISCO.

FILED JUNE 23, 1898. No. 8155.

1. **Appeal from County Court:** DEFAULT OF OFFICER. The rule whereby the right to appeal from the county court or a justice of the peace is not destroyed by failure to perfect the appeal within the time limited by law, where the delay is caused solely by the default of the officer, relates only to the failure of the officer to perform a duty imposed upon him by law. If the officer undertakes to perform some act not so required of him, he does so as the agent of the appellant, and his neglect is attributable to the appellant himself.

2. ———: ———: DELIVERY OF TRANSCRIPT. It is the duty of the county judge or justice of the peace to make out a transcript and on demand to deliver it to the appellant or his agent, but the demand and the delivery should be at the office of the officer. It is not his duty to deliver a transcript at some other place, by mail or messenger.

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

Frank T. Ransom, for plaintiffs in error.

Thomas & Nolan and *H. C. Murphy, contra.*

IRVINE, C.

Francisco recovered a judgment against the plaintiffs in error in the county court of Douglas county. The judgment was rendered June 14, 1895. An appeal undertaking was filed in due time, but the transcript was not filed in the district court until July 18, four days after the statutory time had elapsed. On the application of Francisco the appeal was dismissed, and this proceeding is brought before us for review.

The evidence on which the district court acted tends to

show that plaintiffs ordered the preparation of a transcript in due season and that it was prepared in ample time to have permitted the perfecting of the appeal. It seems, however, that a usage exists in the county court of Douglas county whereby a book is kept in which attorneys enter applications for transcripts and similar orders. It is also the usage to make transcripts as so ordered, and, with persons of known standing, to deliver them by mail or messenger as may be directed. The attorney for plaintiffs in error sent a clerk to the county court and the clerk there entered, according to instructions, in the order book the title of the case, its docket number, and the words: "Transcript. Send to F. T. Ransom," he being the attorney. By some mistake the transcript was placed in a drawer after its preparation and was not sent to the attorney, and he, relying on receiving it as directed, neglected to send for it until too late to file it within the proper time.

In several cases it has been held that if the appellant do all of him required and is not negligent, he cannot be deprived of his appeal by the failure of the justice or county judge to perform his duty. These cases are all where the officer has failed to perform some duty required of him in his official capacity, as to prepare the transcript, to make up his record, etc. On the other hand, it has been held that where the officer undertook to go beyond his duty and to perform some service not required of him by law, he was then acting as the agent of the appellant, and his failure to perform such extra-official acts would not excuse the appellant. (*Gifford v. Republican V. & K. R. Co.*, 20 Neb. 538; *Union P. R. Co. v. Marston*, 22 Neb. 721.) These were cases where the officer undertook to file the transcript in the district court, but they are like the case before us in principle. Unless it was the official duty of the county judge to send the transcript to appellant's attorney, his failure to do so would not excuse the default. Appeals in civil cases from the county court to the district court are governed by the same rules as ap-

peals from a justice of the peace. (Compiled Statutes, ch. 20, sec. 26.) Code of Civil Procedure, section 1008, makes it the duty of a justice of the peace to make out a certified transcript and "on demand deliver the same to the appellant or his agent." The word "deliver" is not there used in the sense of sending it by mail or messenger. Plainly it contemplates a demand at the office of the justice and a delivery there to the appellant or his agent. If appellants or their agent had called at the county court for the transcript it would have been delivered to them. Not having done so the default was their own. The usage relied on may be one operating for the convenience of litigants, but it does not enlarge the duties of the county judge or become a part of the law.

AFFIRMED.

PERKINS WINDMILL & AX COMPANY v. J. W. TILLMAN.

FILED JUNE 23, 1898. No. 8177.

1. **Alteration of Instruments:** PLEADING. A change made in a written instrument by a stranger is an act of spoliation merely and recovery may still be had, but the instrument must be pleaded according to its original terms and not according to its terms as altered.
2. ———: ———: RATIFICATION. When the holder of a note had notice that it had been altered by changing the amount, and with such notice sued upon it in its altered condition, and endeavored to recover thereon, *held*, that he thereby ratified the act of alteration, and that the court did not err in refusing to permit him, after trial, to amend by counting on the note as originally made.

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

E. M. Coffin and *V. H. Stone*, for plaintiff in error.

Clark & Allen, contra.

IRVINE, C.

This was an action by the plaintiff in error against the defendant in error on a promissory note for $45. The

answer was a general denial. The case was tried to the court without a jury, and by special findings the case was determined in favor of the defendant. The facts as established by the proof and found by the court were that the defendant had purchased a windmill from an agent of the plaintiff and had given in part payment his note for $25. This note was afterwards altered, presumably by the agent, so as to make its amount $45, and was transmitted in its altered condition to the plaintiff.

The plaintiff contends, and correctly, as held by several decisions of this court, that a change made in a written instrument by a stranger is a mere spoliation, and that a recovery can still be had according to its original terms. It is next argued, and here there is room for doubt, that an agent to sell, receive notes in payment, and transmit them to his principal, is, for the purposes of the rule stated, a stranger, unless he had authority to make the alteration or his act in so doing has been ratified. We need not decide that question, because it was shown clearly that the alteration had been made and the petition was upon the note as altered. The denial put the execution of such a note in issue, and the proof sustained the denial. The amount of the note is descriptive thereof, and under a description of a note for $45 recovery could not be had on one for $25. If the plaintiff desired to recover upon the note as made he should have so described it.

Five days after the trial application was made for leave to amend by alleging the note as made. The application was denied and that ruling is assigned as error. Leave to amend was properly refused. The evidence shows that the note was sent to a local bank for collection. It was returned and bears upon its back the words: "Says this amt. is incorrect." Defendant also wrote plaintiff as follows: "I have the money that I owe you, but I will not pay that $45 note for I never gave it. P. S. Send this note that I gave you to Valparaiso Bank and I will cash it at once." The plaintiff asserts that this was a mere

charge that defendant had not signed the note and did not put it on inquiry as to the alteration. We think otherwise. He had asserted that the amount was incorrect and then wrote that he never gave the $45 note. He added sufficient to show that he had made some other note which he was willing to pay. This certainly charged the plaintiff with notice that there had been a forgery committed. Notwithstanding such notice, it sued on the forged instrument before a justice of the peace, and on appeal again asserted the validity of the altered instrument. It never admitted that the instrument was not in its original condition until after the trial, when it found itself defeated in its attempt to enforce it as altered. These facts sustained the special finding that the plaintiff ratified the agent's acts by suing after notice of the change and alteration. Even if the plaintiff might be permitted to amend on appeal by counting on an essentially different instrument than that sued upon before the justice, there was no error in refusing leave to amend after ratification had transformed what had possibly been only a spoliation into an alteration.

AFFIRMED.

LOUIS T. MICHAUT V. FRANK MCCART.

FILED JUNE 23, 1898. No. 8217.

Justice of the Peace: JUDGMENT: SUFFICIENCY OF FINDING. An entry in the docket of a justice of the peace as follows: "After hearing the evidence on both sides, and argument, it is considered by me that the plaintiff shall recover of the defendant" a sum named, imports a sufficient finding to support the judgment. *Rhodes v. Thomas*, 31 Neb. 848, followed.

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

Sedgwick & Power, for plaintiff in error.

John Tongue, contra.

IRVINE, C.

McCart recovered a judgment against Michaut before a justice of the peace for $18.15 and costs. Michaut took the case on error to the district court, where the judgment was affirmed. These proceedings seek a reversal of the judgment of affirmance. The assignments of error raise the question of the sufficiency of the justice's findings to support the judgment rendered.

The entry on the docket of the justice is as follows: "After hearing the evidence on both sides, and argument, it is considered by me that the plaintiff shall recover of the defendant the sum of $18.15 and costs of this action." It has often been held that a finding is essential to the regularity of a judgment, and that this is as requisite in cases before a justice of the peace as in other courts. But it seems the language quoted imports a finding. In *Ransdell v. Putnam*, 15 Neb. 642, the entry was: "It was found * * * that the plaintiff have and recover from the defendants," etc., and this was held sufficient. In *Rhodes v. Thomas*, 31 Neb. 848, the entry was: "Court convenes and defense proceed with examination of witnesses, after which case is argued by attorneys and submitted to the court with the following finding: October 17, 1888. After hearing the evidence, it is therefore considered by me that the plaintiff have and recover from the defendant the sum," etc. This, too, was held to be a sufficient finding. The latter entry is like the one before us except that by way of a kind of preamble the entry is first described as a finding. We take it that this fact would not make a finding out of matter not equivalent thereto, and we certainly do not feel disposed to hold that the word "find" or "found" is absolutely essential. If the foregoing cases are traceable to any principle it must be that it is sufficient if from the entry it appears that the judgment follows from a determination of the issues. This appears from the recital that it is based on a consideration of the evidence and arguments. The justice

and the district court were certainly warranted in following the analogy of the cases cited. There can be no doubt of what was intended by the justice and that he in fact proceeded upon an examination of the evidence and entered his judgment in accordance with the result thereby attained. We do not care to re-examine the question on principle. It is not one of any great practical moment, and it is safest in such cases to follow the precedents.

AFFIRMED.

NORFOLK BEET-SUGAR COMPANY V. FREDERICK PREUNER.

FILED JUNE 23, 1898. No. 8165.

1. **Special Finding:** GENERAL VERDICT: INCONSISTENCY. A special finding controls a general verdict, and when inconsistent with the general verdict it is the duty of the court to render judgment accordingly.
2. ———: ———: ———: PERSONAL INJURY: NEGLIGENCE. Special findings in a personal injury case examined and found not to be inconsistent with one another, but to establish contributory negligence, and so to be inconsistent with a general verdict for plaintiff.
3. **Master and Servant:** RISKS OF EMPLOYMENT. Unless mental immaturity or infirmity is shown, a servant is charged with notice of dangers obvious to persons of ordinary intelligence and foresight, and cannot recover from his master because of injuries resulting therefrom, on the ground that he was inexperienced in the use of the machinery in which such danger existed, and was not warned thereof.

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

Powers & Hays, for plaintiff in error.

E. F. Gray and *George L. Whitham, contra.*

IRVINE, C.

Preuner sued the Norfolk Beet-Sugar Company to recover for personal injuries sustained while in its employ. The cause of action, briefly stated, was that he was inex-

perienced in the use of machinery, and that the defendant maintained in connection with its sugar factory a lime mill, in which was machinery defectively constructed in that a rapidly revolving pulley was connected with a shaft by means of a wedge and set screw so projecting that they were likely to engage the clothing of persons there working, and were set below the surface in a pit constructed for the purpose; that a leaking water pipe discharged its contents into the pit in such manner that it became necessary to bail out the water from the pit while the machinery was in motion. It was alleged that the plaintiff was directed to perform this work and, while so doing, his clothing was caught by the wedge, set screw, shaft, and pulley, and that he was thereby injured. The answer denied negligence on the part of defendant and alleged that the injury was caused by the negligence of plaintiff in attempting to remove the water without removing his coat as he had been instructed to do. The jury returned a general verdict for the plaintiff and also answered certain special interrogatories. The defendant moved for judgment on the special findings, notwithstanding the general verdict. The court overruled this motion and entered judgment on the general verdict. The defendant brings the case here, assigning as error the overruling of its motion.

Section 294 of the Code of Civil Procedure enacts that, "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly."

Following are the special findings:

"1. Was the accident caused by the plaintiff's coat or garments coming in contact with the revolving shaft near which he was working at the time? Yes.

"2. Was the danger of working near the revolving shaft described in evidence, as plaintiff was doing at the time the accident occurred, obvious to a person of ordinary intelligence and foresight? Yes.

"3. Was the plaintiff careless in working near the re-

volving shaft described in evidence without first removing his coat or protecting his garments from coming in contact with the shaft? Yes.

"6. Would the accident probably have been avoided had the plaintiff removed his coat before going near the shaft to work? Yes.

"7. Could the plaintiff have performed the work assigned to him, that of dipping water from the basin under the pulley mentioned in evidence, without exposing his person to danger from the shaft, by standing upon and performing said work on the south side of said shaft? Yes.

"8. Was the plaintiff careless in attempting to perform said work by leaning over and placing his person in close proximity to the revolving shaft while dipping said water from under the moving pulley? In answering this question you may take into consideration the plaintiff's experience or lack of experience with moving machinery, and any directions or instructions which may have been given plaintiff by his foreman as to the manner in which said work should be performed. No."

These findings seem on first reading to be inconsistent, and we were at first of the opinion that they were incomplete, so that the judgment on the general verdict was proper. On a closer analysis we are convinced that they are not inconsistent with one another, but that they establish contributory negligence and therefore demand a judgment for defendant.

The first finding establishes as the cause of the accident plaintiff's coat or garments coming in contact with the shaft, the second that the danger was obvious, the third that the plaintiff was careless in working near the shaft without removing his coat or protecting his garments. Negligence is the failure to exercise such care as the circumstances require. Therefore the third finding, while using the word "careless," is equivalent to a finding that the plaintiff was in the particular mentioned negligent. It follows that these three findings establish

contributory negligence and control the judgment unless they are inconsistent with those which follow. There are no findings numbered four or five, and from the clerk's certificate it appears there were none. The sixth is that the accident probably would have been avoided had the plaintiff removed his coat. This alone would not complement the third, because, to prevent a recovery, the plaintiff's negligence must have contributed to the injury. It is not enough that it may probably have done so. But this must be taken with the first and they are not inconsistent. The first finds absolutely that the accident was actually caused by plaintiff's coat or garments coming in contact with the machinery, the sixth that it would probably have been avoided by his removing his coat. The first could not be correct unless the sixth was so. The sixth must be correct if the first was so. As found they were not inconsistent, the sixth was an understatement of the first and was included within it. The seventh relates to plaintiff's ability to perform the work by occupying another position. It has no reference to the particular negligence found by the third instruction. The eighth interrogatory proposed to the jury the question of plaintiff's negligence in attempting to perform the work by leaning over and placing his person in close proximity to the revolving shaft. It had no reference to his doing so with his coat on. Taking the findings together they are that plaintiff might have taken another position and by so doing not exposed himself to danger; that he was not, however, negligent in taking the position he in fact assumed, but that in doing so without removing his coat or protecting his garments from contact with the shaft he was negligent, and that such negligence caused the injury.

It is argued that in the last finding is incorporated a direction to consider the inexperience of plaintiff and the instructions given him, and that such direction with regard to that question impliedly excluded such considerations from the answers to other questions; that therefore

the element of plaintiff's inexperience is not covered by the other findings and they for that reason do not warrant a judgment. In the record we have neither the evidence nor the charge to the jury, so we cannot say upon what state of facts or what rules of law the interrogatories were based, but we have in the answer to the second interrogatory a distinct finding that the danger was obvious to a person of ordinary intelligence and foresight. There is in the petition no allegation of youth or mental infirmity to relieve plaintiff from the duty of exercising that degree of intelligence and foresight. The danger being so obvious, he was charged with knowledge thereof although he may not have been experienced in the use of machinery and may not have been warned of the danger.

The judgment must be reversed and the cause remanded with directions to enter judgment on the special findings.

REVERSED AND REMANDED.

EASTERN BANKING COMPANY, APPELLEE, V. ANNA C. SEELEY ET AL., APPELLANTS.

FILED JUNE 23, 1898. No. 8194.

Mortgages: DEFAULT IN INTEREST: ELECTION TO DECLARE DEBT DUE: NOTICE. A note, and a mortgage securing it, provided that if default should be made for ten days in the payment of any interest after it should become due, then at the mortgagee's election the whole debt should become due and payable, and that no notice need be given of such election. *Held*, That there was nothing in such contract beyond the power of the parties to make, and that on default in payment of interest according to the terms of the contract the mortgagee might foreclose for the whole debt, without previously notifying the mortgagor of his election so to do.

APPEAL from the district court of Buffalo county. Heard below before SINCLAIR, J. *Affirmed.*

Francis G. Hamer, for appellants.

N. P. McDonald, contra.

IRVINE, C.

The defendants executed and delivered to the plaintiff their note secured by mortgage. Both note and mortgage contained a provision that if default should be made in the payment of any interest for ten days after the same should become payable, then the principal and accrued interest should at once become due at the election of the mortgagee and that no notice of such election should be required. A suit to foreclose was begun alleging a default for more than ten days in the payment of certain interest installments and an election to treat the whole debt as due. A decree of foreclosure was rendered and the defendants appeal, claiming that they were entitled to notice of plaintiff's election to treat the whole sum as due, at least as a condition to their being subjected to costs.

It has been held that where the note did not expressly provide that no notice was necessary, still notice was not required of the mortgagee's intention to proceed to collect the whole debt. (*Morling v. Bronson*, 37 Neb. 608.) We know of no principle of law whereby it is put beyond the power of the parties to contract that no notice need be given of the election, and here they have expressly so contracted. Commencing suit was a sufficient act to establish the election to so proceed, and no previous notice was necessary.

AFFIRMED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1898.

PRESENT:

HON. T. O. C. HARRISON, CHIEF JUSTICE.
HON. T. L. NORVAL, HON. J. J. SULLIVAN, } JUDGES.
HON. ROBERT RYAN, HON. JOHN M. RAGAN, HON. FRANK IRVINE, } COMMISSIONERS.

ROYAL TRUST COMPANY OF CHICAGO V. EXCHANGE BANK OF CORTLAND ET AL.

FILED SEPTEMBER 23, 1898. No. 8078.

1. **Transcript for Review.** The words, "A transcript of the proceedings," as employed in section 586 of the Code of Civil Procedure to designate what shall be filed with a petition in error, include within their meaning duly certified copies of the original papers and pleadings in the trial court, which it is sought to present to the attention of the appellate court. The filing of the original papers and pleadings is not contemplated, and will not fulfill the requirements of the statute. (*School District v. Cooper*, 44 Neb. 714; *Moore v. Waterman*, 40 Neb. 498.)

2. **Opening Judgments:** COUNTY COURT: PRACTICE. The provisions of section 1001 of the Code of Civil Procedure relative to setting aside a judgment by default are applicable to practice in the county court in all civil actions regardless of the amount in controversy.

3. ———: ———: ———. The order must be conditional in the first instance; and that notice of the time and place of trial be given to the adverse party is jurisdictional, and unless given, the final order cannot be made. (*Tootle v. Jones*, 19 Neb. 588.)

4. ———: ———: ———. If a conditional order has been made in the county court in a case which, by reason of the amount, calls for trial within term time, an order which finally overrules the motion to set aside the judgment may be made by the county judge during vacation, if both parties consent that an order be made in the matter at that time.

5. ———: ———: ———. Where such an order has been made during vacation, it is voidable, not void; and in the absence of proof or showing to the contrary, it will be presumed that the assent to the authority to make it at that time was given. (*Hansen v. Bergquist*, 9 Neb. 269.)

6. **Journal Entry**: EXCEPTIONS. If a journal entry of a hearing and determination of a matter recites that a party to the action noted an exception to a ruling or order, it will be presumed that such party was present in person or by counsel. (*Rose v. Burr*, 43 Neb. 358.)

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

C. C. Flansburg, for plaintiff in error.

Davis, Hibner & Whitmore, contra.

HARRISON, C. J.

March 13, 1894, the plaintiff in error instituted an action in the county court of Lancaster county against defendants in error to recover the sum of $823.26 alleged to be its due from them. Summonses were issued and served, returnable at the next term of the court; and on a day of such term, the parties having been served and not appearing, a judgment by default was entered against them. This was done of date April 11. With reference to the occurrences thereafter, we will quote from the transcript of the county court record:

"April 18, 1894. On motion of the defendants, and confession of judgment for costs this day filed, it is or-

dered and adjudged that the defendants pay the costs herein made to this date, taxed at $10.95, and that the default and judgment herein be set aside conditionally upon defendants' notifying the plaintiff of the opening of said judgment, and the time and place of trial of said cause, according to law.

"JOSEPH WURZBURG,
"*Acting County Judge.*"

"April 24, 1894. Defendants file affidavit of W. J. Brown, and answer and cross-petition. May 3, 1894. Defendants file motion for security for costs. June 16, 1894. Plaintiff files motion to overrule conditional order setting aside judgment, and to confirm original judgment, because conditional order has not been complied with. July 3, 1894. Defendants' motion for security for costs is granted, and ordered that plaintiff file security by 13th instant. August 1, 1894. Cause comes on to be heard on plaintiff's motion to set aside the conditional order setting aside the original judgment herein, and to confirm said original judgment, because said order has not been complied with. On consideration thereof I find that said order has not been complied with; and it is ordered and adjudged that said conditional order be set aside; and that the original judgment herein be and it is hereby confirmed; and that plaintiff recover the costs of increase taxed at $8. To this order the defendants except. August 8, 1894. Defendants file affidavit alleging that the conditional order herein was complied with and a notice served upon plaintiff of the filing of the defendants' motion for security for costs, and that plaintiff has failed to comply with the order of the court to give security for costs."

The case was by the now defendants in error removed to the district court for review of the order, which, however worded, was in effect but a denial of the motion to set aside the judgment. In the district court the order of the county judge and the judgment were reversed and the cause retained for trial. So much of the journal entry

of the proceedings as we deem it necessary to particularly notice is as follows:

"And this cause having been heretofore, on a former day of this term of court, to-wit, March 13, 1895, argued and submitted to the court upon the petition in error, transcript of proceedings had, and the original papers and pleadings in the county court of Lancaster county, Nebraska, now comes on for final determination, and, after due consideration, the court, being fully advised in the premises, finds that there is error in the proceedings and judgment of the said county court in that the said county court erred in rendering judgment in vacation upon defendants' motion to set aside the conditional order made by said court, said motion being acted upon by the said county court on the first day of August 1894, which is admitted by the parties hereto in open court to have been in vacation, and the record not showing affirmatively that plaintiffs in error were present in said court upon said date, or in any way assented to the court passing upon said motion at said time, the ruling of the county court in setting aside such conditional order and its judgment thereon is therefore reversed, and cause ordered docketed in this court for trial."

The section of the Code of Civil Procedure in which is prescribed the method of procedure to open default judgments rendered by justices of the peace is as follows: "When judgment shall have been rendered against a defendant in his absence, the same may be set aside upon the following conditions: First—That his motion be made within ten days after such judgment was entered. Second—That he pay or confess judgment for the costs awarded against him. Third—That he notify in writing the opposite party, his agent, or attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial, at least five days before the time, if the party reside in the county, and if he be not a resident of the county, by leaving a written notice thereof at the office of the justice ten days before the trial." (See

Code of Civil Procedure, sec. 1001.) This has been determined applicable to the practice in county courts in all cases regardless of the amount in controversy. (See *State v. Smith*, 11 Neb. 238.) When the matter was heard in the district court on the petition in error of the now defendants in error, there was filed for the adverse parties what was styled a plea in bar to the petition in error, in which certain things were stated which it was urged called for a dismissal of the error proceedings. Of the issues joined on this plea there was a trial, and the evidence then introduced has been preserved in a bill of exceptions and brought to this court with the petition in error.

It is argued for defendants in error that the decision on the question of the force of the plea to the petition in error is all of the proceedings in the district court which is now before this court for consideration. This position is clearly untenable. The journal entry of what occurred in the trial court embraces the determination of the other point, *i. e.*, the power of the county judge to finally deny at the time he did the motion to set aside the judgment by default, and both branches of the decision of the district court have been presented here for review. As to what the district court had before it and weighed relative to the order of the county judge, by which there was a final denial of the demand to open the default judgment, we must, in the absence of any other or further information on the subject, be governed by the statement in the journal entry, which is that it was "argued and submitted to the court upon the petition in error, transcript of proceedings had, and the original papers and pleadings in the county court of Lancaster county." Of the things enumerated the original papers and pleadings should not have been considered, for, from a fair reading of the foregoing excerpt from the entry, the conclusion follows that such papers and pleadings were before the court as portions of the record of the county court, and they could only properly be so by being made by copies

parts of the transcript. (*School District v. Cooper*, 44 Neb. 714; *Moore v. Waterman*, 40 Neb. 498.)

We will now turn to and examine the order of the district court by which it worked a reversal of the order and judgment of the county judge, and involved in such examination is the consideration of the order of the county judge. We have hereinbefore quoted section 1001 of the Code of Civil Procedure. It has been said by the court in the decision in case of *Tootle, Hosea & Co. v. Jones*, 19 Neb. 588, of this section that: "By an examination of this section it will be seen that the order setting aside a judgment can be made only on three conditions. These are, the making of the motion within the time prescribed, the payment of costs, or that judgment therefor be confessed, and that the party seeking to set it aside give written notice of the same, and of the time of trial. These conditions are precedent. If the motion should be made after the expiration of the time in which the law provides it may be made, the justice could not molest the original judgment. If the defendant refused to pay or confess judgment for costs, he would have no power to act. The same is true if the notice be not given. The judgment can only be set aside conditionally in the first instance. (Maxwell, Justice Practice 76.) If the judgment is thus conditionally set aside, and the notice is not given nor waived, that fact should be stated on the docket, without hearing any testimony, and the motion overruled. (Swan's Treatise [12th ed.] 104.)" It will be remembered, as we have shown in the portions of the record of the county court which we have copied herein, that the judge made a finding that there had been a non-compliance with the condition of the order, and the only condition thereof was that in regard to notice of the time and place of trial, from which we must conclude that the facts warranted the order made by the judge within the rule applicable as announced by this court in the case to which reference has just been made.

There is the further question, did the county judge

have the authority to make the order on a date out of regular term time? It has been decided that such an "order is voidable, not void" (*Hansen v. Bergquist*, 9 Neb. 269); also, in the same opinion, that with the consent of parties the order may be made out of term time; and further, in the absence of proof or showing to the contrary, such assent will be presumed. In the case at bar, to the extent the record properly presented to the district court as disclosed by the statements in the entry of its proceedings and decision, the presumption of assent to hear and determine the matter must prevail; and further in this connection it is stated in the entry of the acts and order of the county judge that the defendants excepted to the making of the order. This is sufficient to raise the presumption that the parties were present in person or by counsel, and it does not appear they objected to the hearing and determination of the matter at that time. (*Rose v. Burr*, 43 Neb. 358.) It follows that the judgment of reversal rendered in the district court was erroneous. It must be and is reversed, and the petition in error from the judgment of the county court dismissed.

As this disposes of the entire matter, it is unnecessary to discuss or determine the force of the adjudication of the district court relative to the other point in the litigation.

REVERSED.

SHERMAN M. CASLER V. JOHN G. NORDGREN.

FILED SEPTEMBER 23, 1898. No. 8228.

Transcript for Review. In error proceedings to this court, an authenticated transcript of the proceedings of the inferior tribunal must contain the final judgment or order. Such requirement is jurisdictional, and if there is a non-compliance therewith, the error proceedings must be dismissed.

ERROR from the district court of Hamilton county.

Tried below before WHEELER, J. *Error proceeding dismissed.*

Howard M. Kellogg and *A. W. Agee*, for plaintiff in error.

Hainer & Smith, contra.

HARRISON, C. J.

In every case presented to this court by proceedings in error there must be of the record a transcript of the proceedings in the trial court inclusive of the judgment or final order, authenticated by the certificate of the clerk of such court. (Code of Civil Procedure, secs. 586, 587; *Romberg v. Fokken*, 47 Neb. 198; *Union P. R. Co. v. Kinney*, 47 Neb. 393.) The certificate in this case of the clerk of the trial court contains a specific statement or enumeration of the matters of the transcript to which it is made applicable, and there is no reference to a judgment or order. It is jurisdictional that the transcript contains the final order or judgment, and if not, the error proceeding will be

DISMISSED.

EDWARD W. PETERSON ET AL. V. MELVILLE R. HOPEWELL.

FILED SEPTEMBER 23, 1898. No. 8231.

1. **Pleading**: CONSTRUCTION. If the question of the sufficiency of the petition in its statement of a cause of action is not raised until during the trial of the cause, the pleading will be liberally construed, and, if possible, sustained.

2. ———: ———. By an application of the foregoing rule the petition in the present case *held* to state a cause of action.

3. **Trespass**: BURDEN OF PROOF: HIGHWAYS. In an action which involves an alleged trespass on real estate, wherein a defendant pleads as a justification or excuse of or for the acts which consisted of the removal of a fence, and making a grade and ditch, that they were done within a public road, such party must show by a preponderance of the evidence the facts so pleaded. (*Shaffer v. Stull*, 32 Neb. 98.)

4. **Highways:** ESTABLISHMENT: EVIDENCE. Findings that a public road had not been established by the board of commissioners; that a section-line had not been ordered opened for travel; that a road had not been established by user; also, that there had not been such use of a highway, and for the necessary length of time, as to raise a presumption that an order by the county board which purported its establishment was with and after all necessary legal steps,—were all sustained by the evidence.

5. **Trespass:** INJUNCTION. An injunction will be granted to restrain a threatened trespass upon real estate, where such act would result in the destruction of the premises, in the character of their use and enjoyment, or a deprivation thereof.

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

Edward W. Peterson, for plaintiffs in error.

Melville R. Hopewell, contra.

HARRISON, C. J.

The plaintiff instituted this action in the district court of Burt county and prayed that defendants be restrained from threatened trespasses upon real property, and in the trial court was awarded a judgment for the relief asked. The defendants have prosecuted an error proceeding to this court.

The original petition declared against one of the defendants as a road overseer, and set forth that past acts and threatened ones had been, and were to be, done by such party as such officer in the claimed performance of his duties in and about the opening of a public road and its preparation and completion for travel. After the answers of the defendants had been filed, the plaintiff asked leave to amend the petition by eliminating all reference to the official position of the one defendant; also, all statements which indicated that acts done or threatened had been or were to be done by such defendant in his capacity as road overseer, or in the performance of the duties of his office. The plaintiff was allowed to so amend the petition and defendants were given five days

within which to plead to the amended petition. This they did by obtaining leave and refiling their answers.

After the inception of the introduction of evidence during the trial, the defendants objected to the reception of any evidence on the ground of the insufficiency of the amended petition. This objection was overruled, which action of the trial court is the burden of one assignment of error to which our attention is challenged in the present examination of the litigation. The question of the sufficiency of the petition, or that there is not stated therein a cause of action, should ordinarily be raised and determined prior to the trial of the cause; and, where not presented until that time, the petition will be liberally construed, and, if possible, sustained. (*Roberts v. Taylor*, 19 Neb. 184, 27 N. W. Rep. 87; *Marvin v. Weider*, 31 Neb. 774, 48 N. W. Rep. 825; *Johnston v. Spencer*, 51 Neb. 198, 70 N. W. Rep. 982; 6 Ency. Pl. & Pr. 349.) Viewed and construed within the latitude of presumptions allowed by the rule just stated, the amended petition in the case at bar stated a cause of action—a begun and threatened destruction of the plaintiff's property for the use for which, or the character in which, he held and enjoyed it, or rather his deprivation of it for such use and enjoyment—and the objection interposed was properly overruled. (*White v. Flannigain*, 1 Md. 525; *Baltimore B. R. Co. v. Lee*, 23 Atl. Rep. [Md.] 901; *Schneider v. Brown*, 24 Pac. Rep. [Cal.] 715.)

The defenses were that the real estate—a portion of a section-line and the land bordering on the one side thereof—was embraced within the limits of a public road, either established or ordered opened by the proper authorities, or acquired by continued or continuous use by the public, and that the acts performed and to be done, which consisted in the main in the removal of a fence which belonged to plaintiff, and grading and ditching, were necessary to fit the road for travel; that one of the defendants was a road overseer, and he and the others under his directions were but proceeding in the proper manner to open the road to the passage of travel.

It is urged that the trial court erred in its findings of fact and in its conclusions of law relative to the litigated matters, and that some of the findings of fact were contrary to or unsupported by the evidence. It was of the evidence that during the year 1884 there was presented to the county board of the county in which the land involved was situated a petition which asked that a road be located on and along the section-line which figures in this suit, and that an order was made which recited that the road was so located. The notices of which there was shown at least an attempted publication, or a publication which partially complied with the statutory requirements at that time in that respect, were of the opening of the road, in one portion, if construed liberally, and of its establishment, in another portion. By the law in force at the time the petition to which we have just referred was presented to the county board the method of procedure to be pursued to alter, vacate, or establish a road or roads was prescribed. The law also declared all section-lines to be public roads, and that they might be opened by the county board whenever the public good required it. The trial court determined that it had not been shown that a road had been established by the order of the commissioners, pursuant to the prayer of the petition presented, and, further, the section-line which the legislature had declared a public road had never been ordered opened by the board, and there had not been such an open, notorious, adverse, exclusive possession of the section-line as a road from the time of the order of the board which purported to locate the road as to preclude any question of the validity or force of the proceedings; also, that there had not been such use of the section-line by the public for travel as to establish a road; and for each of these findings or conclusions there is sufficient support in the evidence, and they are in accordance with the law applicable in any connection where a question of law was involved; hence they will not be disturbed; and as this, in effect, disposes of the controverted matters,

it follows from what has been said that the judgment of the district court will be

AFFIRMED.

ALBERT WELTON V. SAMUEL ATKINSON.

FILED SEPTEMBER 23, 1898. No. 8268.

1. **Foreign Laws:** EVIDENCE. In the absence of proof the law of another state on any subject, where involved in litigation here, will be presumed to be the same as the law of this state.
2. **Notary Public:** SEAL. A notary public must, by impression of his official seal, authenticate all his official acts, and his certificate which lacks such authentication is without force or effect.

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

S. B. Pound, Roscoe Pound, and *A. N. Sullivan,* for plaintiff in error.

D. K. Barr, George W. Clark, Beeson & Root, and *Mockett & Polk, contra.*

HARRISON, C. J.

In error proceedings in this action it is complained that the trial court refused, on motion of plaintiff, to suppress certain depositions and, over objections, admitted them in evidence. An examination of the transcript inclusive of the correction thereof discloses, by fair reading, that the motion to suppress the depositions was properly presented, both in point of manner and time. The addition to the transcript allowed on motion of defendant was evidently made with a purpose to make it appear that the motion for suppression of the depositions was not interposed until after the trial had commenced, but we think a perusal of all the record which refers to this subject leads to the conclusion we have heretofore announced. The certificate attached to the depositions

was signed, "D. Shafer, Notary Public," but there was no impression of his official seal. At the close of the testimony of each witness the name of each witness was written, and just below there was a jurat which was signed officially by the notary public, and in each of such places there was the impression of the official seal of the notary; but these jurats were not necessary, and possessed no significance relative to the authentication of the depositions.

In the absence of proof to the contrary it must be presumed that the law of Arkansas—the state in which the depositions were taken—in regard to notaries public is the same as this state; and in this state it is provided, among other things, that each notary public shall provide himself with an official seal, * * * with which seal, by impression, all his official acts shall be authenticated. (See Compiled Statutes 1897, ch. 61, sec. 5.) And in section 384 of the Code of Civil Procedure it is provided: "Depositions taken pursuant to this article, by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this state or elsewhere, shall be admitted in evidence on the certificate and signature of such officer under the seal of the court of which he is an officer, or his official seal, and no other or further act of authentication shall be required." If an officer is required to attach his official seal to his acts, a certificate unauthenticated by the impression of such seal is invalid. (*Byrd v. Cochran*, 39 Neb. 118; *Neese v. Farmers Ins. Co.*, 55 Ia. 604, 8 N. W. Rep. 450; *Hewitt v. Morgan*, 88 Ia. 468, 55 N. W. Rep. 478; *De Graw v. King*, 28 Minn. 118, 9 N. W. Rep. 636.) The depositions were not sufficiently authenticated and should not have been admitted. (*Neese v. Farmers Ins. Co.*, 55 Ia. 604, 8 N. W. Rep. 450.)

There were other assignments of error, but they were of matters which we do not deem it necessary to discuss at present. For the error hereinbefore indicated the judgment must be reversed and a new trial awarded, dur-

ing which, if it occurs, these further matters, if erroneous, will doubtless be corrected, or not be again parts of the trial. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HENRIETTA M. WRIGHT, APPELLEE, V. NATHAN STEVENS, APPELLANT.

FILED SEPTEMBER 23, 1898. No. 8269.

1. **Officer Conducting Judicial Sale:** OATH. A person designated in a decree of foreclosure of a mortgage of real estate to conduct the sale is not required to take and file an oath.

2. ———: ———: PRESUMPTION ON REVIEW. If such action had been necessary or required, in the absence of proof in the record to the contrary the presumption would prevail that there had been a compliance with such requirement.

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

John O. Yeiser, for appellant.

Kennedy & Learned, contra.

HARRISON, C. J.

In this action in the district court of Douglas county to procure the foreclosure of a mortgage on real estate, there was a decree of foreclosure, by the terms of which a designated party was authorized to conduct the sale of the property, if one should be made. For the due enforcement of the decree a sale of the premises involved in the litigation became necessary, and was effected by the person indicated in the decree, and on report presented, and motion, was by the court confirmed.

In this, an appeal from the order of confirmation, there is but one ground of complaint in the argument in the attack on the said order, and for which it is asked to be

annulled, viz., that the party appointed to make the sale did not take or file an oath in the proceedings prior to the performance of the duties which devolved on him. It was not required or necessary that the person empowered by the decree to make the sale should take or file an oath. (*Omaha Loan & Trust Co. v. Bertrand*, 51 Neb. 508, 70 N. W. Rep. 1120; *Northwestern Mutual Life Ins. Co. v. Mulvihill*, 53 Neb. 538, 74 N. W. Rep. 78.) Moreover, had it been essential that such party should take or make and file an oath, the record presented here does not disclose that it was not done; and, in the absence of proof to the contrary, it must be presumed that all things required were performed. (*Omaha Loan & Trust Co. v. Bertrand, supra; Northwestern Mutual Life Ins. Co. v. Mulvihill, supra.*) It follows that the objection is unavailing and the order of confirmation must be

AFFIRMED.

MICHAEL B. DAVIS V. OTOE COUNTY.

FILED SEPTEMBER 23, 1898. No. 9428.

1. **Assignments of Error:** RULINGS ON EVIDENCE. In an assignment of error in the admission of evidence there must be a specified designation of the ruling to which it is desired to direct attention.

2. **Taxes Paid Under Protest:** RECOVERY: PLEADING: BURDEN OF PROOF. In an action to recover taxes paid under protest, if allegations of the petition of the illegality or invalidity of the taxes or reasons which render them unenforceable are not admitted, the burden of their proof is on the pleader.

3. ———: ———: ———. The protest against the payment of taxes provided for in the first subdivision of section 144, chapter 77, Compiled Statutes, must state the grounds thereof specifically and with particularity, and not generally, or by way of conclusions, and no claim can be successfully pursued for the repayment of such taxes as provided in said subdivision for any other or different reasons than are set forth in the notice of protest.

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

M. L. Hayward and *C. W. Seymour*, for plaintiff in error.

John V. Morgan and *John C. Watson, contra.*

HARRISON, C. J.

On November 23, 1893, the plaintiff purchased of James Reed a stock of drugs, medicines, and oils; also the fixtures then in a store building in Nebraska City, and assumed possession, management, and the sale of the stock in the regular course of a retail trade or business. On the next day the county treasurer of Otoe county, wherein the property was and had been of location, issued distress warrants to enforce the collection of certain delinquent taxes which purported to have been assessed against the former owner of the drug business and stock, and they were by the sheriff of the county, to whom they were delivered for service, levied on the said stock of goods and property in the store. On December 5 the plaintiff paid the taxes under protest, and during the succeeding month filed a claim with the county commissioners for the repayment to him of the amount he had so paid. The claim was rejected or disallowed by the board, and an appeal of the matter was perfected for the plaintiff to the district court, where, as the result of a trial, judgment was rendered against him, and the matter is presented to this court by error proceeding in his behalf.

It is argued for plaintiff that he had in his petition pleaded that certain acts prescribed by law relative to the assessment and collection of the taxes in question had not been performed, or not properly done, hence the taxes were invalid and uncollectible; that no evidence had been introduced for defendant to show to the contrary, and without such evidence there could not be a judgment for defendant, or, if rendered, it was erroneous. To make out a claim for the repayment of the taxes on either of the grounds to which this branch of the argument for plaintiff has reference, it was, as to each, a

necessary averment on the part of plaintiff that the act had not been performed, or the essential prerequisite to a valid tax did not exist, and to such assertions the answer contained denials. The burden of proof was on the plaintiff as to each subject-matter pleaded through or by reason of which he asserted the illegality or invalidity of the taxes. (*Miller v. Hurford*, 13 Neb. 13; *Towle v. Holt*, 14 Neb. 221; *Adams v. Osgood*, 42 Neb. 450.)

It is urged that there was error committed in the admission of certain testimony. There is no specific assignment relative to this asserted error in either the motion for a new trial or the petition in error; hence it cannot be reviewed. (*Grand Island & W. C. R. Co. v. Swinbank*, 51 Neb. 521; *Woodbridge v. DeWitt*, 51 Neb. 98.)

The futher arguments of plaintiff relate specifically to matters of each of which it is contended it rendered the taxes invalid, or of one that the taxes for the major number of the years were barred by limitation, and unenforceable. The recovery of these taxes was sought by plaintiff under and by virtue of a portion of section 144, chapter 77, article 1, Compiled Statutes, which is as follows: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof, hereafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax, or the part thereof enjoined, be levied or assessed for an illegal or unauthorized purpose; nor shall any person be permitted to recover by replevin, or other process, any property taken or distrained by the county treasurer, or any tax collector, for the non-payment of any tax, except such tax be levied or assessed for illegal or unauthorized purpose; but in every case the person or persons claiming any tax or any part thereof, to be for any reason invalid, who shall pay the same to the county treasurer, tax collector, or other proper authority, may proceed in the following manner, viz.: First—If such person claim the tax, or any part thereof, to be invalid for the reason that the property upon which it was levied

was not liable to taxation, or that said property has been twice assessed in the same year and taxes paid thereon, he may pay such taxes under protest to the tax collector, county treasurer, or other proper authority, and it shall be the duty of the collector, treasurer, or other proper authority receiving such taxes, to give a receipt therefor, stating thereon that they were paid under protest, and the grounds of such protest, whether not taxable, or twice assessed, and taxes paid thereon. If such taxes are paid to the proper authority, other than the county treasurer, such person so receiving them shall, within ten days thereafter, deliver such taxes, or so much thereof as are paid under protest to the county treasurer, together with a copy of the receipt given for the same, and the county treasurer shall retain the money so paid under protest until otherwise directed by order of the county board. Within thirty days after paying such taxes, the person paying them shall file a statement in writing, duly verified, with the county board, setting forth the amount of tax paid under protest, the grounds of such protest, and shall attach thereto the receipt taken for said taxes. Whereupon at the first meeting of the county board thereafter they shall inquire into the matter, and if they shall find either that the property upon which such taxes were levied was not liable to taxation, or that it had been twice assessed in the same year, and taxes paid thereon, they shall issue an order to the county treasurer to refund said taxes, stating therein what sum shall be refunded, and if they shall find that the grounds of such protest are not true, they shall issue an order to the county treasurer to dispose of said money in the same manner as though it had not been paid under protest. Appeals may be taken from such decisions in the same manner and within the times set forth in sections 37 and 38, chapter 18, of the Compiled Statutes of Nebraska; and if such an appeal be taken the treasurer shall retain such taxes until the case is finally determined; provided, that he shall in all cases retain said money until the time

for an appeal shall have elapsed. If an appeal from the decision of the county board be taken, and upon the final determination thereof their decision be affirmed, the treasurer shall at once carry the order of said board into effect; and if their decision be reversed, they shall issue a new order to the treasurer conforming to the decree of the court finally determining the case. In all cases where the treasurer shall refund such taxes, he shall write opposite such taxes, in the tax list, the words, 'Erroneously taxed—Refunded.' The term 'county board,' as used in this section, shall be held to mean board of county commissioners, and board of supervisors, as the case may be." The protest is the basis of the claim for repayment, and the reasons assigned for the protest must be stated with as much certainty and particularity as in a petition in an action in district court; if not, the protest is insufficient. The protest in this matter contained but general statements or conclusions, was not specific in relation to any ground on which a recovery was finally urged or demanded, and contained no reference to the bar of the statute of limitations, and furnished no sufficient groundwork for the claim presented to the commissioners. In the claim to the county board and petition in the court, if an appeal be taken, the party cannot assign other, further, or different reasons than were sufficiently set forth in the document on which the action is predicated the notice of protest. (*City of Omaha v. Kountze*, 25 Neb. 60; *Hinds v. Township of Belvidere*, 65 N. W. Rep. [Mich.] 544; *Union P. R. Co. v. Commissioners*, 98 U. S. 545; *Rogers v. Inhabitants of Greenbush*, 58 Me. 390, 4 Am. Rep. 292; *Meek v. McClure*, 49 Cal. 623.)

It follows that the judgment of the district court was right and will be

AFFIRMED.

MIDDLEBORO NATIONAL BANK ET AL., APPELLANTS, V. JAMES RICHARDS ET AL., APPELLEES.

FILED SEPTEMBER 23, 1898. No. 8292.

1. **Bonds**: CONDITIONAL SIGNATURE: PRINCIPAL AND SURETY. If a bond in form a joint obligation is signed by a surety on condition that others are to become parties to the instrument in the same capacity, and delivery of the bond occurs without a compliance with the condition, the instrument is ineffective as to the party who so signed it, unless the obligee, prior to the delivery, was not apprised of the condition, or the signer, subsequent to execution of the bond, waived the condition.

2. ———: ———: ———. If, when delivery of such bond is made, there appears on its face that which discloses or suggests an infirmity or irregularity relative to one of the requisite signatures sufficient to cast the duty of an inquiry on the obligee, and no investigation follows, the condition and its lack of fulfillment may be potent matter of defense for the party who signed the bond conditionally in an action thereon.

3. ———: ———: ———. A surety may insist on a compliance with the plain import of his contract, inclusive, in a case like the present, of the condition which accompanied his signature; and, where the condition exacted the signature to the instrument of another party, it will not be satisfied with a subsequent ratification of the signature which had been, at the time of execution thereof, written on the paper by an unauthorized person.

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

Byron G. Burbank, for appellants.

E. Wakeley and *W. H. De France, contra.*

HARRISON, C. J.

On September 10, 1889, Richards & Company contracted with Washington county to erect for it a building—a court house—and to furnish the material therefor, and in connection with the contract, executed and delivered to the county a bond conditioned for the due and full performance of the contract. The contractor purchased of the Bohn Sash & Door Company articles nec-

essary for use in the erection of the building, and which were used in, on, and about it, of the value in the aggregate of $4,032.43; and the plaintiffs and appellants herein assert ownership, respectively, of a portion of the account, by assignment, and, to effect its recovery, instituted actions on the bond to which we have hereinbefore referred, the basis of the rights of actions being in substance that by the terms and conditions of the contract and bond, connectedly, the bondsmen became obligated in the capacity of sureties for the contractor for the payment of the accounts for material purchased and employed in the performance of the contract. The plaintiffs were unsuccessful as to some of the defendants and have perfected an appeal from the judgment of the trial court. That the points of discussion and decision may be more clearly understood, it seems proper to insert here a statement of some of the facts and circumstances relative to the form, substance, and execution of the bond involved in the litigation. In the body of the bond appeared the names of the sureties, and in the order as follows: "J. H. Hulbert, James Morton, John Epeneter, and Albert Fall." After it had been signed by the principal, Richards & Company, it was presented to Morton for his signature. He objected to being the first of the sureties to sign the bond, and stated that it should have been taken to Hulbert, whose name was first as surety in the body of the instrument, and when signed by said party it would be in proper shape to request Morton's signature. Finally this objection was waived, and Morton signed the bond with the agreement and condition that it was not to be considered complete or to be delivered until signed by all the sureties named in it, and, if not so signed, it should be returned to him. The signature of Hulbert was next obtained, on the same condition and agreement as with Morton; and the party who had the matter in charge went to the office or place of business of John Epeneter, who was then in Europe, and procured the name of John Epeneter to be written thereon by Ep-

eneter's son, Oscar E. Epeneter, who was then "bookkeeper and cashier" for his father. The signature was as follows: "John Epeneter; O. E. E." The bond was subsequently signed by the other sureties, and delivered to the clerk of Washington county, and by him given to the county commissioners when in session, on the 12th of the same month—September—and was by them approved. It appears that prior to approval of the bond the attention of the commissioners was attracted to the signature as it purported to be attached for Epeneter, and there was some discussion of the matter, and during the course thereof it was suggested, if not concluded, that the instrument was sufficient or good as a security or bond, regardless of whether Epeneter's name had been signed by some person who had authority so to do or not, or of whether Epeneter could be held bounden by the action, which ostensibly, at least, some one had taken for him. No inquiries were made relative to the matter, and it received no further attention from the county or its officers. It is also of the evidence that the son had no authority to sign this or any like instrument for the father; and it follows that the signature on the bond was without significance—had no force or effect. That John Epeneter had not himself signed the bond was a patent fact—was disclosed on the face of the instrument. This was sufficient notice to put the commissioners on inquiry, to charge them with the ascertainment of the authorization of the party who wrote it, to learn of the weight of the act or the want of it. Investigation would have developed that John Epeneter had not signed the bond, and it had not been signed in his name by any person who possessed the requisite authority for such action, or would have disclosed that he was not a party to the instrument.

On the subject of the obligation of a person signing a bond as surety with a like agreement or condition as the appellee herein, it was stated in the decision in the case of *Mullen v. Morris*, 43 Neb. 596: "Where one signs as surety a bond, which in form is a joint obligation, upon

condition that others are to sign the same with him, and it is delivered without the condition having been complied with, the instrument is invalid as to the one so signing as surety, unless the obligee, prior to the delivery, had no notice of such condition, or the surety, after signing, waived the condition." And further: "Where such a bond is delivered to the obligee without being executed by all the persons named in the body thereof as obligors, it is sufficient to put the obligee upon inquiry whether those who signed consented to its being delivered without the signatures of the others." We will add that where, as in the case at bar, the signature discloses that it was not written by the party, but by some other person, and a performance of the duty which devolved on the persons who were to approve or disapprove it—of inquiry of the authority with which it was written—would have disclosed that it was wholly without such power and of none effect, the lack of such inquiry renders allowable and potent, in an action on the bond, the defense of a surety that he signed the instrument on the condition that it should also be signed by all the sureties whose names appear in the body of the bond, inclusive of the one as to whose signature a query appears. There was a doubt suggested by the face of the bond, which cast on the commissioners the duty of inquiry. This was sufficient notice of the infirmity to make the defense presented available.

The conclusion from the foregoing would be that the signature of John Epeneter was never in fact placed on the bond in a manner effectual to bind him, and the defense of a conditional signing or an execution of the bond with the agreement that all sureties named therein should sign before it should be operative would be sufficient for any and all as to whom it was applicable.

It is not contended that if Epeneter was not bound, the other sureties were; but it is asserted that if the instrument in question at any time after the signature became of force as to him, the condition which was interposed as a defense to the action was fulfilled, and the

bond effective as to all; and in this connection it is further urged that Epeneter returned from Europe within about two months subsequent to the time his son attached the signature to the bond, and was immediately informed of such action, and allowed it to stand—never took any steps to discredit or repudiate his son's action,—that this amounted to an affirmance of what had been done, or a ratification by the father with retroactive effect, and the signature became as if made with authority given prior thereto, not only as to Epeneter and his rights and liabilities, but with reference to the other sureties, and their relations to the bond. It was of the evidence that Epeneter was informed within two months of the date of the act that his name had been signed to the bond, and, further, that he took no steps to disaffirm it. But our inquiry here is not whether Epeneter became in some manner or for some reason liable on the bond; it is whether it was signed by him, or he became a party to it, as contemplated or required in the condition with which others of the sureties executed it. The obligation of a surety is the subject of strict construction, and will not be extended beyond its plain import, and this is applicable to a condition such as is herein involved, attendant on the assumption of the obligation. The sureties who signed this bond conditionally required that it be signed by Epeneter, not that his signature written by some other person unauthorized to do so be ratified at some time subsequent. The condition was for the signature, not for an after ratification of what purported to be it, but was not. The sureties who signed on condition could demand a strict compliance therewith, and in default thereof were not bound. On the proposition that sureties who signed on condition such as is herein invoked in the defense will not be bound where an incompleteness in the conditional requirement is shown or plainly suggested on the face of the bond, see *St. Louis Plattdeutscher Club v. Tegeler*, 17 Mo. App. 569; *Hall v. Parker*, 37 Mich. 590; *Sharp v. United States*, 4 Watts [Pa.] 21; *Fletcher v. Austin*, 11 Vt.

447; *Commonwealth v. Magoffin*, 25 S. W. Rep. [Ky.] 599; *People v. Bostwick*, 32 N. Y. 445; *People v. Hartley*, 21 Cal. 585. That subsequent ratification was not efficacious, see *Hall v. Parker*, 37 Mich. 590; *Fletcher v. Austin*, 11 Vt. 447; *Taylor v. Robinson*, 14 Cal. 396; *Wood v. McCain*, 7 Ala. 800; *McMahan v. McMahan*, 13 Pa. St. 376; *Fiske v. Holmes*, 41 Me. 441.

The judgment of the district court must be

AFFIRMED.

ORLANDO SWAIN V. HIRAM SAVAGE ET AL.

FILED SEPTEMBER 23, 1898. No. 9920.

1. **Replevin**: DISMISSAL: JURY TRIAL: FINAL ORDER. In an action of replevin the court determined that the writ was, in its inception, unauthorized and the court without jurisdiction, and rendered a judgment of dismissal of the plaintiff's action, coupled with an order to impanel a jury to inquire of the right of property and possession of defendants and their damages. *Held*, A final judgment in the action as to plaintiff.

2. ———: AFFIDAVIT: AMENDMENTS: RELATION. A petition or affidavit in replevin may be amended to make general statements more specific and more definite that which is indefinite, and such amendments may have relation back to the inception of the cause.

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

George A. Murphy, for plaintiff in error.

E. O. Kretsinger and *F. B. Sheldon, contra.*

HARRISON, C. J.

In this, an action of replevin, commenced in the county court of Gage county, the appraisal of the property, of which possession was taken under the writ, disclosed such a value thereof as determined that the cause was one for trial during a regular term of said court. As the result of a trial of the issues joined a judgment was ren-

dered, from which an appeal was perfected to the district court and a petition and affidavit were filed therein. The defendants filed an answer, and the plaintiff a reply. During the progress of a trial the plaintiff asked leave to amend the petition and affidavit, which was granted, and the cause was continued. The defendants filed an answer to the amended petition, to which answer there was, for the plaintiff, a reply. Subsequent to such joinder of the issues on the merits, the defendants filed a motion to quash the writ of replevin issued by the county judge and to be allowed to prove the value of the property which had been taken by virtue of the writ and the value of their interests therein, and for judgment in their favor for such amounts and costs. The ground of the motion was that the county judge had no jurisdiction to issue the writ for the reason that no sufficient affidavit or petition had been filed with him prior to the issuance of the process. The motion was sustained by the district court and it was adjudged that the writ be quashed, the plaintiff's action dismissed, and defendants allowed to have a jury impaneled to inquire of the defendants' right of property and possession; also to assess such damages for defendants as might be determined right and proper. The plaintiff presents the case here by petition in error. In this court the defendants have moved a dismissal of the petition in error on the ground that there has been no final order or judgment in the action in the district court.

A judgment or final order of the district court may be reversed, vacated, or modified by this court for errors which appear of record. (Code of Civil Procedure, sec. 582.) The judgment herein dismissed the plaintiff's suit. He was no longer an actor. The case for him was ended. He could obtain no relief. This was a final determination of the action relative to him and his rights which he sought to assert, and error in his behalf would lie. (*Harman v. Barhydt*, 20 Neb. 625; *Rogers v. Russell*, 11 Neb. 361; *Belt v. Davis*, 1 Cal. 138; *Weston v. Charleston*, 2 Pet. [U. S.] 449; *Jewell v. Lamoreaux*, 30 Mich. 155; 2

Ency. Pl. & Pr. 52; *Evans v. Dunn*, 26 O. St. 444.) The motion to dismiss the error proceeding must be overruled.

This brings us to the inquiry in respect to the propriety of the trial court's action on the motion to quash the writ issued by the county court. The attack on the process, it will doubtless be remembered, was based on the insufficiency of the affidavit filed with the county judge at the inception of this suit. It is provided in our Code of Civil Procedure that prior to the issuance of a writ of replevin by the officer charged by law with such duty there shall be filed in his office an affidavit of the plaintiff, his agent, or attorney in which there shall be stated: "First—A description of the property claimed. Second —That the plaintiff is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the same." (Code of Civil Procedure, sec. 182.) In the case at bar the replevin affidavit which was filed with the county judge was not in the record in the district court, is said to have been lost or mislaid, and for its statements the district court had the recollections of certain parties as embodied in affidavits, also the transcript of the docket entry of the county court; and we have for examination the same information. It is urged in argument for the plaintiff in error that the petition and affidavit filed in the county court were not wholly insufficient in statements, the amendments made in the district court were allowable, and gave to them the force and effectiveness which they lacked, if any. It appears from the record that, in county court, the pleadings filed for plaintiff asserted in general terms his special ownership of the property in litigation, and further set forth that this right to the property was by virtue of ownership of a chattel mortgage executed and delivered, on a certain date, to George A. Murphy, and assigned to the plaintiff; further that he was entitled to the immediate possession of the property. There were other allegations descriptive of the property, and such

as are usual and requisite in pleadings of the kind, none of which are drawn in question except those relative to the special ownership of the property by plaintiff, in which it is claimed for defendants there were such omissions of statements of essentials as constituted the pleadings fatally defective, consequently the county judge was not authorized to issue the writ, and the county court was without jurisdiction over the property or subject-matter of the controversy, and the district court gained none by the appeal. That the petition or affidavit in replevin may be amended is too well settled to require argument or citation of authorities to support the proposition. It is also true that the idea of an amendment suggests and carries with it elemental thereof that there is something existent to which more will be added.

The statements on the subjects now particularly under consideration in the pleadings in the county court were broad and general, and some partook in their nature of conclusions, and they were probably in some respects incomplete and unsatisfactory, but they were comprehensive of the necessary elements. There were general statements of matters to which other and further might be added to render them specific and complete. In short, they were amendable and were not fatally defective and without force, and the writ issued by the county judge was not wholly unauthorized and void. (*Lewis v. Connolly*, 29 Neb. 222; *Crans v. Cunningham*, 13 Neb. 204; *Commercial State Bank of Crawford v. Ketcham*, 46 Neb. 568; *Wilson v. Macklin*, 7 Neb. 50; *Williams v. Gardner*, 22 Kan. 122; *Meyer Bros. v. Lane*, 40 Kan. 491.)

The plaintiff applied for, was granted leave, and made the amendments prior to any objections to the pleadings. The amendments were properly allowed and the defects, if any, were cured.

There are other points raised and presented, but their discussion is not necessary. The judgment of the district court was erroneous and must be reversed.

REVERSED AND REMANDED.

VINCENT KOKES V. STATE OF NEBRASKA, EX REL. FRANK KOUPAL.

FILED SEPTEMBER 23, 1898. No. 9921.

1. **Mandamus:** TITLE TO OFFICE. The title of a party to a public office is not proper matter of issue or trial in an action of mandamus.
2. ———: CERTIFICATE OF ELECTION. In an action of mandamus to force the proper officer to issue to the relator a certificate of his election to fill an office, the question of the propriety or validity of an election at the alleged time to fill the office may be litigated.
3. **Evidence:** JUDICIAL NOTICE: CENSUS. Courts will take judicial notice of a United States census and its results, a school census and its results; also of an authorized election and its results, and the number of votes cast thereat.
4. **Sufficiency of Evidence:** REVIEW. If the evidence is wholly insufficient to sustain the findings of the trial court, the resultant judgment must be reversed.
5. **Finding as to Population of County.** Evidence herein examined and determined insufficient to support the findings.

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

Clements Bros., for plaintiff in error.

Charles A. Munn and *A. Norman, contra.*

HARRISON, C. J.

In this, an action for mandamus, the relator asked the issuance of the writ against the respondent, as county clerk of Valley county, and by it his direction to deliver to relator a certificate of election to the office of clerk of the district court of said county. A trial of the issues joined resulted in a judgment in favor of the relator, and the cause is presented to this court for respondent by petition in error.

In 1879 the legislature enacted: "In each county having a population of eight thousand (8,000) inhabitants

or more, there shall be elected in the year eighteen hundred and seventy-nine (1879), and every four years thereafter, a clerk of the district court in and for such county, and in each county having a population of less than eight thousand (8,000) inhabitants, the county clerk shall be ex-officio clerk of the district court and perform the duties devolving upon the officer by law." (See Compiled Statutes 1897, ch. 26, sec. 7.) This was an authority for the election of clerks of the district court in counties of 8,000 inhabitants or more in 1879, and thereafter in the counties of requisite number of inhabitants, at times of election occurring at intervals of four years. (*State v. Whittemore*, 11 Neb. 175; *State v. Stauffer*, 11 Neb. 173.) In the case last cited it was said: "The act approved March 1, 1879, authorizing an election of clerks of the district court in the year 1879, and every four years thereafter, in counties containing not less than eight thousand inhabitants, does not authorize an election of such clerks in other counties during the intervening years upon attaining that population." In 1897 a bill was introduced in the senate, and passed that body, and is embodied in the Session Laws of the year named as chapter 28, and also appears in the Compiled Statutes of 1897 as sections 8*a* and 8*b*, chapter 26, page 556. In the note on said page it is said in relation to the bill: "It is said not to have passed the house." The trial court determined in this case that it did not. It appears that the county clerk of Valley county, when about to prepare and issue notices, etc., for the election in the fall of 1897, asked the advice of the county attorney in regard to whether he should include in the notices, etc., the office of clerk of the district court, and was advised that it would be proper and better to do so. He followed the advice, and the relator was nominated for the office of the clerk of the district court, and received the highest number of the votes cast for the several nominees for that office. After the canvass, etc., of the election returns, the relator demanded of the respondent that he be issued a certifi-

cate of election, which the respondent refused; and to compel compliance with his request the relator instituted and prosecuted this action. As we have before stated, the trial court decided that the act of 1897 did not become a law, and with that adjudication the plaintiff in error has no quarrel. Furthermore, it is conceded for the relator that that decision was right; and it is further stated in the brief for relator that he makes no claim herein based on the existence of the act of 1897 as a law. His assertion is that in 1895 the county of Valley had 8,000 inhabitants or more, and there should then have been elected a clerk of the district court; that there was a vacancy in that office in 1897, and an election to fill the same was proper. Of the findings of the trial court were the following:

"Was there a fixed ratio or number in the state of Nebraska by which the whole number of votes cast at any general election in a county may be multiplied to determine the population of said county at this time?

"Answer. Not for all cases (by statute), but by comparison we can arrive at a fair conclusion.

"If so, what is the ratio or number?

"Answer. The number which I would use in this case, if deciding it upon that alone, is 5 when based upon a comparatively full vote, and 5½ when based upon a comparatively light vote.

"Does such ratio or number apply to the whole number of votes cast at said election, or to the whole number of voters residing in said county at the said time?

"Answer. To the whole number of votes cast."

"Findings of law:

"Is there a legal or fixed ratio by which the whole number of votes cast at an election in a county may be multiplied to determine the population of said county at that time?

"Answer. I think the ratio I have given above is legal, but I do not think it is fixed.

"If so, what is said ratio?

"Answer. The ratio that I would use is 5 for a comparatively full vote and 5½ for 'off years,' with a comparatively light vote.

"Does said ratio apply to the whole number of votes cast at said election, or to the whole number of voters in said county at that time?

"Answer. The whole number of votes cast.

"The court further finds facts as follows:

"That Valley county is now neither a newly settled county or community, nor an old, settled one.

"That if this case was to be decided alone upon the ratio between the votes and population, the ratio that the whole vote bears to the whole population of the state, at any election, is the proper ratio to use for Valley county in this case.

"That there has been an increasing population in Valley county for over twenty years last past, except 1890, when it was nearly stationary, and in the fall of 1894 and the spring of 1895 when there was some moving away from the county on account of drouth.

"That a great many of those that went away have been ever since steadily returning; and that the population of Valley county is now the largest that it has ever been, and that said county of Valley is now, and has been ever since and prior to the election in the fall of 1895, a county containing 8,000 inhabitants, and was at that time, and has since that date been, entitled to elect a clerk of the district court, as one of the officers within and for said county."

One question that is noticed in the argument for plaintiff in error, and which we deem it well to settle, is in relation to whether the litigation before us involves the trial of the title to an office. If it does, then it cannot be adjudicated in an action of mandamus. (*Anderson v. Colson*, 1 Neb. 172; *State v. Plambeck*, 36 Neb. 401; *McMillin v. Richards*, 45 Neb. 786.) The question herein was not the relator's title to an office, but his right to the evidence of his election to an office; and, if the office

had no existence at the time, as an office to be filled by an election, no right to a certificate of election to fill it could arise. Without an office to fill, no recognizable claim could be asserted to receive the certificate evidencing the relator's election or right to fill it. Whether the office of clerk of district court could be filled by election was determinable by mandamus, and a trial of such question could not be termed a trial of the title to an office. (*State v. Whittemore*, 11 Neb. 175; *State v. Stauffer*, 11 Neb. 173; *Van Horn v. State*, 46 Neb. 62; *State v. Aldermen of Pierce City*, 3 S. W. Rep. [Mo.] 849.)

The only further point for discussion—and it is stated for relator, by counsel, in the brief filed, to be the only matter of contention in this case—is the sufficiency of the evidence, viewed in connection with the matters of which courts take judicial notice, to sustain the findings and judgment of the trial court. In the case of *State v. Long*, 17 Neb. 502, wherein the same section of the statute was under examination as is here involved, it was said: "The annual census not being made by statute the basis upon which the population of a city or county at an election succeeding the taking of the same is to be estimated, there would seem to be no authority for this court to inject into the election law the words 'as returned by the census taken in 1883.' The language of the election law is general, 'that in each county having 8,000 inhabitants or more there shall be elected,' etc. This, in the absence of any restriction, would seem to apply to the time the election was called, and not to the time the census was taken. It is well known that in some of the new counties of the state thousands may be added to their population by immigration in a single year, and this largely during the summer season. It is but reasonable to suppose that this fact was taken into consideration by the legislature in passing the act; hence its general language. The cities and villages of the state, as well as counties, are classified according to population. Thus, cities containing more than twenty-five thousand inhab-

itants are cities of the first class (Compiled Statutes, ch. 13), and cities of the second class having more than ten thousand inhabitants (Session Laws 1883, ch. 16). Section 2 of this act provides that 'whenever any city shall hereafter have attained a population of ten thousand inhabitants, and such fact shall have been duly ascertained and certified by the mayor of such city to the governor, the governor shall, by proclamation, declare such city to be a city of the second class,' etc. It is very clear that the mayor of such city is not required to rely upon the census taken under the statute, but may ascertain that fact in any other legitimate mode. So towns containing more than fifteen hundred inhabitants and less than ten thousand are to be cities of the second class, while towns containing not less than two hundred nor more than fifteen hundred may be incorporated as villages. (Session Laws 1881, ch. 22.) In none of these cases is the census referred to as the criterion for determining the population, while in most of them it is apparent that it is not. The inquiry may be made, by what means is the population of a county or city to be ascertained if not exclusively by the census? The answer is, it is to be determined, like any other question of fact, by the best evidence that can be obtained. The votes polled at the election of 1883, when multiplied by the well-known ratio of population to the number of voters in a county, is evidence tending to prove the number of inhabitants." It is true that the foregoing extract was merely *arguendo* and was *obiter*, for, as stated in the decision, the method of inquiry or proof of the number of inhabitants was not of the questions in the case; but it contains some very pertinent observations bearing upon the question in controversy here. In 1887 an act was passed by the legislature by which the office of register of deeds was created. The legislature of 1889 amended the first section of that act, and as amended it read as follows: "At the general election in the year 1889, and every four years thereafter, a register of deeds

shall be elected in and for each county having a population of eighteen thousand and three (18,003) inhabitants or more, to be ascertained by the census of 1885 and each state and national census thereafter, who shall give bond, with sufficient sureties thereon, to be approved by the county board, in the penal sum of ten thousand ($10,000) dollars, conditioned for the faithful performance of his duties, and such register of deeds shall have all the power, and perform all the duties relative to all papers, writings and instruments pertaining to real estate heretofore enjoined by law upon county clerks, and shall receive the compensation allowed by law therefor," etc. (Compiled Statutes 1889, ch. 18, sec. 77*a*.) By the state census of 1885 Richardson county was shown to have a sufficient number of inhabitants to entitle it to a register of deeds, but by the national census of 1890 the population fell below the requisite number, and in the decision in the case of *State v. Lewis*, 38 Neb. 191, it was held that the county was not entitled in 1893, or subsequent to 1890, to a register of deeds, and would not be until it was established by a state or national census that the county contained the number of inhabitants specified in the act. In that case the census governed, because it had been made by statute the element or factor by which the population of the political subdivision should be determined, and that decision cannot assist us in the present action.

It may be said of the evidence introduced that it did not, in and of itself, establish the population of Valley county at the time of the election of 1895 at any certain number, and did not therefore, in and of itself, furnish a measure by which the population—the main question at issue in the case—could be determined. It may also be said that the testimony of the various witnesses was composed, and necessarily to a large extent, of opinions, general in their character; but there was, as to matters of fact, no appreciable conflict; and it was established that during the years of 1894 and 1895, by reason of

climatic conditions which rendered agricultural pursuits almost entirely of no financial or material avail, and incidentally operated detrimentally upon all other avocations and lines of business, the population of the county was decreased quite a considerable number, some of the persons who removed during that time doing so temporarily, and others permanently; but the population was less during those years than immediately prior thereto or since. It also developed that there was quite an increase in the population during 1896. It was admitted of record, although objected to as incompetent, irrelevant, and immaterial, that "There were cast at the general election in Valley county in the year 1890, 1,515 votes; that there were cast in the year 1891 at the general election in said county, 1,434 votes, and that the total vote cast for any county or state officer was 1,386; that there were cast in the year 1893 at the general election held within and for said county, 1,542 votes; that there were cast in the year 1894 at the general election held within and for said county, 1,463 votes; that there were cast at the general election held within and for said county in the year 1895, 1,492 votes; that there were cast at the general election held within and for said county in the year 1896, 1,669 votes; that there were cast at the general election held within and for said county at the general election for the year 1897, 1,541 votes,—all of which votes for the several years were duly canvassed by the proper canvassing officers of said county; that there were cast and counted in said county for the year 1892 for county and state officers 1,522 votes, and that that was the highest number of votes cast for any candidates at that election; and that the total vote cast for said year of 1892 is not shown by the records of said county, and that the same is not now agreed upon as to the total number of votes. It is further agreed that the total number of votes as given heretofore is the total number of votes cast in said county for each of the said years, except that for the year 1892; that there were cast

and counted in said county for state and county officers at the general election held therein in the year 1888, 1,539 votes, the same being the highest number of votes cast and counted for any office at said election." It will doubtless be remembered that in the excerpt we have made from the opinion of MAXWELL, J., in the case of *State v. Long, supra*, it was observed that the votes polled at an election, when multiplied by "the well-known ratio" of population to the number of votes, is evidence which tends to prove the number of inhabitants. What the "well-known ratio" is, was not specifically stated. I had always believed it was, by popular voice, fixed at 5, and yet think that the majority entertain a belief that such is the ratio; but a limited experience in investigation in the realm of popular opinion on the ratio to which we have just referred has led me to conclude that there is not an entire agreement or a uniformity of knowledge on the subject. The opinion of the individual in regard to the ratio and its amount, I conclude, is governed by what in fact, or supposably, it was stated to be in the state or political subdivision in which the individual resided when knowledge was acquired or supposed to have been obtained on the subject. I have been informed that it is 4, and also that it is 6; and am forced to believe, as before stated, that there is some lack of agreement and uniformity of belief and popular knowledge or information in regard to the ratio, if, indeed, a general one exists. If it was a fact of general notoriety or knowledge, the courts would take judicial notice of it; but the question was not raised in the case, and we need not decide it.

Of the matters of which it is insisted the courts should take judicial notice, is the United States census, the school census taken under the authority of a statute of the state and by the officers empowered for such purpose, the state and county elections, and the results of each and all of them. We think this insistence is correct. Courts will take judicial notice of the things enumerated, and the results. From the results of one or the

other census to which we have referred—that of the United States used being the one of 1890—and also the results of elections, certain ratios or percentages were obtained by mathematical processes, and, by application to certain figures or conditions existent of the relative affairs in Valley county in the year 1895, argued to show that the population was or was not the requisite 8,000. Whether it tended to show that it was or was not, depended to some considerable extent on who did the arithmetical work—counsel for relator, or counsel for respondent. Both, in briefs filed, have set forth extended calculations of the nature to which we have referred, and have based arguments thereon. We will notice some of these. In one the census of school children is used in connection with the whole population of the county as shown by the United States census of 1890. In such census Valley county was accredited with 7,092 inhabitants, and in the brief for relator it is stated: "According to the census reports of 1890, Valley county had a population of 7,092. The same report gave the number of children of school age in Valley county as 2,189. It would therefore appear that in the year 1890 the school population of Valley county constituted 31 per cent of its entire population." It is then, on the assumption that the per cent would be the same in 1894, further said that the number of school children in the county on December 31 of the year last mentioned was 2,924, and, if 31 per cent of the whole population, the county then had 9,400 inhabitants. An examination of the report of the national census of 1890 discloses that in Valley county there were 2,716 persons of school age, and the per cent of the population was a fraction more than 38; and if it was the same in 1895, there were not 8,000 inhabitants in the county. By the school census taken during June and July, 1890, the number of school children was shown to be 2,667. By the use of this number we obtain the per cent of 37.6, and the population less than 8,000. Further than this, the number of school children

used by counsel in the calculation set forth in the brief was of June and July, 1894, and by law there was another enumeration of persons of school age taken in June and July, 1895, which was shown in the report of the state superintendent of schools of January 1, 1896, from which it appears that there were then of such persons in Valley county 2,491, and on the assumption, as said before, that the per cent was the same as in 1890, the population was less than 8,000. In another method of calculation which is used by the parties in their briefs the population of the state as shown by the census of 1890, which was 1,058,910, is taken, and this in connection with the vote of the state is used, and the ratio obtained. The vote of the state in 1890 was 214,090 and the ratio was less than 5. It is assumed that the population of the state increased from 1890 to 1895, or did not decrease, and that the same was true of Valley county; and the figures 1,058,910 are taken to represent the total number of inhabitants in 1895, and the vote of the latter year is employed, and a ratio obtained of 5.7. But, on the other hand, we are asked to notice that if the number of inhabitants in Valley county in 1890, as shown by the national census (7,092), is used, and the vote of the county taken to obtain the ratio—and this, if the method is employed at all, would seem proper, as it is the population of the county which we desire to obtain—then in 1890 there were 1,515 votes, and the ratio less than 5. In 1891 the vote was 1,434, and the ratio a trifle less than 5. In 1892, vote, 1,592; ratio less than 5. In 1893, vote, 1,542; ratio less than 5. In 1894, vote, 1,463; ratio below 5. In 1895, vote, 1,496; ratio less than 5; and the average ratio for these years less than 5.

There are other methods contained in the briefs, but in all of them are assumptions or unallowable inferences which make them somewhat unsatisfactory as a basis for settlement of the matters in litigation. Then many of them lead at best to rather unreliable approximations. Courts may not assume the existence of something and

then take judicial notice of it as a fact. A thorough examination and consideration of all the evidential matters herein, inclusive of such as it is contended judicial notice should and will be taken, forces us to the conclusion that there is not of such evidence and allowable inferences therefrom, sufficient to sustain the findings of the trial court in relation to the population of Valley county in 1895, and the resultant judgment must be reversed and the case remanded.

REVERSED AND REMANDED.

SULLIVAN, J., and IRVINE, C.

We concur in the foregoing opinion, but, to avoid any inference as to the competency of such evidence as was offered, we wish to add that in our opinion the only competent proof of population in such cases is a census. The question not being essentially involved, we do not care to state our reasons at length, but might say that one of them is that the legislature cannot be presumed to have contemplated a resort to other evidence, which the opinion of the Chief Justice shows to be wholly conjectural.

RYAN, C., dissenting.

I dissent from the views expressed by HARRISON, C. J., for the reasons I shall now briefly state. The alternative writ of mandamus which issued from the district court of Valley county required the county clerk to issue to the relator a certificate showing his election to the office of clerk of the district court of said county, or show cause why such certificate should not issue. The return to this writ presented several issues, but on the trial the stipulations of counsel established all the facts entitling the relator to the writ prayed, except, as contested by the respondent, that, as Valley county contained less than 8,000 inhabitants, there was no independent office of clerk of the district court in that county. As the respondent was county clerk he was ex-officio clerk of the district court, if there were less than 8,000

inhabitants in Valley county. His denial of the existence of that number of inhabitants presented the issue whether he or the relator was clerk of the district court of said county. In effect, as I understand the case, the controversy is as to the title to a public office, and it has been repeatedly held that the title to such an office cannot be tried by mandamus. (*Anderson v. Colson*, 1 Neb. 172; *State v. Plambeck*, 36 Neb. 401; *McMillin v. Richards*, 45 Neb. 786.) It was the duty of the respondent to issue the certificate showing the relator's election in accordance with conceded facts. The question attempted to be litigated in this case should, I think, be presented at the proper time and by proper parties in quo warranto proceedings. (Compiled Statutes, ch. 71; *State v. Plambeck*, *supra*; *State v. Jaynes*, 19 Neb. 164.) The judgment of the district court, therefore, in my opinion should be affirmed.

IN RE JOHN FANTON.

FILED SEPTEMBER 23, 1898. No. 10067.

1. **Habeas Corpus:** REVIEW OF ERRORS. On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered.
2. ——: ——: EXCESSIVE SENTENCE. Habeas corpus will not lie on behalf of a convicted prisoner on the ground that the sentence to imprisonment is in excess of the statutory period, since such a sentence is erroneous merely, and not void.

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

The opinion contains a statement of the case.

R. R. Dickson and *George A. Day*, for petitioner:

The legislative enactment under which petitioner was convicted and sentenced is void. The trial court was

therefore without jurisdiction, and habeas corpus is the proper remedy to obtain petitioner's liberty. (*Ex parte Rosenblatt*, 14 Pac. Rep. [Nev.] 298; *Ex parte Siebold*, 100 U. S. 377; 1 Black, Judgments sec. 257; *Van Horn v. State*, 46 Neb. 62; *Marbury v. Madison*, 1 Cranch [U. S.] 137; *In re Harlik*, 45 Neb. 747; *Ex parte Fisher*, 6 Neb. 309; *In re Betts*, 36 Neb. 283; *State v. Crinklaw*, 40 Neb. 759.)

The sentence of the court being in excess of the maximum period fixed by statute is void. (*In re McVey*, 50 Neb. 481; *Ex parte Kearny*, 55 Cal. 229; *Ex parte Lange*, 18 Wall. [U. S.] 163; *Elliot v. Piersol*, 1 Pet. [U. S.] 340.)

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

NORVAL, J.

An information was filed in the district court of Holt county, charging "that one John Fanton, late of the county aforesaid, on the 20th day of December, 1895, in the county of Holt and state of Nebraska aforesaid, the said John Fanton then and there being, did unlawfully and feloniously steal, take, and drive away eighteen (18) head of mixed cattle, described as follows: * * * All of said cattle being of the value of $300, and the personal property of one Timothy Cross; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska." A trial was had thereunder, the accused was found guilty as charged in the information, the value of the property stolen was fixed by the jury at $300, and a sentence of eight years' imprisonment in the penitentiary was imposed by the court. Error proceeding was prosecuted to this court, which resulted in the affirmance of the judgment and sentence below. (*Fanton v. State*, 50 Neb. 351.) Afterw(ard this application was made for his discharge from imprisonment upon a writ of habeas corpus.

It is insisted that the petitioner was prosecuted under chapter 77, Session Laws 1895 (Criminal Code, sec. 117*a*), and that his conviction is illegal and void, because said chapter failed to pass both branches of the state legislature. The chapter assailed purports to make cattle stealing a distinctive crime; and whether such legislation was adopted in the constitutional mode it is unnecessary to now determine, since it will be observed that the information under which the conviction was obtained alleged every ingredient of the crime of grand larceny, as defined by section 114 of the Criminal Code. The district court having jurisdiction of the crime charged, as well as over the person of the petitioner, its judgment and sentence are not void. (*In re Ream*, 54 Neb. 667.)

The maximum sentence authorized to be imposed by section 114 of the Criminal Code upon a conviction of grand larceny is seven years' imprisonment, while the petitioner was adjudged to be confined in the penitentiary for the term of eight years. It is argued that the sentence of the court being in excess of the maximum limit authorized by law is void. The soundness of this contention depends upon the fact whether or not the defect indicated constituted an error or irregularity merely, since it is firmly established in this state that habeas corpus is not the appropriate proceeding to review mere errors and irregularities in a judgment of an inferior court in a criminal case. The writ of habeas corpus cannot operate as a proceeding in error. (*Ex parte Fisher*, 6 Neb. 309; *In re Balcom*, 12 Neb. 316; *Buchanan v. Mallalieu*, 25 Neb. 201; *In re Betts*, 36 Neb. 282; *State v. Crinklaw*, 40 Neb. 759; *In re McVey*, 50 Neb. 481; *In re Ream*, 54 Neb. 667.) If a person is restrained of his liberty by virtue of an absolutely void judgment, he may be discharged on habeas corpus. To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity. (*In re Havlik*, 45 Neb. 747.)

Mr. Church in his valuable treatise on Habeas Corpus

states: "The general rule is that when a court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities. It is only when the court pronounces a judgment in a criminal case which is not authorized by law, under any circumstances, in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void so as to justify the discharge of the defendant held in custody by such judgment. Thus a judgment of conviction is not void because of the failure to inform the accused of his right to an appeal or because of the fact that there were gross irregularities committed during the trial, in the impaneling of the jury, in the introduction of evidence, and in the rendition of the verdict, or because an excessive punishment has been imposed—except as to the excess." (Church, Habeas Corpus sec. 370.) And at section 373 the same author uses this language: "The prevailing rule is that an excessive sentence is merely erroneous and voidable; that the whole sentence is not illegal and void because of the excess; that it is not void *ab initio;* and that it is good on habeas corpus so far as the power of the court extends, and invalid only as to the excess." Numerous decisions are cited by the author which fully sustain the doctrine announced in the foregoing excerpts. The following are in point: *People v. Liscomb,* 60 N. Y. 559; *People v. Jacobs,* 66 N. Y. 8; *People v. Baker,* 89 N. Y. 460; *Ex parte Henshaw,* 73 Cal. 486; *In re Graham,* 138 U. S. 461; *In re Crandall,* 34 Wis. 177; *In re Graham,* 74 Wis. 450; 76 Wis. 366; *In re Pikulik,* 81 Wis. 158; *Ex parte Mooney,* 26 W. Va. 36; *Feeley's Case,* 12 Cush. [Mass.] 598; *Ex parte Crenshaw,* 80 Mo. 447; *People v. Markham,* 7 Cal. 208; *Ex parte Shaw,* 7 O. S. 81; *Ex parte Van Hagan,* 25 O. S. 427. A judgment imposing sentence to imprisonment for a longer period than authorized by statute is not void for want of jurisdiction, but erroneous merely. It is the excessive portion of the sentence alone that is invalid, and relief cannot be had therefrom

upon habeas corpus until the valid portion has been served.

In *Re Graham* and in *Re McDonald*, 74 Wis. 451, the petitioners were convicted of a felonious assault and robbery, and sentenced to the penitentiary for the term of thirteen years each, while the maximum punishment allowed by statute for that crime was ten years. They applied for a writ of habeas corpus on the ground of excessive sentences. The writ was denied, the court through Cole, C. J., saying: "We deny the writs for the reason that the error in the judgments does not render them void, or the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of habeas corpus. The judgments are doubtless erroneous, and would be reversed on a writ of error (*Fitzgerald v. State*, 4 Wis. 412; *Haney v. State*, 5 Wis. 529; *Benedict v. State*, 12 Wis. 314; *Peglow v. State*, 12 Wis. 595.); but the judgments are not void. (*State v. Sloan*, 65 Wis. 647.) The court had jurisdiction of the persons and subject-matter or offense, but made a mistake in the judgment. For mere error, no matter how flagrant, the remedy is not by habeas corpus. The law is well settled in this court that on habeas corpus only jurisdictional defects are inquired into. The writ does not raise questions of errors in law, or irregularity in the proceedings."

Ex parte Van Hagan, 25 O. St. 426, was an application for discharge on habeas corpus, where an excessive sentence was imposed. The court say: "The punishment inflicted by the sentence, in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void. It follows that a writ of error to reverse the proceedings or sentence is the remedy that the relator should have resorted to in order to obtain a discharge from illegal imprisonment, and not habeas corpus, which is not the proper mode of redress where the relator was convicted of a criminal offense, and erroneously sentenced to excessive imprisonment therefor by a court of competent jurisdiction. *Ex parte Shaw*, 7 O. St. 81, approved and followed on this point."

The defect in the sentence imposed on John Fanton was not jurisdictional, but merely erroneous, since the district court acquired jurisdiction over his person and of the subject-matter, and the judgment rendered was of the kind authorized by the statute. *In re McVey*, 50 Neb. 481, is not in conflict with the conclusion reached herein, although there is to be found in the report of that case language apparently opposed to the doctrine announced in the case at bar. In the *McVey Case* it was asserted that the court must possess jurisdiction to impose the particular sentence adjudged, else the same will be void. When that thought was expressed the court did not have in mind, or under consideration, a sentence inflicted in excess of the limit authorized by the legislature. There the petitioner had been found guilty of the statutory offense of breaking and entering a building in the daytime, while the information under which he was tried did not charge him with having committed that crime, but did charge a burglary committed in the night-season. He was prosecuted for one offense, and convicted for another, so that the court did not have jurisdiction of the subject-matter, or of the power to impose that particular sentence at that time in that case, and the sentence was void. If, upon a conviction for burglary, the court should sentence the accused to be hanged, the judgment would be void for want of jurisdiction of the court to impose a sentence of that kind in that case. But it would be otherwise if the court should adjudge an imprisonment in the penitentiary for a longer period than fixed by statute for the crime of burglary. In the latter case the sentence would be erroneous merely, but not void. In the one case the court had no jurisdiction to impose that particular kind of a sentence upon conviction of burglary, while in the other the statutory kind of punishment was meted out, although the time of imprisonment exceeded the statutory bounds. A sentence of a different character than that authorized by law to be imposed for the crime of which the accused has been found guilty is void, while

a sentence which imposes the statutory kind of punishment is not absolutely void, although excessive. In the former case the entire punishment is invalid, while as to the latter the excessive portion is alone erroneous, and not void in such a sense as to be available on habeas corpus, at least until after the valid portion of the judgment has been executed. The writ is

DENIED.

HENRY GOSMUNT, APPELLANT, V. PETER GLOE ET AL., APPELLEES.

FILED SEPTEMBER 23, 1898. No. 8185.

1. **Right to Redeem Realty from Judicial Sale:** CONFIRMATION. The right of the owner of real estate to redeem the same from sale under an execution or order of sale is purely statutory, and he must avail himself of the right prior to the confirmation of the sale.

2. ———: ———. The failure of the purchaser at a judicial sale to pay the amount of the bid prior to confirmation does not render the sale void, nor does it extend the statutory period for redemption.

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

The opinion contains a statement of the case.

Lamb & Adams, for appellant:

If a party bids at an auction sale, knowing that he is not in a position to comply with the terms of sale, the sale is absolutely void, and no title passes, and the bidder is not in a position to claim any rights under his bid. (*Dazet v. Landry*, 30 Pac. Rep. [Nev.] 1068; *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 282; *Swortzell v. Martin*, 16 Ia. 522; *United States v. Vestal*, 4 Hughes [U. S. C. C.] 467.)

The sale on credit, false return, and confirmation ren-

dered the proceedings void. (*Thompson v. McManama*, 2 Disn. [O.] 214; *Camden v. Mayhew*, 129 U. S. 84; *Negley v. Stewart*, 10 Serg. & R. [Pa.] 207; *Robins v. Bellas*, 2 Watts [Pa.] 359; *Smith v. Fort*, 10 S. E. Rep. [N. Car.] 914; *Sauer v. Steinbauer*, 14 Wis. 76; *Griffin v. Thompson*, 2 How. [U. S.] 244; *Williamson v. Berry*, 8 How. [U. S.] 544; *Sedgwick v. Fish*, 1 Hopk. Ch. [N. Y.] 669; *Isler v. Colgrove*, 75 N. Car. 341; *Michel v. Kaiser*, 25 La. Ann. 57; *Humphrey v. McGill*, 59 Ga. 649; *Walworth v. Readsboro*, 24 Vt. 252; *Illingworth v. Miltenberger*, 11 Mo. 80; *Dickenson v. Gilliland*, 1 Cow. [N. Y.] 498; *Ex parte State Bank*, 15 Ark. 267; *State v. Lawson*, 14 Ark. 121; *United States v. Haytian Republic*, 64 Fed. Rep. 214; *Rickards v. Cunningham*, 10 Neb. 417.)

Failure of the purchaser to pay at the time of the purchase, at least, extends the time and right of redemption of the plaintiff during such period as the purchaser is in default. (*Siggett v. Firestone*, 96 Ind. 260; *Argo v. Oberschlake*, 48 Ill. App. 289; *Maina v. Elliott*, 51 Cal. 8; *Ruckle v. Barbour*, 48 Ind. 274; *Smith v. Fort*, 10 S. E. Rep. [N. Car.] 914.)

Boehmer & Rummons, contra.

References: *Tootle v. White*, 4 Neb. 401; *Swearinger v. Roberts*, 12 Neb. 336; *Robertson v. Vancleave*, 15 L. R. A. [Ind.] 68; *Power v. Larabee*, 57 N. W. Rep. [N. Dak.] 789; *Gates v. Ege*, 59 N. W. Rep. [Minn.] 495; *Phillips v. Dawley*, 1 Neb. 320; *Gregory v. Tingley*, 18 Neb. 320; *Maul v. Hellman*, 39 Neb. 329; *State v. Graham*, 21 Neb. 329; *Forbes v. McCoy*, 24 Neb. 702.

NORVAL, J.

On May 24, 1894, a decree foreclosing a real estate mortgage was rendered in the district court of Lancaster county in a cause then pending in said court wherein James H. Brown, trustee, was plaintiff and Henry Gosmunt was defendant. A stay of nine months was taken,

and at the expiration of such stay an order of sale was issued in the case, which was delivered to the sheriff, and the premises were sold thereunder by him on April 2, 1895, to one Peter Gloe for the sum of $3,250. The amount of the bid was not paid to the officer at the time of the purchase, nor until April 19, 1895. The sheriff made return to the court of the order of sale, reporting that he had sold the lands to Gloe for the sum stated above. On April 6, 1895, the sale was confirmed by the court, and a deed was ordered to be made by the sheriff to the purchaser for the real estate embraced within the decree. On April 19, 1895, Peter Gloe paid in cash to the sheriff the sum of $3,250—the amount of his bid—and the officer thereupon delivered to said purchaser a deed of said lands. On the same day, and after Gloe had paid the said amount to the sheriff, and the former was yet in the office of the latter, and while the said money was being counted by the sheriff, the attorney for Henry Gosmunt stated to the officer in the presence of Gloe that Gosmunt desired to redeem said land, and would pay the necessary money therefor to the sheriff, if he would receive and accept the same, which offer the sheriff declined. On April 23, 1895, John Menke, for and on behalf of Gosmunt, tendered to Gloe the sum of $3,250, with interest to that date, and requested the execution by the latter of a quitclaim deed to Gosmunt to the land. Gloe declined to either accept the money or execute the deed. Subsequently this action was instituted to redeem the premises, and from a decree adverse to the plaintiff he prosecutes an appeal.

The right of the owner of real estate to redeem the same from sale under an execution or order of sale is purely statutory, and, to entitle one to redeem, he must bring himself within the purview of the law. By section 497*a* of the Code of Civil Procedure power is given to redeem from a decree of foreclosure or the lien of a levy of an execution upon real estate at any time prior to the confirmation of the sale by a court having jurisdiction. Unless

the right is exercised within that time it is lost. It has been ruled that where an appeal is taken from an order confirming the sale of real estate, and an appeal bond is given for that purpose, the right to redeem continues until the appeal is disposed of in the appellate court. (*Philadelphia Mfg. & Trust Co. v. Gustus*, 55 Neb. 435.) This is upon the ground that the order of confirmation is suspended and not in force while the appeal remains undetermined.

The confirmation of the sale in the case at bar was not resisted, nor has any appeal been prosecuted from the order approving and confirming the sale. No attempt was made to redeem until after the sale was confirmed by the court below. So that it cannot be successfully asserted that plaintiff invoked the provisions of the statute within the period prescribed for redemption, unless the sale was absolutely void, as argued by plaintiff's counsel, because the purchaser failed to pay the amount of his bid at the time the premises were struck off to him. Sales under executions and decrees of foreclosure are made for cash, and the person making such sale should require the purchaser to pay the amount of his bid at the time of the sale. If the officer fails to do so and reports the sale, he is liable for the purchase price. Probably the failure to pay the amount of the bid might be sufficient ground for vacating the sale. But the omission to pay the money does not render the sale void, else the successful bidder could not be compelled to comply with the terms of his purchase by paying the money, as this court has held may be done. (*Phillips v. Dawley*, 1 Neb. 320; *Jones v. Null*, 9 Neb. 254; *Gregory v. Tingley*, 18 Neb. 318; *Maul v. Hellman*, 39 Neb. 322. See also *Allred v. McGahagan*, 39 Fla. 118, 21 So. Rep. 802; *McCarter v. Finch*, 36 Atl. Rep. [N. J.] 937; *Robertson v. Smith*, 26 S. E. Rep. [Va.] 579.) The sale was not rendered invalid by the failure of the purchaser to pay the amount of his bid before the sheriff made his return, and the authorities cited in the brief of plaintiff do not sustain the contention that the fail-

ure of the purchaser to make payment of his bid rendered the proceedings void, nor do they sustain the position that plaintiff was entitled to redeem under the facts disclosed by this record. The decision of the district court is right, and is accordingly

AFFIRMED.

JASPER HUFFMAN V. R. C. NEWMAN.

FILED SEPTEMBER 23, 1898. No. 8188.

Liability of Agent to Third Person: PAYMENT. An agent, the fact of agency and name of principal being disclosed, who receives money for his principal which he fails to pay to the latter, is not liable to the payer, either in an action for conversion or for money had and received.

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

G. W. Bemis, for plaintiff in error.

N. V. Harlan, contra:

The agent is liable to plaintiff below in an action for money had and received. (*Smith v. Binder*, 75 Ill. 492.)

NORVAL, J.

Lizzie P. Ryan and R. R. Ryan, of Salem, Oregon, owned a quarter section of land in York county, Nebraska. Jasper Huffman, their agent at York, sold the premises for the owners to one R. C. Newman on February 15, 1893, for the stipulated sum of $4,100—$1,800 cash, and the purchaser to assume a mortgage of $2,300 against the property. One hundred dollars of the cash payment was paid down by Newman to Huffman. The latter on the same day reported the sale to the Ryans and advised them that he had received the $100, and applied the same on commissions. A deed was inclosed in the same letter for the Ryans to execute and

return to the York National Bank. On February 13, without the knowledge of either Newman or Huffman, one Ensign sold the land to one Kingston, which sale the Ryans recognized, and the premises were never conveyed to Newman. He demanded of Huffman the return of the $100 paid on the land, which request not having been complied with, this action was instituted by Newman to recover from Huffman the amount of the advance payment, and from a judgment in favor of the former the latter prosecutes error.

Numerous grounds have been urged in the brief filed by defendant below for a reversal of the judgment, but one of which will be considered, namely, the petition fails to state facts sufficient to constitute a cause of action. The petition alleges substantially that defendant on February 15, 1893, represented to plaintiff that Lizzie P. Ryan and R. R. Ryan, residents of Salem, Oregon, were owners in fee of the southwest quarter section 6, of town 12, range 4 west, in York county, and that defendant was duly authorized by them to sell said land for $4,100; that the Ryans would give a good and sufficient warranty deed therefor, clear of all incumbrances, except a certain mortgage of $2,300 and interest; that plaintiff, relying upon said representations, on said day purchased, through defendant, said real estate, and paid him thereon $100, and received from him a receipt therefor, and memorandum of agreement which is set out in the petition, and which states the consideration to be $4,100 as follows: $1,800 in cash and assume the mortgage of $2,300. The petition further avers that plaintiff tendered defendant the sum of $1,700, being the balance of the purchase price above the mortgage, and requested a conveyance of said premises according to the terms of the agreement, but defendant refused, and still refuses, to furnish, execute, and deliver said conveyance; that defendant did not turn over said $100 to said Ryans, or account to either of them for the same, but retained said money and converted it to his own use; that plaintiff duly performed all the condi-

tions on his part to be performed, and has been ready at all times to pay over the purchase-money, yet defendant has rejected and refused to deliver to plaintiff a good and sufficient deed for said land, and has refused to pay back to plaintiff the $100, although requested so to do, and plaintiff has been damaged by failure of defendant to comply with the terms of said agreement, in loss of time, expenditure of money, and loss of bargain in contract in the sum of $100.

It will be observed that the pleading alleges that Huffman never paid over to the Ryans the $100 advanced on the land, but converted the same to his own use. An action of conversion will not lie against Huffman. In *Mathews v. O'Shea*, 45 Neb. 299, it was expressly decided that, in the absence of fraud, an agent is not liable for conversion at the suit of one paying him money which the agent has authority to receive, though he does not pay it over to his principal. This for the obvious reason that the person, after paying the money, no longer has any title thereto, or right of possession, as the title had vested in the principal. The petition in the case at bar imputes no fraud to the defendant, Huffman, in the transaction. It is true, it charges that he made certain representations to plaintiff which induced the purchase, but it is not averred that a single statement regarding an existing fact was untrue. It is not averred that defendant was not authorized by the Ryans to make the sale, nor that they could not execute, or have not executed, a deed to the premises to plaintiff. It is not alleged that defendant has failed to perform a single act he promised to do, nor that the Ryans have omitted to do anything Huffman represented or contracted they should do.

It is argued that the charge of conversion contained in the petition may be eliminated therefrom as surplusage, and that the pleading would still state a cause of action for money had and received. There is a conflict in the authorities as to whether an agent who receives money for a disclosed principal is liable to the payer as

principal; but the decided weight of the adjudications sustains the negative of the proposition. (*United States Bank v. Bank of Washington*, 6 Pet. [U. S.] 8; *Calvin v. Holbrook*, 2 N. Y. 126; *Costigan v. Newland*, 12 Barb. [N. Y.] 456; *Denny v. Manhattan Co.*, 5 Denio [N. Y.] 639; *Cooper v. Tim*, 38 N. Y. Supp. 67; *Smith v. Bond*, 25 W. Va. 387; *Lyon v. Tevis*, 8 Ia. 79; *Huston v. Tyler*, 36 S. W. Rep. [Mo.] 654; *Johnson v. Welch*, 24 S. E. Rep. [W. Va.] 585; *Moran v. Clarke*, 59 Minn. 456; Mechem, Agency sec. 555; *Whitney v. Wyman*, 101 U. S. 392; *Bleau v. Wright*, 68 N. W. Rep. [Mich.] 115.) In the case last cited it was ruled that a person contracting with an authorized insurance agent, with knowledge of the agency, cannot recover from him the premium paid, on failure of insurer to issue the policy. Where the name of the principal is disclosed, the agent incurs no personal responsibility. The contract is that of the principal, and not of the agent. We are constrained to hold, upon reason as well as authority, that Huffman was not personally liable to plaintiff on the contract in question, and an action against him for money had and received cannot be maintained, though the $100 had never been paid by him to the Ryans. The judgment is

REVERSED.

SCHOOL DISTRICT NO. 67, SHERMAN COUNTY, APPELLANT, V. SCHOOL DISTRICT NO. 24, SHERMAN COUNTY, ET AL., APPELLEES.

FILED SEPTEMBER 23, 1898. No. 8237.

School Districts: BOUNDARIES: ACTION AGAINST COUNTY SUPERINTENDENT. No cause of action will accrue to a school district, as a corporation, against the county superintendent for the manner in which he may change boundaries of such district.

APPEAL from the district court of Sherman county. Heard below before SINCLAIR, J. *Affirmed.*

Nightingale Bros., for appellant.

J. N. Paul, contra.

NORVAL, J.

School districts 24 and 67 of Sherman county included within their boundaries twelve sections of land, each district being of the same size, and the former adjoining the latter. On February 23, 1895, a petition signed by two-thirds of the legal voters in said district 24 was presented to the county superintendent of Sherman county, praying the consolidation of district 67 with district 24. At the same time there was likewise presented another petition signed by George Romine alone, a resident of school district 67, praying the attachment or consolidation of all the territory embraced in said district, without designating the district or territory to which it was the purpose to attach the same. On March 15, 1895, the county superintendent made an order consolidating school district 67 with school district 24. This action was instituted by district 67 to prevent the county superintendent, the officers of the last named district, the county clerk, and county treasurer from proceeding to carry said order into execution, and to annul said order. The decree below was for the defendants, and the plaintiff appeals.

An order of the county superintendent as to the formation or change of boundaries of a school district cannot be collaterally assailed where he acted within his jurisdiction. (*State v. Palmer*, 18 Neb. 644.) It is conceded by counsel for plaintiff that this action must fail unless the proceedings before the county superintendent consolidating the two districts were not erroneous merely, but were without jurisdiction and absolutely void; but they argue against the validity of the order of consolidation, and their contention is unanswerable. The petition of school district 67 was fatally defective, because it omitted to

designate the territory or district with which it was proposed to consolidate district 67, and for the further reason that said petition was not signed by two-thirds of the qualified voters of said district as required by section 4, subdivision 1, chapter 79, Compiled Statute 1893, which declares that "two districts may be consolidated into one district upon petitions from each district signed by two-thirds of the legal voters in each district." The petition on behalf of district 67 was signed by one elector only, while the affidavit attached to the petition shows that there were two legal voters in said district at that time.

Whatever may have been the rights of any voter of district 67 in the premises, the facts enumerated created no cause of action in favor of said district as a corporation. That a school district as such cannot question the action of a county superintendent in changing the boundaries of a district is thoroughly established in this state. (*Cowles v. School District*, 23 Neb. 655; *School District v. Wheeler*, 25 Neb. 199; *Hendreschke v. Harvard High School District*, 35 Neb. 400.) It follows that plaintiff cannot maintain this action, and the judgment is

AFFIRMED.

EDWARD L. ROBERTSON ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED SEPTEMBER 23, 1898. No. 8241.

1. **Municipal Corporations:** COSTS OF REPAIRING PAVEMENT. Under the provisions of section 69, chapter 12*a*, Compiled Statutes 1891, the costs of making "ordinary repairs" in street pavements cannot be assessed against the abutting lot owner, but must be paid by the city.

2. ———: ———: CONTRACTS. A paving contract which binds the contractor to bear the expense for the term of ten years of "all repairs which may, from any imperfection in the said work or material, become necessary within that time," does not include "ordinary repairs," nor is said stipulation in violation of said chapter 12*a*.

3. ———: ———: ———. The contract mentioned in the opinion construed and *held* not to cast the burden on the abutting lot owner to make "ordinary repairs."

4. **Review:** CONFLICTING EVIDENCE. This court will not disturb a finding of fact based upon conflicting evidence.

5. **Municipal Corporations:** COST OF PAVING STREET. Where, in case a street paved with wooden blocks laid on a concrete base, such blocks have become worthless and are entirely removed in pursuance of a contract entered into with the city, and replaced with vitrified brick laid on the old base, such new improvement is not an "ordinary repair" within the meaning of the statute, but is a repavement of the street, and to pay the costs thereof a special assessment may be made against the abutting real estate.

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

J. C. Cowin and *W. D. McHugh*, for appellants.

W. J. Connell and *E. H. Scott, contra.*

NORVAL, J.

The object of this action is to perpetually restrain the city of Omaha from levying a special assessment or special tax upon the premises described in the petition to pay the costs of repaving Leavenworth street in said city, between Sixteenth street and Twenty-ninth avenue. From a decree for the city plaintiffs appeal.

It is disclosed by the record that there was duly created in said city street improvement or paving district No. 447, including Leavenworth street, and the property abutting thereon on each side to the distance of 132 feet, between Sixteenth street and Twenty-ninth avenue, and that said Leavenworth street in said improvement district was paved with cedar blocks laid on a concrete foundation. Prior to April 12, 1892, this pavement had become in such a dilapidated and worthless condition as to require said portion of Leavenworth street to be repaved, and on said date an ordinance was duly passed declaring the necessity of repaving said portion of the street, and authorizing the property owners in said im-

provement district, within 30 days, to designate the kind of material to be used in making the improvement. A petition was filed with the city clerk, signed by plaintiffs and other owners of lots abutting upon Leavenworth street within said improvement district No. 447, and representing a majority of the feet frontage thereon and a majority of the area within said district, asking the repavement of said street in said improvement district and designating vitrified brick as the material desired to be used in such repaving. An ordinance was subsequently passed and approved, providing for the repavement of said Leavenworth street with vitrified brick, and ordering the board of public works to contract therefor. A contract was duly made with one Hugh Murphy to repave said street, who performed the work, and the city authorities accepted the improvement. Afterwards the city council sat as a board of equalization, due and legal notice thereof first having been given, for the purpose of equalizing the proposed levy of special taxes to meet the costs of said improvement, and at such meeting adopted a plan of assessment. This suit was instituted to prevent the levy of the special taxes in accordance with such plan. The contract with Hugh Murphy, under which the improvement was made, contained the provisions following:

"15. The contracting party of the second part hereby expressly guaranties the above work for the full period of ten years from approved acceptance of the work, and said party binds himself and his heirs and assigns for the entire expense of all repairs which may from any imperfection in the said work or material become necessary within that time.

"16. And it is hereby agreed that the amount reserved, and accruing interest by the city of Omaha, as guaranty for the maintenance of the work herein specified, shall be used as a special fund for making repairs or reconstruction as deemed necessary by the board of public works, in the manner provided, as follows:

"'If at any time within the period of guaranty, after the completion and acceptance of the work herein contracted for, the said work shall, in the judgment of the city engineer and board of public works, require to be repaired and resurfaced or reconstructed, the board of public works shall notify the said second party to make the repairs required, and if the said second party shall neglect to proceed with such repairs within three days from the date of the service of such notice, then the board of public works shall have the right to cause such repairs or reconstruction to be made in such manner as they and the city engineer shall deem best, and the whole cost thereof, both for labor and material, shall be paid out of the special fund before mentioned, or if necessary, at the expense of the contractor and sureties.'

"17. * * * Failure or neglect on the part of the inspector to condemn inferior work or material at the time it is being supplied or done, shall not be construed to imply an acceptance of any work. If it becomes evident to the board of public works, at any time prior to the payment of the 15 per cent reserve, that improper material has been furnished or inferior work done upon said improvement, it shall have the right to order the removal of such material or work, and to require that suitable material be supplied and proper work done in lieu thereof by said contractor without expense to the city.

"18. As a basis of interpretation of the acceptable condition of pavements at the expiration of the period of guaranty, it is hereby agreed and understood that if the paving material is found and the wearing surface of the roadway shall possess no less than 75 per cent in the thickness of the specified depth of the original paving material, in a reasonable smooth condition for travel, it shall be considered as meeting the requirements for final acceptance."

The contract, under the head of "Guaranties," contains this stipulation:

"All pavements embraced in these specifications and

bidding specifications are based upon a guaranty that the pavements will be well and substantially constructed as heretofore provided, and that such pavements will be maintained by the contractor in a condition of continuous good order and repair for the period of ten years from and after the date of their approved acceptance. All securities held as reserves and accruing interest thereon shall be subject to use for such maintenance and repairs by the city of Omaha in the event of the failure of the contractor to keep such pavements in proper condition, it being expressly understood and agreed that the board of public works and city engineer shall determine when repairs or reconstruction are necessary; and failure by the contractor to comply with a written order, or to enter upon such work within ten days, and complete the same within a reasonable time, shall be held as sufficient authority on the part of the city of Omaha to execute the work, and draw upon the reserve fund to defray the expenses thereof, or at the expense of the contractor and sureties, or both. * * * It is distinctly understood and hereby agreed that all guarantied pavements shall receive prompt attention in their maintenance, and when repairs shall fail to be made within twenty days of written notice from the board of public works, a charge of ten cents per square yard of the entire area within the block requiring repairs shall be made against the contractor for every month or fraction thereof that the repairs of said pavement shall be neglected."

It is argued by counsel for plaintiffs that the proposed levy of the special taxes in question is illegal for the reason it includes the costs and expenses of repairing the pavement for ten years. This argument is predicated upon the provisions of the contract already set out, and a clause contained in section 69, chapter 12*a*, Compiled Statutes 1891. This section, after authorizing the levy and collection of special taxes and assessments upon the lots or pieces of ground abutting upon or adjacent to any street to defray the costs and expenses of improving or

repairing such street, declares "that the above provision shall not apply to ordinary repairs of streets or alleys, and one-half of the expense of bringing streets, avenues, alleys, or parts thereof to the established grade shall be paid out of the general fund of the city except as otherwise hereinafter provided." It would seem that this clause places the burden upon the entire city to make ordinary street repairs, and that special assessments cannot be levied upon the real estate abutting upon any street to cover the expenses of making the ordinary or usual repairs of the pavements thereon. If, therefore, the contract with Murphy obligated him to make the ordinary repairs required to maintain in good condition the pavement laid by him on Leavenworth street, in said district No. 447, there would be much force to the argument of plaintiffs, that this special assessment is invalid, at least to the extent that such assessment included the costs of all ordinary repairs, since the expense of making them is a burden assumed by the city and cannot be assessed upon adjacent lot owners. An examination and consideration of the paving contract entered into by the city with Murphy are necessary to determine whether the proposed assessment requires the property owners to pay more than can be properly chargeable to them under the law. It will be observed that paragraph 15 of said contract merely makes it the duty of the contractor to bear "the entire expense of all the repairs which may from any imperfection in said work or material become necessary." It requires no argument to show that this provision does not cover usual or ordinary repairs, or the expenses incident to the natural wear of the pavements or its destruction by floods or causes other than those resulting from defective workmanship or materials. Manifestly said paragraph was merely a guaranty on the part of the contractor for the faithful performance of his contract, and required him merely to make good any defects arising from bad materials or the improper manner in which the work was performed.

Such stipulation or guaranty cast no unlawful burden upon the adjacent property owners. They are required to pay for the kind of materials and workmanship designated in the contract, and it is perfectly proper for the city to stipulate that the contractor shall be at the expense of making all the repairs occasioned by the improper construction of the pavement, either in work or materials, or both, so that the abutting lot owner shall receive what he is required to pay for. There are other provisions in the contract, other than those found in paragraph 15 quoted above, which relate to the subject of repairs, but it would be a strained and unnatural construction to hold that they refer to what is termed "ordinary repairs." If it had been the intention to require the contractor to bear the expense of all the repairs, whether resulting from use of the pavement or defective materials, or any other cause, then language expressive of such purpose doubtless would have been employed, instead of the stipulation found in said paragraph 15. Applying the usual rules of interpretation to the contract, and construing all the provisions together, it is reasonably certain that no obligation was imposed upon Murphy to make what is denominated "ordinary repairs." As suggested by counsel for the city, by paragraph 15 he guarantied the work for a specified period, and was to bear the whole expense of replacing defective work and material during the time, and the references elsewhere in the contract on the subject of repairs should be read in the light of said guaranty, since they are intended to secure the enforcement of the stipulation against defective workmanship and materials. The conclusion is irresistible that the contract does not contemplate the making of ordinary repairs, such as the act incorporating metropolitan cities relieves the abutting lot owner from making.

Upon this branch of the case counsel for plaintiffs and appellants have cited, to support their position that the contract we are considering is void, the decisions in

People v. Maher, 9 N. Y. Supp. 94; *Brown v. Jenks*, 32 Pac. Rep. [Cal.] 701; *Verdin v. City of St. Louis*, 27 S. W. Rep. [Mo.] 447. An examination of those cases will disclose that each was based upon a provision in the contract materially different from those in the one we have been considering, in that in those cases the stipulation relating to repairs was independent in character, covering usual repairs, and not intended merely as a guaranty of the faithful execution of the paving contract by the contractor.

The proposition that the contract with Murphy is not rendered void by the provisions therein relating to repairs is sustained by the adjudications elsewhere. In *City of Schenectady v. Union College*, 66 Hun [N. Y.] 179, the stipulation of the paving contract there under consideration by the court was essentially the same as the one before us, and the court in the opinion say: "The provision to which objection was made reads as follows: 'The party of the second part hereby covenants and agrees that it will do all the work required by such ordinance, and this contract, in such good and substantial manner that no repairs thereto shall be required for the term of five years after its completion.' If the contract had stopped here it would hardly be claimed that the contract went further than the ordinance, and was anything more than a guaranty that the work should conform to the requirements of the ordinance, and no one would doubt the power of the common council to prescribe the quality of the work to be done by an ordinance; and yet if the contract had stopped there it can hardly be doubted that the contractor would be liable to the city to keep and make good to the city the conditions of the warranty that no repairs thereto shall be required in five years after its completion. The covenant, therefore, to keep in repair for five years is not an independent obligation, but only a guaranty of the quality of the work contracted to be done. In this respect we think it essentially different from the contract under consideration in *People v.*

Maher, supra, and that this case does not come under the condemnation of that decision."

The precise question was passed upon by the supreme court of New Jersey in an able opinion rendered in *Wilson v. Inhabitants of the City of Trenton*, 38 Atl. Rep. 635. The court observed: "The first ground upon which it is urged that this contract should be declared invalid is that, by its terms, Montgomery is made to guaranty the endurance of the pavement for a period not less than five years from the date of its completion and acceptance by the city, and to maintain the pavement in good condition at the finished grade of the street at his own cost and expense during said period; and that upon his failure to do so, the city is authorized to make such repairs as may become necessary, and deduct the cost thereof from such moneys as it may have in hand belonging to the contractor. This provision of the contract, it is claimed, imposes upon the abutting owners, who are liable to assessment for the cost of this work in proportion to the benefit received by them therefrom, not only the burden of paying for the improvement, but also the cost of keeping it in repair for a period of five years after its completion. If this be the effect of the provision, it is clearly illegal, for, by the eighty-seventh section of the charter of the city of Trenton, 'after any street shall have once been paved, then the city shall take charge of and keep the same in repair at the general expense.' (P. L. 1874, p. 376.) We are referred to the following cases, which, it is said, support the prosecutor's contention: *People v. Maher*, 56 Hun [N. Y.] 81, 9 N. Y. Supp. 94; *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. Rep. 480, 36 S. W. Rep. 52; *Brown v. Jenks*, 98 Cal. 10, 32 Pac. Rep. 701; *Excelsior Paving Co. v. Leach*, 34 Pac. Rep. [Cal.] 116; *Fehler v. Gosnell*, 35 S. W. Rep. [Ky.] 125; *Boyd v. City of Milwaukee*, 66 N. W. Rep. [Wis.] 603. The theory upon which these cases are decided is that when, by the terms of the contract, the contractor is required not only to lay the pavement, but also to maintain and

keep it in repair for a certain period after its completion, the abutting owners are necessarily required to pay a higher price by reason of the provision to maintain and keep in repair; and that a contract which throws on abutting owners anything more than the burden of having the pavement well constructed in the outset is invalid, so far as they are concerned. The contract in each of the cases referred to differed, however, in an important particular from that now before us. In those cases the provision for maintaining or repairing was treated as an independent one, while in the one under consideration it is merely an appendant to the guaranty of the durability of the pavement. What the contract, in effect, says is this: The contractor guaranties to put down a pavement which shall remain in good condition for at least five years. If it gets out of order during that period, the contractor must restore it at his own expense; and if he fails to do so the city may make the repairs, and retain the cost thereof out of the contract price. It does not require him to make all the repairs which shall become necessary during the period named, but only those which arise from lack of durability of the pavement. Certainly, it cannot, with reason, be contended that a provision in the contract requiring the contractor to guaranty the durability of his work for a reasonable period imposes upon the adjacent property owners the burden of keeping the street in repair. It is merely an added precaution for insuring good workmanship and the use of good material. And if the contractor, notwithstanding the guaranty, fail to lay a durable pavement, it cannot be doubted that the city would have the right to recover from him, in a suit for breach of his guaranty, the cost of restoring the same to a good condition. It seems to me that the provision in the contract relating to the maintenance of the pavement is a mere method of enforcing the guaranty of the contractor by a speedier and less expensive method than by suit, and that it does not have the effect of imposing upon abutting owners

any burden other than that of having the pavement well constructed at the outset. In the case of the *City of Schenectady v. Union College*, 66 Hun [N. Y.] 179, 21 N. Y. Supp. 147, a similar view was taken by the supreme court of New York to that here expressed, in construing a contract like that now before us; and, although the judgment in that case was afterwards reversed by the court of appeals, 144 N. Y. 241, 39 N. E. Rep. 67, it was on another ground altogether, nothing being said by the appellate tribunal which casts doubt upon the correctness of the construction put by the lower court on the contract in that case."

It is also insisted that the pavement in question was so worthless that it would be a fraud upon the property owners to compel them to pay the assessment. The evidence adduced on the trial on this issue, as well as to establish collusion between the contractor and the city authorities, in the matter of the construction and approval of the work, is conflicting and irreconcilable. Suffice it to say that the lower court specially found that the material was furnished and used in the construction of the improvement in question in substantial conformity with the terms of the contract; that the repavement after it had been finished was accepted by the city engineer, the board of public works, and the city authorities; that in doing so they acted in the utmost good faith without either fraud or collusion, and the bill of exceptions contains ample proofs to repel all inference of fraud, and to establish that the pavement was constructed in conformity with the terms of the contract. In declining to disturb a finding of fact made upon conflicting testimony, we merely observe a well settled rule, which has been frequently applied.

The final argument presented is that the work done by Murphy under the contract was not a repavement of Leavenworth street, but was merely a repair of an existing pavement, and, therefore, the city was liable therefor, and it possessed no authority to impose a special assess-

ment against the real estate of plaintiffs to pay the same. This contention is grounded upon the single fact that the concrete foundation of the former cedar block pavement was utilized in making the improvement in controversy. The entire wearing surface of wood of the old pavement was removed and replaced with vitrified brick, and the mere using of the old base of concrete did not constitute the work an "ordinary repair" within the meaning, and contemplation, of the statute. The assessment assailed was made for the repavement of the street, and the invalidity thereof not having been shown, the decree is accordingly

AFFIRMED.

MARTHA J. PINKHAM, APPELLANT, V. JOHN H. PINKHAM ET AL., APPELLEES.

FILED SEPTEMBER 23, 1898. No. 8219.

1. **Deeds**: TESTAMENTARY INSTRUMENT. An instrument, although in form a deed, which by its terms was to operate only after the death of the maker or grantor, is testamentary in its character, and not a deed, and passes no present estate in the premises therein described.
2. **Dower.** A widow in this state is entitled to dower in all lands whereof her husband was seized of an estate of inheritance at any time during marriage, unless she has been lawfully barred thereof.

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

The opinion contains a statement of the case.

Ricketts & Wilson, for appellant:

An instrument which takes effect only upon the death of the maker is testamentary in character. (*Haberghan v. Vincent*, 2 Ves. Jr. [Eng.] 204; *Turner v. Scott*, 51 Pa. 126; *In re Lantenschlager's Estate*, 45 N. W.

Rep. [Mich.] 147; *Hitchcock v. Simpkins*, 58 N. W. Rep. [Mich.] 47; *Singleton v. Bremar*, 17 Am. Dec. [S. Car.] 699; *Conrad v. Bell*, 61 N. W. Rep. [Minn.] 673; *Blackman v. Preston*, 15 N. E. Rep. [Ill.] 42; *Donald v. Nesbitt*, 15 S. E. Rep. [Ga.] 367; *White v. Hopkins*, 4 S. E. Rep. [Ga.] 863; *Sperber v. Balster*, 66 Ga. 317; *Hazelton v. Reed*, 26 Pac. Rep. [Kan.] 450; *Brown v. Bronson*, 35 Mich. 415; *Leaver v Gauss*, 17 N. W. Rep. [Ia.] 522; *Nichols v. Emery*, 41 Pac. Rep. [Cal.] 1089; *Hannig v. Hannig*, 24 S. W. Rep. [Tex.] 695; *Bowdoin College v. Merritt*, 75 Fed. Rep. 480.)

John C. Watson and *F. E. Brown, contra:*

A conveyance, otherwise perfect in form, is not converted into a will by inserting in it a clause declaring that it is to go into effect after the death of grantor, and that he claims to hold the land so long as he lives. (*Seals v. Pierce*, 83 Ga. 787; *Evans v. Smith*, 28 Ga. 98; *Cable v. Cable*, 146 Pa. St. 451; *Wall v. Wall*, 30 Miss. 91; *Phillips v. Thomas Lumber Co.*, 94 Ky. 445; *Bassett v. Budlong*, 77 Mich. 338; *Sharp v. Hall*, 86 Ala. 110; *Robertson v. Dunn*, 2 Murph. [N. Car.] 133; *Burlington University v. Barrett*, 92 Am. Dec. [Ia.] 383; *Williams v. Tolbert*, 66 Ga. 127; *Owen v. Williams*, 114 Ind. 179; *Graves v. Atwood*, 52 Conn. 512; *Bunch v. Nicks*, 50 Ark. 367; *Shackelton v. Sebree*, 86 Ill. 616; *Barber v. Milner*, 43 Mich. 248; *Warren v. Tobey*, 32 Mich. 45; *Jackson v. Cleveland*, 15 Mich. 94; *Wallace v. Harris*, 32 Mich. 380; *Gale v. Gould*, 40 Mich. 515; *Wilson v. Carrico*, 49 Am. St. Rep. [Ind.] 213.)

NORVAL, J.

This action was instituted in the court below by Martha J. Pinkham, widow of Calvin Pinkham, deceased, for the assignment of dower in the southwest quarter of section 8, township 7, range 11, Otoe county, claiming that her husband died siezed of said premises. The defendant John H. Pinkham asserts that he is the absolute owner of the real estate, and the trial resulted in a decree quieting the title to the land in him.

The facts are substantially as follows: On and prior to March 13, 1885, one Calvin Pinkham was the owner in fee of the real estate in controversy. On that day, while dangerously ill, he executed to his grandson, the defendant John H. Pinkham, an instrument, in form a warranty deed, covering said premises, which contained this provision: "This deed is to take effect and be in full force from and after my death. The further and additional consideration of this conveyance is that the said John H. Pinkham shall pay to Ella P. Reiddell, my great-granddaughter, fifty dollars ($50) per annum for ten years from the date this deed is in full force and effect; that is to say, fifty dollars each and every year for ten years from the taking effect of this deed." This instrument was acknowledged and duly filed for record. Subsequently, on November 4, 1886, plaintiff married said Calvin Pinkham and they lived together as husband and wife until May 30, 1893, when Calvin died leaving plaintiff, his widow, him surviving. John H. Pinkham did not acquire possession of the property during the lifetime of Calvin, but did so immediately upon the death of the latter, asserting title in himself by virtue of the instrument already mentioned, and has since refused to recognize any interest in the land in plaintiff. The defendant Lilly P. Reiddell is the great-granddaughter of Calvin Pinkham, deceased, and is the person designated in the clause of the instrument quoted as "Ella P. Reiddell." Said Calvin Pinkham, deceased, left him surviving two children, the defendant Anna Babcock and Calvin Pinkham, Jr., the latter being the father of the defendant Emma E. Ryan. The interest of Calvin Jr. in the premises has been conveyed to said daughter. John H. Pinkham is the son of Anna Babcock. The said Emma E. Ryan claims an undivided half of the lands in fee simple, while said Lilly P. Reiddell asserts that she is entitled to $500 under the clause in the instrument set out above, and that the amount should be made a lien upon the premises.

By virtue of section 1, chapter 23, Compiled Statutes,

the widow is entitled to dower in all lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she has been lawfully barred thereof. (*Butler v. Fitzgerald*, 43 Neb. 192.) If Calvin Pinkham, deceased, held title to the real estate in dispute at the time of his death, his widow has a dower interest in the property, and is entitled to have the same assigned. The proper solution of this question calls for an interpretation of the instrument under which John H. Pinkham asserts title, or rather, the clause of the instrument already quoted. If that instrument acted as a conveyance of the lands *in præsenti*, then it is patent that plaintiff cannot recover herein. We are satisfied that the instrument was not effective as a deed. It did not purport to be effective as a conveyance until the death of Calvin Pinkham, so that the absolute legal title to the premises was in him at the time of his death. A deed must pass a present interest in the property, even though the right of possession and enjoyment may not accrue until some future period. A will passes no title until after the testator's death, and this marks the essential difference between a deed and a will. The great weight of authority sustains the proposition that an instrument, in the form of a deed, which takes affect and becomes operative alone upon the death of the maker, is testamentary in character, and is not a deed. (Devlin, Deeds sec. 309; *Habergham v. Vincent*, 2 Ves. Jr. Ch. Rep. [Eng.] 204; *Bigley v. Souvey*, 45 Mich. 285; *Singleton v. Bremar*, 4 McCord [S. Car.] 201; *Conrad v. Bell*, 61 N. W. Rep. [Minn.] 673; *Blackman v. Preston*, 15 N. E. Rep. [Ill.] 42; *Donald v. Nesbitt*, 15 S. E. Rep. [Ga.] 367; *White v. Hopkins*, 4 S. E. Rep. [Ga.] 863; *Sperber v. Balster*, 66 Ga. 317; *Hazelton v. Reed*, 26 Pac. Rep. [Kan.] 450; *Nichols v. Emery*, 41 Pac. Rep. [Cal.] 1089; *Hannig v. Hannig*, 24 S. W. Rep. [Tex.] 695; *Leaver v. Gauss*, 62 Ia. 314; *Turner v. Scott*, 51 Pa. St. 126.)

In the last case a father executed a warranty deed to his son, reserving the lands described to the grantor for

his life, and containing a provision that "this conveyance in no way to take effect until after the decease of the grantor." The court held this clause rendered the instrument testamentary in character. Woodward, C. J., in delivering the opinion of the court, observed: "As these words were expressly limited to take effect only after the death of the grantor, they were necessarily revocable words. The doctrine of the cases is, that whatever the form of the instrument, if it vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they had used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed, for all parties must be judged by the legal meaning of their words."

In *Singleton v. Bremar*, 4 McCord [S. Car.] 201, it was held that a deed to take effect at the death of the grantor is void. The same principle was recognized and applied in *Blackman v. Preston*, 15 N. E. Rep. [Ill.] 42.

In *Donald v. Nesbitt*, 15 S. E. Rep. [Ga.] 367, it was held that a deed containing a clause that "in no event is this deed to go into effect until after my death" was testamentary in its character, and not a deed of conveyance operating *in præsenti*.

In *White v. Hopkins*, 4 S. E. Rep. [Ga.] 863, the court said: "The true test to determine whether the instrument is a deed or a will is whether it is to take effect immediately or to take effect only after the death of the maker. If it is to take effect only after the death of the maker, it is a will; if it is to take effect immediately, or if it conveys a present estate, it is a deed."

In *Sperber v. Balster*, 66 Ga. 317, an instrument in the general form of a deed was construed, which contained this provision: "Said deed of gift to be of full effect at my death, together with all the live stock * * * that may be found on said premises, together with all said premises." Jackson, C. J., speaking for the court, ob-

served: "These words show the intention of the maker to convey what would be on the premises at his death, and to have his gift of the land to go into effect at the same time. * * * The true meaning of the maker here, whether to part with the title at once or on his death, must be gathered from the entire paper. The title to other items of property in the very same sentence, passing to the same person, may well be invoked to show how and when the title to the land was intended to pass. * * * The very fact the deed of gift is to have full effect, in express words, at the death, is potent to show the meaning of the donor. No life interest, no possession for life is anywhere reserved. Such a thing is not hinted at."

In *Hazelton v. Reed*, 46 Kan. 73, the supreme court of Kansas states the doctrine in this way: "It may be laid down as a general rule that a written instrument which discloses the intention of the maker respecting the posthumous disposition of his property, and which is not to operate until after his death, is testamentary in its character, and not a deed or contract, and may be revoked."

Although the instrument before us was in form a deed, it was nevertheless testamentary in character, and inoperative as a conveyance of the land. The instrument in express terms was made to take effect on the death of the maker, and no present estate in the property passed to John H. Pinkham. Calvin Pinkham, Sr., was the owner of the land at the time of his death, and his widow was entitled to dower therein, and, subject thereto, the estate passed to the heirs of the deceased.

We have examined the cases cited by defendants and appellees and find that most of them do not conflict with the conclusion we have reached, although one or two of those decisions are not in harmony with our views, but they are opposed to the decided weight of the authorities on the subject. The decree is reversed, and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

EQUITABLE TRUST COMPANY, APPELLEE, V. FRANCES R. O'BRIEN, APPELLEE, AND JAMES W. DVORSKY, APPELLANT.

FILED SEPTEMBER 23, 1898. No. 8248.

1. **Pleading:** UNDENIED ALLEGATIONS. All material allegations of new matter in the answer, which are not put in issue by a reply, will be taken as true and need not be proved.
2. **Enforcement of Tax Lien:** BURDEN OF PROOF. Where a lien is sought to be enforced for the non-payment of special taxes, the person asserting the lien has the burden of showing its validity.
3. **Special Taxes:** EQUALIZATION: NOTICE. The city council of a city of the metropolitan class has no jurisdiction to pass an ordinance levying special taxes until, as a board of equalization, it has ascertained the amount of special benefits to be assessed against the real estate; and sections 73 and 85, chapter 12*a*, Compiled Statutes 1887, require notice of the sitting of such board to be given for at least six days prior thereto in the official paper of the city.

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

W. A. Saunders and *Saunders & Macfarland*, for appellant:

The burden of proof was upon Frances R. O'Brien to show the illegality of the special taxes. (*Adams v. Osgood*, 42 Neb. 450; *Towle v. Holt*, 14 Neb. 221; *Dillon v. Merriam*, 22 Neb. 151.)

In an equitable proceeding for the foreclosure of tax liens technical defenses should not be considered. (*Merriam v. Dovey*, 25 Neb. 618; *Roads v. Estabrook*, 35 Neb. 297; *Otoe County v. Brown*, 16 Neb. 394.)

Morris, Beekman & Marple and *Gregory, Day & Day*, *contra.*

NORVAL, J.

This suit was instituted by the Equitable Trust Company to foreclose real estate mortgages upon lot 3 in

block 4, Kountze & Smith's Addition to the city of Omaha. James W. Dvorsky was made a party defendant, who filed a cross-petition for the foreclosure of a tax lien claimed on account of the purchase of said premises at tax sale for delinquent county and city taxes, and subsequent taxes paid by him, including certain special paving, curbing, and guttering taxes imposed by the city of Omaha. The owner of the equity of redemption, the defendant Frances R. O'Brien, filed an answer to said cross-petition, denying that Dvorsky had paid the special taxes, and averring, substantially, that the levy of special taxes for street improvements was made without a petition for such improvements having been presented to the city signed by the required number of property owners; that the materials used for paving were different from those designated in the petition upon which the order for pavement was based; and that the levy of said special taxes is absolutely null and void. No reply to this answer was filed. The decree of foreclosure and sale was in favor of plaintiff for the sum due on its mortgages, and for the defendant Dvorsky for the amount of the county and city taxes paid by him, with interest thereon; but he was refused a lien as to all special taxes. Dvorsky alone appeals, assailing that portion of the decree which denied him a lien for the special taxes.

It is argued that the burden of proof was upon Frances R. O'Brien to establish the invalidity of the special taxes in question, and as she offered no proof upon that point the court below erred in holding said special taxes illegal. To this contention two answers suggest themselves: First—The illegality of these special taxes was pleaded in the answer to the cross-petition of Dvorsky, and he did not controvert the averments of the answer by a reply. Under the Code of Civil Procedure every material allegation of new matter in an answer, not put in issue by the reply, must be taken as true, and need not be proved. (*Stewart v. American Exchange Nat. Bank of Lincoln*, 54 Neb. 461, and cases there cited.) All testimony relating

to the special taxes was received over the objections and exceptions of O'Brien, so that it cannot be successfully asserted that she waived the filing of a reply. Second—The burden of proof was not upon O'Brien to show the illegality of the special taxes, and the cases cited by appellant do not so hold. Those decisions were made with reference to general taxes, and not to special assessments; and, whatever may be the presumption as to the validity of general taxes in an action to foreclose a lien for their non-payment, the presumption will not be indulged that special taxes were legally levied; but the party who asserts a lien for such taxes assumes the burden of establishing their validity. This is no new doctrine in this state. (*Smith v. City of Omaha*, 49 Neb. 883; *Leavitt v. Bell*, 55 Neb. 57.)

The evidence contained in the bill of exceptions fails to establish that due and legal notice of the meeting of the city council of Omaha, as a board of equalization, was given prior to the levy of these special taxes. A city of the metropolitan class cannot pass an ordinance levying special taxes until, as a board of equalization, it has ascertained the amount of special benefits to be assessed against the real estate; and such board has no authority to determine the benefits to be levied without proper notice to the landowner. Chapter 12*a*, Compiled Statutes 1887, was in force when these special taxes were imposed, and by sections 73 and 85 of said chapter notice of the sitting of the board of equalization of a city of the metropolitan class is required to be given during at least six days prior thereto in the official paper of the city. While the evidence adduced in this case shows that a notice of the meeting of the board of equalization was published for the requisite time in the Omaha *Republican*, a newspaper "in general circulation in the county of Douglas and state of Nebraska," it was not established by any proof that such publication was made in the official paper of the city of Omaha. These special taxes were

therefore levied without jurisdiction and were void. (*Leavitt v. Bell*, 55 Neb. 57.) The decree is accordingly

AFFIRMED.

VILLAGE OF SYRACUSE, APPELLEE, V. JESSE S. MAPES ET AL., APPELLANTS.

FILED SEPTEMBER 23, 1898. No. 8286.

1. **Appeal:** RULINGS ON EVIDENCE. An appeal in an equity case will not present to this court for review the rulings of the trial court excluding or admitting evidence.
2. **Villages:** ANNEXATION OF TERRITORY. Section 99, article 1, chapter 14, Compiled Statutes, authorizes the boundaries of a village to be extended so as to include adjacent lands, where either they will be materially benefited from the annexation, or justice and equity require that it be done.
3. ———: ———. Under said section the corporate limits of a village may be extended so as to embrace contiguous territory which is in such close proximity to the platted portion as to have some unity of interest therewith in the maintenance of municipal government.
4. ———: ———. Contiguous territory may be annexed, though the same may not have been subdivided into tracts of ten acres or less.

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

M. L. Hayward and *F. E. Brown*, for appellants.

John C. Watson, contra.

NORVAL, J.

The village of Syracuse presented its petition to the district court of Otoe county for the annexation of certain territory to the corporate limits of said village, and from a decree annexing a portion of the lands described in the petition the defendants have appealed.

It is insisted that the trial court erred in admitting the

testimony of M. C. Joyce and J. H. Arand, respectively, relating to the occupations of the defendants. The rulings in question are not now available as grounds of reversal, since the cause was not brought to this court by proceeding in error, but on appeal. An appeal in equity will not present for review rulings on the exclusion or admission of evidence. (*Ainsworth v. Taylor*, 53 Neb. 484.) Moreover, the cause was tried without the assistance of a jury, and the admission of improper evidence is not in itself a ground for reversal. (*Stabler v. Gund*, 35 Neb. 648; *Whipple v. Fowler*, 41 Neb. 675; *Pearce v. McKay*, 45 Neb. 296; *Tolerton v. McClure*, 45 Neb. 368; *Phœnix Ins. Co. v. Walter*, 51 Neb. 182.)

The decree is assailed as being wholly unsupported by the evidence. The suit was instituted under and in pursuance of the provisions of section 99, article 1, chapter 14, Compiled Statutes 1895. This section authorizes the extension of the boundaries of a town or village so as to include adjacent lands, against the consent of the owner or owners, whether such territory has been subdivided into tracts or parcels of ten acres or less, or has not been so subdivided, in case the same would receive material benefits or advantages by its annexation to the corporation, or justice and equity require such annexation to be made. There was evidence conducing to show the location of the territory proposed to be annexed, its close proximity to the platted portion of the village and to the streets and sidewalks therein; that between 100 and 200 persons reside on the lands sought to be annexed; also the population of the village, its improvements and surroundings, its advantages as a trading point, and for educational and church purposes; and that the lands in question represented the growth of the village beyond its limits, and would receive material benefits by extending the boundaries of the village so as to include the same. On the other hand, there was testimony of a very convincing character to the effect that annexation to the corporation of these lands would be a substantial detri-

ment and damage to their respective owners, instead of a benefit to them. The writer is unable to discover how, in any way, the territory in question would be benefited by the annexation, as it now practically receives all the advantages and benefits as if the same was within the boundaries of the village. It has been held that under section 99 the corporate limits of a village may be extended to include adjacent lands in such close proximity to the platted portion as to have some unity of interest therewith in the maintenance of municipal government. (*State v. Dimond*, 44 Neb. 154; *City of Wahoo v. Tharp*, 45 Neb. 563.) This case is within the rule just announced, and, while the adjacent lands may not be materially benefited by their annexation, justice and equity require that the corporate limits of the village be extended to include said territory. The section mentioned authorizes the annexation to a village of contiguous territory upon the ground of material benefits and advantages to flow from such annexation, or because justice and equity require that the boundaries of the corporation be extended so as to include such territory. (*Village of Hartington v. Luge*, 33 Neb. 623.)

It is urged that as the tract belonging to Mr. De Long, one of the defendants, contains more than ten acres, no portion thereof can be annexed to the village under the section of the statute in question. That section contains no such limitation of the power to extend the boundaries of the village. It reads: "When any city or village shall desire to annex to its corporate limits any contiguous territory, whether such territory be in fact subdivided into tracts or parcels of ten acres or less, or be not so subdivided, the council or board of trustees of said corporation shall vote upon the question of such annexation," etc. It is perfectly plain that contiguous territory may be annexed although the same may not have been subdivided into tracts of ten acres or less.

Another argument is that all the land lying east of the village should not have been annexed, as portions thereof

are not contiguous to, but are separated from, the corporate limits by a narrow strip on the east side of the village and a public highway. There is some evidence to support this contention, while the maps or plats put in evidence disclose that the territory on the east extended to the eastern boundary of the village. It is disclosed that the lands on the north and east of the village adjoin and those on the north touch the north boundaries of the corporation; hence, all the territory in question is contiguous to the village, within the meaning of the statute. The decree has some support in the evidence, and it is

AFFIRMED.

GRAND LODGE ANCIENT ORDER UNITED WORKMEN v. ANNIE O. HIGGINS.

FILED SEPTEMBER 23, 1898. No. 9532.

Printed Abstracts: REVIEW. Under section 1 of rule 2 of this court (52 Neb. ix.) the agreed printed abstract must be complete in itself, without reference to the transcript, and, when error does not affirmatively appear from an examination of such abstract, the judgment sought to be reviewed will be affirmed.

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

James W. Carr, for plaintiff in error.

Matthew Gering and *Arthur C. Wakeley, contra.*

NORVAL, J.

A submission of this case was taken under section 1 of rule 2 (52 Neb. ix), which provides, *inter alia*, that any cause may be submitted "upon the written stipulation of the parties thereto providing for such submission on printed briefs accompanied by or containing an agreed printed abstract of the record and evidence upon which the case is to be determined."

An abstract of the testimony, signed by the parties, has been printed, and in no other respect has there been an attempt to comply with the requirements of said section of the rule. Neither the pleadings and journal entry of the judgment nor abstracts thereof have been printed. We cannot look beyond the abstract and examine the transcript, but must determine the case upon the abstract alone; and, unless error affirmatively appears therefrom, the judgment must be affirmed. (*Closson v. Rohman*, 50 Neb. 323; *North Platte Water Works Co. v. City of North Platte*, 50 Neb. 853; *Home Fire Ins. Co. v. Skoumal*, 51 Neb. 655; *Wheeler v. Barker*, 51 Neb. 847; *Shewell v. City of Nebraska City*, 52 Neb. 138; *Zink v. Westervelt*, 52 Neb. 90.) The rule requires an agreed printed abstract of the record and evidence, and the printing of an abstract of the evidence alone is not sufficient. We cannot know the issues tendered by the pleadings, what errors were assigned in the motion for a new trial, or what was the judgment rendered, without reference to the transcript; and, under the authorities cited, we cannot examine the transcript for any purpose. In the absence of a printed abstract of the record the errors assigned cannot be reviewed. The judgment is

AFFIRMED.

GATE CITY ABSTRACT COMPANY ET AL. V. BERNARD H. POST.

FILED SEPTEMBER 23, 1898. No. 8195.

1. **Liability of Bonded Abstracter.** The statute relating to bonded abstracters (Compiled Statutes 1897, ch. 73, secs. 65-69) was intended to extend the liability of abstracters beyond the limits fixed by the common law.

2. ———: ACTION BY VENDEE. One who purchases real estate on the faith of a certificate of title furnished to his vendor by a bonded abstracter may maintain an action for damages grounded on the failure of the abstracter to make a proper search and true certificate.

3. **Summons:** EVIDENCE OF SERVICES: SHERIFF'S RETURN. An officer's return on the back of a summons that he served the same "on C., one of the defendants herein," is sufficient evidence of service on J. C. who was named in the writ as a defendant.

4. **Evidence of Official Acts.** A public officer may give evidence of the uniform course of business in his office, for the purpose of showing the performance of a specific official act which it was his duty to perform, but concerning which he has no independent recollection.

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

ACTION by Bernard H. Post against Gate City Abstract Company and the sureties on its bond, William Coburn, F. W. Taylor, R. E. Gaylord, Cadet Taylor, Henry O. Devries, J. B. West, and S. K. Spaulding, to recover the amount paid by plaintiff to satisfy a judgment which was a lien on land purchased by him in reliance upon abstracter's certificate that the land was free from incumbrance. From a judgment against defendants they prosecute a proceeding in error. *Affirmed.*

G. W. Shields and *F. C. O'Hollaren*, for plaintiffs in error:

The abstracter never had any contract relations with plaintiff. The contract of the abstracter was made with its employer, and it is not liable to third persons. (1 Am. & Eng. Ency. Law 48, note 2; *Savings Bank v. Ward*, 100 U. S. 195; *Thomas v. Carson*, 46 Neb. 765.)

Other references: *Schofield v. Jennings*, 68 Ind. 233; *Metz v. State Bank*, 7 Neb. 165; *White v. Bartlett*, 14 Neb. 320.

G. W. Doane and *W. G. Doane, contra:*

Any person aggrieved may sue in his own name for a breach of the bond. (*Sprowl v. Lawrence*, 33 Ala. 674; *Sutherland v. Carr*, 85 N. Y. 105; *State v. Norwood*, 12 Md. 194; *Lea v. Yard*, 4 U. S. 96; *Dodd v. Williams*, 3 Mo. App. 278.)

SULLIVAN, J.

This was an action on an abstracter's bond given by the first named defendant pursuant to the provisions of section 65, chapter 73, Compiled Statutes 1897. The abstract in question was furnished to Michael Fleck, who relied on it in purchasing of Joseph Cammenzind certain real estate situated in Douglas county. The abstracter's certificate, among other things, recited that, "We have examined the records of the district court of Douglas county, Nebraska, and that there are no unsatisfied judgments nor suits pending in said court against Joseph Cammenzind that are liens on said land, prior to the date hereof, as shown by the records of said court." Relying on this certificate the plaintiff purchased of Fleck the land described in the abstract. The recital of the certificate was false. The land at the time was subject to the lien of a judgment for $144.30 in favor of Patrick and against Cammenzind. This judgment, which had been rendered by a justice of the peace and transcripted to the district court, plaintiff discharged. He now demands reimbursement.

The defense to the action was that the liability of an abstracter is contractual, and that the principal defendant never had any contract relations with the plaintiff. While the decisions are not in harmony upon the point, it was probably the doctrine of the common law that an abstracter's liability was only to his employer for negligence or want of skill in the performance of the duties which he had undertaken to discharge, and that he was not ordinarily liable at all to third persons whose action had been influenced by his certificate. (*National Savings Bank v. Ward*, 100 U. S. 195; *Zweigardt v. Birdseye*, 57 Mo. App. 462; *Kahl v. Love*, 37 N. J. Law 5; *Schade v. Gehner*, 133 Mo. 252, 34 S. W. Rep. 576; *Talpey v. Wright*, 61 Ark. 275, 32 S. W. Rep. 1072; *Mallory v. Ferguson*, 50 Kan. 685, 32 Pac. Rep. 410.) And such seems to be the view of the matter taken in *Thomas v. Carson*, 46 Neb. 765,

where POST, J., discussing the question, said: "The cases cited by counsel appear to sustain the proposition contended for as a rule of the common law, although their application to a statute like ours, under which the bonds of abstracters are conditioned for the payment of all 'damage that may accrue to any party or parties by reason,' etc., may well be doubted." The statute here mentioned was enacted in 1887, and is entitled "An act to provide security to the public against errors, omissions, and defects in abstracts of title to real estate and for the use of abstracts in evidence." The first section declares that it shall be unlawful for any person or persons to engage in the business of compiling abstracts of title to real estate for pay without having first executed a bond to the state, with sureties, to be approved by the county judge, "conditioned for the payment by such abstracters of any and all damages that may accrue to any party or parties by reason of any error, deficiency, or mistake in any abstract or certificate of title made and issued by such person or persons." The second section is as follows: "When any abstracter shall have duly filed his bond as above provided, he shall be entitled to receive a certificate from such county judge that said bond has been by him duly approved and filed for record, which certificate shall be valid so long as such abstracter shall maintain his surety upon the bonds as herein provided for, unimpaired, and the possession of such valid certificate, at the date of issuance of any abstract, shall entitle such abstract of title to real estate, certified to and issued by such abstracter, to be received in all courts as *prima facie* evidence of the existence of the record of deeds, mortgages, and other instruments, conveyances, or liens affecting the real estate mentioned in such abstract, and that such record is as described in said abstract of title." (Session Laws 1887, p. 565, ch. 64.) The next section requires a party who desires to use an abstract as evidence on the trial of a cause to serve a copy thereof on his adversary at least three days before the

trial. It will be thus seen that the statute has greatly increased the usefulness of abstracts. By the common law, as we interpret it, the owner of real estate could only utilize an abstract as an argument to reinforce his own assertions concerning the state of his title. It might be persuasive, but was without legal efficacy. He may now use it as evidence in an action to enforce the specific performance of a contract of sale, and in every other form of action in which the validity of his title or the existence or non-existence of liens or incumbrances are questions directly or collaterally involved. The right to use an abstract as evidence is not even limited to the person to whom it is issued. Any one may use it, and any one against whom it is employed may be injured in consequence of the certificate being false. Having thus widened the abstract's sphere of action, it was quite natural that the legislature should also widen the abstracter's liability. This it did, not by an act to provide security for abstracter's clients, or for people dealing with abstracters, but by an act aptly entitled "An act to provide security to the public." Who are the public, within the meaning of this law? In the first section they are comprehensively described as any party or parties to whom damage may accrue in consequence of errors in an abstract. It is matter of common knowledge that titles are generally transferred and incumbered on the faith and credit of certificates furnished by abstracters to the owners of the land. An abstract has become the usual concomitant of every instrument evidencing an interest or ownership in land. Its function is to vouch for the title, to define its character, and afford a reliable basis on which to estimate its marketable worth. That being the case, it seems highly probable that, in adopting the act in question, the legislative design comprehended protection to those who, in dealing with land titles, rely on the correctness of the abstracter's certificate. They stood most in need of legislation of this character, and, being fairly within the description of per-

sons for whose benefit the law was enacted, we feel warranted in holding that they are within its terms.

The point made by the defendants against the validity of the judgment omitted from the abstract is without merit. The action was commenced before a justice of the peace against Joseph Cammenzind and another; and while it is true that the officer's return does not certify in so many words that the process was served on Joseph Cammenzind, it does state what is equivalent thereto, viz., that service was made on "the within named defendants." This was sufficient. Besides, it is disclosed by the record that Joseph Cammenzind personally appeared as a defendant in the action.

It is claimed that the plaintiff could not maintain this action without having first exhausted his other remedies. He might, of course, have sued his grantor on the covenants of warranty contained in his deed, and he might, also, have proceeded against Cammenzind after having taken an assignment of the judgment from Patrick; but we know of no rule of law that required him to do so. The plaintiff's damage resulted from the fault of the abstract company, and consequently its liability to him is a primary one.

Whether the omission of the judgment from the abstract was the fault of the person employed by the abstract company to investigate the title was a question submitted to the jury on proper instructions, and we see no reason to doubt the correctness of the conclusion reached by them.

To show that the Cammenzind judgment was indexed in the office of the clerk of the district court on the day the transcript thereof was filed, the plaintiff introduced evidence of the uniform custom of the clerk in regard to such matters. This evidence was properly received to supplement the legal presumption that the clerk faithfully discharged the duties imposed on him by the statute in relation to transcripted judgments. (1 Greenleaf, Evidence sec. 40; *Owen v. Baker*, 101 Mo. 407.) Mr. Dev-

ries, the person who made the abstract in question, was a witness for the defendants, and, having testified to the search made by him in the office of the clerk of the district court, was asked on cross-examination whether he had examined the execution docket, to which, over objection, he replied that he had not. The inquiry was probably not beyond the scope of a proper cross-examination, and could not in any event have prejudicially affected the defendants' rights, as the court, in its instructions, confined the jury to the question of whether the proper entry had been made in the judgment index. We find no substantial error in the record and the judgment is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. GEORGE KELLOGG.

FILED SEPTEMBER 23, 1898. No. 7797.

1. **Negligence:** PLEADING. The essential elements of a petition charging actionable negligence are that the plaintiff, without fault on his part, has sustained an injury as the proximate consequence of a specific negligent act or omission of the defendant.

2. ———: ———: DEFECTIVE APPLIANCES. An averment in a petition that the defendant negligently permitted a certain appliance to become defective, and negligently suffered it to remain in a defective condition, implies that the defendant knew or was culpably ignorant of the defect.

3. **Master and Servant:** DEFECTIVE APPLIANCES: NEGLIGENCE: EVIDENCE. Where a servant sues his master on account of injuries resulting from the use of a defective tool or appliance, the fact that the accident happened cannot be taken as evidence of the master's negligence.

4. ———: ———: ———: ———. To entitle the plaintiff to a verdict in such case, he must affirmatively show that the defendant either knew or was inexcusably ignorant of the defective condition of the implement or appliance causing the injury.

5. ———: ———: ———: BURDEN OF PROOF. In an action to recover for injuries caused by defective appliances, an instruction that it was the "duty of the defendant to exercise reasonable care in

keeping such machinery and appliances in a reasonably safe condition for use" does not place the burden of proof on the defendant.

6. **Trial:** MISCONDUCT OF COUNSEL: OBJECTIONS: REVIEW. A party desiring to take advantage of the misconduct of opposing counsel in the argument of a case should seasonably object to the remarks complained of and then enter an exception if the court rule adversely or refuse to make a ruling.

7. ———: ———: ———: ———. But where the misconduct of counsel is so flagrant, and of such a character that neither a complete retraction nor any admonition or rebuke from the court can entirely destroy its sinister influence, a new trial should be awarded, regardless of the want of an objection and exception.

8. **Personal Injuries:** VERDICT FOR PLAINTIFF FOR $9,000: REMITTITUR. Evidence examined and damages *held* to be excessive.

REHEARING of case reported in 54 Neb. 127. *Remittitur made a condition of affirmance.*

J. W. Deweese, F. E. Bishop, W. S. Morlan, and *W. P. Hall,* for plaintiff in error.

A. J. Shafer, S. A. Dravo, and *Stewart & Munger, contra.*

SULLIVAN, J.

This cause is now before us on rehearing. The original opinion, which contains a sufficient statement of the facts, will be found in 54 Neb. 127.

Counsel for defendant contended on the first submission, and still insist, that the petition does not charge the company with actionable negligence. This contention is grounded on the fact that there is in the petition no averment that the defendant knew, or ought to have known, of the defective appliance which was responsible for the accident. That knowledge, or inexcusable ignorance, on the part of the defendant, is an essential element in the plaintiff's right of action cannot be doubted. If there was neither actual nor constructive notice, the defendant was blameless, and the plaintiff has no claim on it for indemnity. But it must be remembered that in pleading negligence it is not necessary to set out the

evidential facts. An allegation that an injury has resulted from a specific negligent act or omission of duty on the part of the defendant, without fault on the part of the plaintiff, is a sufficient statement of facts to support a judgment. (*Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456; *O'Connor v. Illinois C. R. Co.*, 83 Ia. 105; *Louisville, E. & S. L. C. R. Co. v. Utz*, 32 N. E. Rep. [Ind.] 881.)

The averment of the petition that the defendant negligently permitted the brake-rod to become defective, and negligently suffered it to remain in a defective condition, carries a necessary implication that the company either knew, or should have known, of the defect. In the case of *Crane v. Missouri P. R. Co.*, 87 Mo. 588, it is said the allegations in the petition that the injury was caused by the negligence of the master in failing to provide safe appliances, and stating particularly the defect, are equivalent to a specific allegation that the master knew, or might have known, of the defect. It is claimed that the former opinion proceeds on the assumption that proof of the accident was *prima facie* sufficient to entitle the plaintiff to a verdict, and that the burden of disproving the alleged negligence was on the defendant. The law on the subject is clearly and accurately stated in the case of *Kansas City & P. R. Co. v. Ryan*, 52 Kan. 637, as follows: "It has been frequently ruled by this court, in accordance with the authorities generally, that an employé of a railroad company, by virtue of his employment, assumes all the ordinary and usual risks and hazards incident to his employment; that, as between a railroad company and its employés, the railroad company is not an insurer of the perfection of any of its machinery, appliances, or instrumentalities for the operation of its railroad; that, as between a railroad company and its employés, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employés reasonably safe machinery and instrumentalities for the operation of its railroad; that it will be presumed, in the absence of any-

thing to the contrary, that the railroad company performs its duty in such cases, and the burden of proving otherwise will rest upon the party asserting that the railroad company has not performed its duty; that where an employé seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employé to prove such insufficiency, but it will also devolve upon him to show, either that the railroad company had notice of the defects, imperfections, or insufficiencies complained of, or that, by the exercise of reasonable and ordinary care and diligence, it might have obtained such notice; that proof of a single defective or imperfect operation of any such machinery or instrumentalities resulting in injury will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection, or insufficiency in such machinery or instrumentalities." In the case of *Lincoln Street R. Co. v. Cox*, 48 Neb. 807, it was held that in an action by a servant against his master for an injury occasioned by a defective tool or appliance the jury are not authorized to infer negligence from the mere fact that the accident happened. To the same effect are *Washington & G. R. Co. v. McDade*, 135 U. S. 554; *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 319; *Hull v. Hall*, 78 Me. 114; *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555; *Mixter v. Imperial Coal Co.*, 152 Pa. St. 395; *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73; *Atchison, T. & S. F. R. Co. v. Myers*, 63 Fed. Rep. 798; 1 Bailey, Master & Servant sec. 101.

The instructions of the trial court were in harmony with the principles laid down in the authorities cited, and the original opinion, rightly understood, does not declare a different doctrine. The negligence pleaded, and the negligence upon which plaintiff's right to a verdict was, under the instructions, made to depend, consisted in the failure of the company to keep the brake-rod in a

safe condition for use. The jury were told that it was the "duty of the defendant to exercise reasonable care in keeping such machinery and appliances in a reasonably safe condition for use." The burden of proof was not placed on the defendant. The plaintiff proved the accident, and also introduced affirmative evidence from which the jury might well infer that the defect in question had existed for a considerable length of time. That the company's inspectors did not discover the defect is not conclusive against its existence. The worn edges of the hole in the brake-staff and the flattened condition of the wire were persuasive facts supporting plaintiff's theory. They tended to prove that the defect had existed so long that the failure to discover and properly repair it must have been the result of careless inspection.

Defendant has presented quite an elaborate argument in support of its demand for a reversal of the judgment on account of the misconduct of Mr. Shafer, one of the attorneys for the plaintiff. We have again examined the question and reach the conclusion that it is the duty of a party who complains of the misconduct of his adversary's counsel to make seasonable objection and then secure a ruling of the court upon such objection; and if the ruling is against him, or if the court refuse to rule, he should enter an exception. In 2 Ency. Pl. & Pr. 755 the rule is stated as follows: "In order that a party may avail himself in an appellate court of an objection for misconduct of opposing counsel in the argument of a case, he must not only interpose a seasonable objection, as has just been stated, but he must then press the court to a distinct ruling, and, if dissatisfied therewith, enter an exception; otherwise there is nothing presented for review." In this case there was no formal objection, and consequently no ruling, or contumacious refusal to rule, which we are authorized to review. Had the court, in response to a proper objection, vigorously condemned the remarks of counsel, we think they would have left no prejudicial impression on the minds of the jury. By

prompt action the defendant's counsel might have obtained an effective antidote for the poison in Shafer's speech; but he failed to act, and is, therefore, not in an attitude to have his complaint now considered. We do not, however, wish to be understood as holding that a rebuke from the court, or even a complete retraction by the offending counsel, is in all cases of this kind a sovereign remedy. If the transgression be flagrant—if the offensive remark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence—a new trial should be promptly awarded, regardless of the want of an objection and exception. (*Florence Cotton & Iron Co. v. Field*, 16 So. Rep. [Ala.] 538; *Bullard v. Boston & M. R. Co.*, 64 N. H. 27, 10 Am. St. Rep. 367, 27 Am. & Eng. R. Cases 119; *Cleveland Paper Co. v. Banks*, 15 Neb. 20; *Ashland Live Stock Co. v. May*, 51 Neb. 474, 71 N. W. Rep. 67; *Tucker v. Henniker*, 41 N. H. 317; *Martin v. State*, 63 Miss. 505; *Rudolph v. Landwerlen*, 92 Ind. 34.)

In view of the condition of the record we are not warranted in reversing the judgment on account of misconduct of counsel; but we have concluded, after a thorough consideration of the evidence, that the damages are excessive, and must have been assessed while the jury were yet under the sway of counsel's superheated eloquence. The judgment will be reversed unless plaintiff shall within thirty days file with the clerk of this court a remittitur for the sum of $2,500. If such remittitur be so filed the judgment for $6,500 will stand affirmed.

JUDGMENT ACCORDINGLY.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. GEORGE KELLOGG.

FILED SEPTEMBER 23, 1898. No. 8169.

Suit in Equity for New Trial in Action at Law: DISMISSAL: JUDGE: INTEREST IN CASE: WITNESSES. A rehearing having been allowed in this case, the record is examined, and the conclusions announced in the former opinion adhered to.

REHEARING of case reported in 54 Neb. 138. *Affirmed.*

J. W. Deweese, F. E. Bishop, W. S. Morlan, and *W. P. Hall,* for plaintiff in error.

A. J. Shafer, S. A. Dravo, and *Stewart & Munger, contra.*

SULLIVAN, J.

After having again carefully examined the record in this case, we see no reason for receding from the conclusions announced in the former opinion reported in 54 Neb. 138. The evidence is conflicting and, under a well established rule of practice, we are not warranted in interfering with the finding of the trial court, although we are inclined to think it should have found in favor of the railroad company. The judgment of the district court will stand

AFFIRMED.

ERNESTINE LYONS, ADMINISTRATRIX, APPELLEE, V. ALPHONSO S. GODFREY, APPELLANT, ET AL.

FILED SEPTEMBER 23, 1898. No. 8208.

Foreclosure: SALE OF REALTY: PRIOR LIEN. Where real estate is sold under a decree of foreclosure, subject to a prior lien, the purchaser must discharge such lien, or suffer the land to be sold for its satisfaction.

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

Stewart & Munger, for appellant.

Charles O. Whedon, contra.

SULLIVAN, J.

Francis Lyons sold and contracted to convey to John R. Megahan five acres of land in Lancaster county. Two hundred dollars of the purchase price was paid in cash, and by the terms of the contract the balance was to be paid in six annual installments, commencing August 13, 1891. Immediately after the execution of the contract Megahan went into possession of the land and erected a house and barn thereon. Alphonso S. Godfrey furnished the materials for these buildings and took a mechanic's lien on the property. In an action brought to foreclose this lien Lyons was made a party defendant and filed an answer asserting his rights under the contract of sale. In due time the cause was tried and the amount of Godfrey's claim adjudged to be a lien on the premises, subject only to the deferred installments of the purchase-money. The first of said installments had matured when the decree was rendered, and the court directed the land to be sold for the satisfaction of the same, as well as for the amount due Godfrey on his mechanic's lien. The land was appraised for sale by deducting from the gross valuation the purchase-money which had not matured

when the decree was rendered. Godfrey became the purchaser at the foreclosure sale, and, upon securing an order confirming the same, took possession of the premises and is still in the occupancy thereof. Lyons died in March, 1893, and afterwards this action to foreclose the purchase-money lien on the land in question was commenced by his widow as administratrix of his estate. Godfrey answered the petition alleging that in the action brought to foreclose the mechanic's lien there was a full adjudication of Lyons' rights under the contract of sale, and that this action is consequently barred. The district court found the plaintiff had a vendor's lien, ascertained the amount due thereon, and directed that the premises be sold for its payment. From this decree Godfrey appeals.

In the first action it was determined that appellant's lien was inferior to Lyons'. As required by the terms of the decree, the land was offered for sale and sold subject to five installments of the purchase-money which had not then matured. The appellant purchased subject to this incumbrance, and he must, of course, discharge the same or suffer the land to be sold for its satisfaction. The judgment is manifestly right and is

AFFIRMED.

MICHAEL SHAFER V. WILLIAM D. WHITING.

FILED SEPTEMBER 23, 1898. No. 8246.

Sufficiency of Evidence: REVIEW. This court will not reverse a judgment based on a verdict supported by sufficient competent evidence.

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

W. G. Sears and *H. Wade Gillis,* for plaintiff in error.

H. E. Carter, contra.

SULLIVAN, J.

This was an action of replevin instituted in Burt county for the recovery of thirty-five cords of sixteen-inch stove wood. The case was tried to a jury, and, the plaintiff having obtained a verdict and judgment in his favor, the defendant brings the record here for review. It is conceded that the only question for decision is the sufficiency of the evidence to sustain the verdict. The testimony is conflicting, but we are disposed to think that the jury reached a correct conclusion. At any rate, there is no sufficient reason why their finding, being approved by the trial court, should not stand. The judgment is

AFFIRMED.

W. P. KANE, APPELLEE, V. SOREN JONASEN, APPELLANT, ET AL.

FILED SEPTEMBER 23, 1898. No. 8267.

1. **Foreclosure:** SALE IN GROSS: DECREE. It is within the province of the district court in a decree of foreclosure to provide for the appraisement and sale of the premises in parcels or *en masse*, as the best interests of the parties may require.

2. ———: ———: DUTY OF SHERIFF. Where a decree of foreclosure contains no direction to the officer charged with its execution touching the appraisement and sale of the mortgaged property, he is vested with a discretion in regard to the matter which will not be disturbed, in the absence of a showing of prejudice to the party complaining.

3. ———: ———: ———: PRESUMPTIONS. Nothing appearing to the contrary, it will be presumed that an officer charged with the execution of a decree was regardful of the rights of the parties to the action, and in a lawful manner performed the duties imposed upon him.

4. ———: ———. Where a decree of foreclosure gives no direction concerning the appraisement and sale of mortgaged premises, an appraisement and sale in gross of two city lots will not be set aside unless it be made to appear that the party complaining has been thereby prejudiced.

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

Joel W. West, for appellant.

Wharton & Baird, contra.

SULLIVAN, J.

In an action brought by Kane against Jonasen, the district court for Douglas county rendered a decree of foreclosure, and directed the sale of the mortgaged property, being two lots in the city of Omaha. Confirmation of the sale made in pursuance of the decree was resisted by the defendant on the ground that the lots had not been appraised and sold separately. The objection was overruled and the sale confirmed. The defendant appeals. It does not appear whether the lots are contiguous or disconnected. They may, for aught we know, be used, improved, and occupied as a single tract. As to their situation, condition, and use the record gives no information.

The general rule is that distinct tracts of land sold on judicial process should be separately appraised and sold separately. (*Laughlin v. Schuyler*, 1 Neb. 409.) But the rule has exceptions, one of which was recognized in *Craig v. Stevenson*, 15 Neb. 362, where it was held: "The mortgaged premises, consisting of three city lots upon which were situated a dwelling-house and appurtenances, some portion of which extended to and upon each of the said lots, were properly sold in gross, and the sale upheld." It is undoubtedly within the province of the district court to provide in a decree of foreclosure for the appraisement and sale of mortgaged premises in parcels or *en masse*, as the best interests of the parties may require. (*Macomb v. Prentis*, 57 Mich. 225; *Geuda Springs Town & Water Co. v. Lombard*, 47 Pac. Rep. [Kan.] 532; *Montague v. Raleigh Savings Bank*, 24 S. E. Rep. 6, 118 N. Car. 283.) And, if no direction in relation to the matter is contained

in the decree, the officer charged with its execution is vested with discretionary power, and his action in the premises will be sustained, in the absence of an affirmative showing of prejudice by the complaining party. (*Hughes v. Riggs*, 36 Atl. Rep. [Md.] 269; *Johnson v. Garrett*, 16 N. J. Eq. 31.)

It is quite possible that a separate sale of the lots here in question was neither practicable nor advantageous to either of the parties. We have no means of knowing what considerations influenced the action of the person commissioned to make the sale. We will presume, however, in the absence of evidence to the contrary, that he was regardful of the rights of the parties, and in a lawful manner discharged the duties which he assumed. The order appealed from is

AFFIRMED.

NORVAL, J.

I concur in the judgment of affirmance on the ground that the record fails to show that the lots were not contiguous.

FRANK DEAN V. SAUNDERS COUNTY.

FILED SEPTEMBER 23, 1898. No. 8288.

1. **Landlord and Tenant:** PAYMENT OF RENT. To absolve himself from the payment of rent a tenant must, in addition to giving notice of the termination of the tenancy, surrender possession of the leased premises.
2. **Public Corporations:** ACTS OF AGENTS. A public corporation is bound by the acts and contracts of its authorized agents within the scope of their authority.
3. **Counties:** OFFICERS: RENT. Where a county rents rooms for one of its officers and puts him in possession thereof with the records and property pertaining to his office, it is bound to pay the stipulated rental so long as such officer continues in possession.
4. ——: ALLOWANCE OF CLAIMS: RECONSIDERATION. Upon due notice to parties interested a county board may once reconsider its action in allowing or disallowing a claim against the county.

5. ——: ——: ——: RES JUDICATA. Where an order disallowing a claim against a county has been reconsidered, such order of disallowance will not operate as an adjudication of the claim.

6. **Evidence:** JUDGMENTS: MEMORANDA. Before an order is formally entered on the record it may be proved by the clerk's memorandum or the judge's minutes.

ERROR from the district court of Saunders county. Tried below before WHEELER, J. *Reversed.*

Franklin Dean and *W. D. Guttery*, for plaintiff in error.

H. Gilkeson, S. H. Sornborger, and *E. E. Good, contra.*

SULLIVAN, J.

On February 6, 1890, the defendant, acting through its board of commissioners, leased of the plaintiff a suite of rooms in the city of Wahoo for the use of the superintendent of public instruction for Saunders county. That officer took immediate possession, and continuously occupied the premises until January 4, 1894, when his official term expired. On March 8, 1893, the defendant gave notice that it would not require the use of the leased rooms after the 1st of the following month. But neither at the time fixed in the notice to terminate the tenancy, nor afterwards, until January, 1894, was there any surrender of possession to the plaintiff. In June, 1893, a bill for rent for the two previous months was presented to the county board and disallowed. From the order of disallowance no appeal was prosecuted. Afterwards a bill for rent covering the period from April 6, 1893, to January 4, 1894, was presented to the county board for allowance and was allowed. A taxpayer appealed to the district court, where a trial to a jury resulted in a verdict and judgment for the defendant.

The judgment must be reversed. A tenant, while occupying demised premises, cannot absolve himself from the obligation to pay rent by notifying his landlord that on a certain day the relation existing between them will be terminated. A surrender of possession is indispensa-

ble to a severance of the relation. The county rented the rooms in question for the use of a county officer. It put him in possession, with the public records and office furniture. The commissioners had power to dispossess him and cause the records and office furniture to be removed, but they seem to have made no effort to effectually exercise their authority. Under these circumstances there can be no doubt of the liability of the defendant to pay rent. A public corporation is bound by the acts and contracts of its authorized agents within the scope of their agency, to the same extent that a private corporation or an individual is. When a county, or other municipal body, rightfully becomes the lessee of real estate, it is amenable to the law governing the relation of landlord and tenant. It cannot assert the rights incident to that relation and repudiate its obligations.

But it is contended by the defendant that plaintiff's entire claim for rent was adjudicated by the disallowance of the bill for the months of April and May. This contention cannot be sustained, because it appears that the order of disallowance was reconsidered. The action of the board in relation to the matter is shown by the transcript certified by the county clerk to the district court, and is as follows: "And now on this 1st day of September, 1894, the following proceedings were had in said board relative to said claim, and the following entry was indorsed on said claim: 'September 1, 1894. Board reconsidered their vote on bill for April and May, and allow this bill in full.'" The power of the commissioners to reconsider the order made by them in June of the previous year is denied, but the case *State v. Baushausen*, 49 Neb. 558, is a direct authority to the effect that such action was authorized and valid.

It is argued that there was no competent evidence to prove that the board reconsidered the order of June, 1893. There was precisely the same evidence of the fact that there was of the existence of the order appealed from. Both orders were blended together, and evidenced

in the same way. Before an order is formally entered on the record it may be proved by the clerk's memorandum or the judge's minutes. (*Commonwealth v. Hatfield*, 107 Mass. 227; *McGrath v. Scagrave*, 2 Allen [Mass.] 443; 2 Jones, Evidence sec. 638.) The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THOMAS H. MCCAGUE, RECEIVER OF THE GERMAN SAVINGS BANK OF OMAHA, APPELLEE, V. ALBERT MILLER ET AL., APPELLANTS.

FILED SEPTEMBER 23, 1898. No. 9878.

Municipal Corporations: WIDTH OF STREETS: EVIDENCE: REVIEW. The owners of real estate situated within the corporate limits of a city subdivided and platted the same. On the recorded plat, L street, which the public authorities had previously undertaken to establish, was indicated as being 66 feet wide, and the surveyor's certificate, in effect, declared that to be its width. The owners of the subdivision built houses on said street as shown on the plat, and along the same constructed a sidewalk, of which the general public enjoyed the unhindered use. They also mortgaged some of the lots, and represented to the mortgagee, as an inducement to make the loan, that such lots were located on L street. *Held*, That the finding of the trial court that L street is a thoroughfare 66 feet wide was warranted by the evidence, and should be sustained.

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

Byron G. Burbank and *Virgil O. Strickler*, for appellants.

Ralph W. Breckenridge, contra.

SULLIVAN, J.

In 1881 James C. Ish, a minor, became the owner of tax lot 57 in the city of Omaha. In 1890 his guardian conveyed the property to Charles C. Spotswood, who

afterwards conveyed it to Orrin R. Cain, in trust for a partnership composed of William G. Bohn, Renfrew Stevenson, and Charles C. Spotswood. In both deeds the property was described by metes and bounds as follows: "Beginning at a point 2,450⅝ feet north of the southwest corner of the southwest quarter of section ten in township 15 north of range 13 east of the 5th principal meridian, and running thence east 920 feet; thence north 189⅜ feet to the north line of said quarter section; thence west 920 feet; thence south 189⅜ feet, more or less, to the place of beginning, containing 4 acres of land including streets, be the same more or less, subject to all lawful streets along and upon the same." In September, 1890, the partnership aforesaid caused a plat of the premises to be made, acknowledged, and recorded in the office of the register of deeds for Douglas county. The acknowledgment of Cain attached to the plat is as follows: "Orrin R. Cain, the owner and proprietor of Cain Place, which is located as follows: Beginning at a point 33 feet east and 33 feet south of the southwest corner of the northwest quarter of section 10, T. 15, R. 13 E.; thence east 887 feet; thence south 156.75 feet; thence west 887 feet; thence north 156.75 feet to the place of beginning, —do hereby state and admit that the survey and subdivision of said land as shown within the red lines on the above plat is made in accordance with his wish and desire, and he hereby dedicates to the public, for their use, the alleys shown on said plat, and hereby ratify and approve the same." Within the red lines mentioned in the acknowledgment is included all the land described in the guardian's deed to Spotswood and in the deed from Spotswood to Cain, excepting only 33 feet on the west side, which is conceded to be a part of Twenty-fourth street, and 33 feet on the north side, which plaintiff contends is part of Locust street. Kountze Place, lying immediately north of tax lot 57, was surveyed and platted in 1886, and on the plat a strip 33 feet wide adjoining said tax lot was designated as "Locust street,"

and dedicated to the public use. In the summer of 1891 the partnership before mentioned completed the erection of eighteen dwelling-houses in Cain Place and constructed a sidewalk in front of the same. This sidewalk was laid just outside the northern boundary of Cain Place and has been in general use by the public ever since it was built. In March, 1891, to secure the payment of a large sum of money borrowed of the German Savings Bank, the partnership caused mortgages to be executed to said bank covering eight lots in Cain Place. These lots were described in the mortgages by metes and bounds, the northern boundary in each case being coincident with the northern boundary of Cain Place as described in the recorded plat. The mortgages were afterwards foreclosed and the bank became the purchaser at the foreclosure sale. The plaintiff is the duly constituted receiver of said bank and, acting in that capacity, commenced this action to enjoin the defendants from asserting title to and obstructing travel along the south half of Locust street in front of Cain Place. The defendants insist that the *locus in quo* is not a public street, and that they have succeeded to, and now hold, the title formerly held by Cain and the partnership. The trial court found the issues in favor of the plaintiff, and from a judgment rendered against them the defendants have appealed to this court.

Among other things the trial court found that there had been a statutory dedication of the disputed strip by the legal and equitable owners thereof, and, in response to the claim of plaintiff that the facts proven established a common-law dedication, the court also made the following finding: "That the use of the strip of land 33 feet in width immediately to the south of and adjoining the lots in Cain Place by the public for street purposes from the completion of the houses erected in Cain Place in June, 1891, to August, 1897, without hindrance from the defendants or from those who claimed title, is a dedication by them of the same as a street." Counsel for defendants

contend that the evidence does not warrant a finding that there was either a common-law or statutory dedication. We think it does. It appears from the printed abstract that in 1886, after Kountze Place had been platted, the proper authorities of the city of Omaha, in order to give Locust street a width of 66 feet from Twentieth street to Twenty-fourth street, instituted and carried to a conclusion proceedings condemning the north 33 feet of tax lot 57. Whether these proceedings were regular and valid we do not decide, but it is evident that Cain and the partnership considered them valid at the time Cain Place was platted, for on the plat they represented Locust street as being of full width.

But it is argued that the failure to include the disputed strip within the red lines evinces a clear intention on the part of the dedicators not to devote it to the use of the public as a highway. The transaction is susceptible of a more reasonable construction. It seems to us that the plat was executed on the assumption that Twenty-fourth street and Locust street had been previously established and that, therefore, a formal dedication assuming to give to the public an easement which it already possessed would be both unnecessary and incongruous. Each of these streets was distinctly marked on the plat of Cain Place as being 66 feet wide and the surveyor certified that the property surrounding Cain Place was as represented on the plat. This certainly was a deliberate and unequivocal recognition and affirmation of the existence of Locust street as a thoroughfare 66 feet wide. The plat did not assume to grant title to the streets shown thereon, but rather to ratify and confirm a pre-existing title. It possessed the essential elements of an express dedication of those streets, and should be given effect according to its obvious import. (*Great N. R. Co. v. City of St. Paul*, 61 Minn. 1; *Gilbert v. Emerson*, 60 Minn. 62; *City of St. Louis v. Missouri P. R. Co.*, 114 Mo. 13; *City of Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *City of Denver v. Clements*, 3 Colo. 472.)

That we have not misinterpreted the plat, nor failed to comprehend the meaning of Cain and his associates in making it, is evidenced by the fact that in each of the eight applications made by them to the German Savings Bank for the loans on the lots here in question they represented that those lots were situated on Locust street. It seems, however, that the city has never improved, nor exercised any dominion over, the south half of Locust street, and that the partnership on numerous occasions assumed to mortgage and sell portions of the same. It also appears that the city council in January, 1893, passed an ordinance to vacate said street between Twentieth street and Twenty-fourth street; that soon afterwards proceedings were commenced to re-establish the portion of the street vacated; that damage amounting to $8,195 was assessed in favor of the partnership; that the German Savings Bank claimed the full amount of this award under its mortgages; and that the city thereupon abandoned the proceedings and repealed the ordinance under which the assessment had been made. It is now insisted that these facts show that there was neither a dedication of the south half of Locust street by the owners of Cain Place nor an acceptance of such street by the city. The facts stated afford an inference against a common-law dedication, but they are not decisive, and we cannot say that the finding of the trial court upon that question is not sustained by sufficient evidence. The judgment is

AFFIRMED.

J. MCGREGOR ADAMS, APPELLANT, V. RALPH R. OSGOOD, APPELLEE.

FILED SEPTEMBER 23, 1898. No. 8226.

1. **Dismissal: TRIAL OF COUNTER-CLAIM.** A plaintiff has the right, before final submission of his cause of action, to dismiss the same, but this right does not control the right of the defendant

to proceed to the trial of a set-off or counter-claim properly pleaded by him in his answer.

2. **Taxation**: EVIDENCE OF LEVY: TAX RECEIPT. A tax receipt is not sufficient to establish the fact of the levy or assessment of taxes when such levy or assessment is disputed in the pleadings.

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

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

Henry W. Pennock, contra.

RYAN, C.

It is admitted by both parties to the present controversy that this action, under conditions differing somewhat from those now presented, was considered in *Adams v. Osgood*, 42 Neb. 450. When the case was remanded, Adams, the original plaintiff, with leave of court, dismissed as to the cause of action set up in his petition. As this was before the final submission it was but the exercise of a right given by statute. (Code of Civil Procedure, sec. 430.) This dismissal, however, did not affect the right of the defendant to proceed to the trial of his claim. (Code of Civil Procedure, sec. 431.)

In the record submitted for our consideration there is no transcript of the petition as to which the above dismissal was made, and we therefore cannot consider arguments which, for their application, depend upon the averments contained in that pleading. (*Calmelet v. Sichl*, 54 Neb. 97.)

Proceeding upon his answer and cross-petition as entitling him to a foreclosure for the amounts of various general taxes and special assessments for improvements in the city of Omaha paid by him, Osgood introduced no proof of the levy or assessment of such taxes, but relied solely upon his tax receipts as being sufficient to afford proof of such levy and assessment in each instance, and now defends this course by citing *Leavitt v. Bell*, 55 Neb. 57. In that case the language relied on is found in the

discussion of the validity of certain paving taxes and, *arguendo*, it was said: "Where a lien is sought to be enforced for general taxes, the presumption is that the statutes in reference to the levy and assessment of these and the sale of the real estate for their non-payment have been complied with, and the burden of showing irregularities or that such a tax sale is void is upon the party asserting such fact." This language implies that in the writer's mind there was a different question from that now presented, and that was, upon whom was the burden of proof to establish a levy and assessment of taxes sought to be foreclosed when the fact of such levy and assessment was disputed? This thought is greatly strengthened by the fact that in support of the above proposition there was cited *Adams v. Osgood*, *supra*, in which it was said: "As a general principle tax receipts alone are not evidence of the existence of the taxes to which they relate; that is, the receipt does not prove that the taxes for which it calls were legally assessed or levied upon the property. (*Miller v. Hurford*, 13 Neb. 13; *Clark v. Blair*, 14 Fed. Rep. 812.)" Following the above language there was a discussion of the petition, not now before us, in which discussion it was shown that the plaintiff, Adams, having alleged an assessment and levy, was concluded by his own averments as to these steps having been taken. It has been distinctly held by this court that the production of a tax receipt was not sufficient to establish the existence of a levy and assessment when such levy and assessment were disputed facts in the case. (*Merrill v. Wright*, 41 Neb. 351.) As the judgment of the district court was not supported by sufficient evidence it is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

IRVINE, C., not sitting.

HERMAN WAGENKNECHT ET AL. V. JAMES E. SEELEY ET AL.

FILED SEPTEMBER 23, 1898. No. 8239.

1. **Foreclosure:** DECREE: ORDER OF SALE. The sale of real property under foreclosure proceedings is by virtue of the decree, the terms of which cannot be modified or controlled by an order of sale issued by the clerk of the court in which such decree is entered.
2. ———: CONFIRMATION OF SALE: OBJECTIONS. Objections to confirmation considered, and shown not to be founded upon facts disclosed by the record.

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

Ed L. Adams, for plaintiffs in error.

Stewart, Hague & Anderbery, contra.

RYAN, C.

This proceeding in error from the district court of Kearney county is prosecuted for the review of an order confirming a sale of real property upon foreclosure of a mortgage. The decree was in favor of the original plaintiff for the sum of $55.50, and in favor of one of the defendants on her cross-petition for the sum of $1,498.50. Previous to the sale which we have under consideration there had been a sale of which confirmation had been denied, and in the order of denial was the direction that "a new order of sale is ordered on the same certificates." The sale under consideration was conducted on the theory that the certificates referred to in the language quoted were the certificates of incumbrances. The first objection which plaintiffs in error now insist should have been sustained was that new certificates of incumbrances were not filed after the issuance of the second order of sale, which is the one now under consideration.

It is not urged that these certificates were incorrect

in any respect whatever, but merely that they were filed too early—that is to say, before the issuance of the second order of sale. The sale on foreclosure proceedings was under and by virtue of the decree itself, and its validity is not dependent upon the existence of an "order of sale," as it is ordinarily designated. Such an order, commonly made use of, is but a convenient method by which the clerk of the court certifies to the sheriff, or other officer to conduct the sale, the decree under which he is to proceed; and his proceedings, in all respects, must be governed by the terms of the decree. (*Jarrett v. Hoover*, 54 Neb. 65.) This objection to confirmation was therefore without merit.

The second objection to confirmation was that the amount of the bid was not equal to two-thirds of defendants' interest in the land. The appraised value was $2,000, and the deduction of prior liens left $1,927.99 as the interest of the defendants. Two-thirds of this sum is $1,285.33. The sale was for the sum of $1,400, which renders further notice of the objection unnecessary.

It is objected that the appraisers did not deduct the amount of the liens, and thus report the interest of the defendants. It is not understood why this objection is urged, for the deduction was actually made as it is insisted it should have been made. It is urged that the appraisement was too low, but of this there is in the records no evidence whatever. There was no objection which has not been considered, and it results that the order of confirmation must be

AFFIRMED.

JACOB MILLER V. EMMA DALY.

FILED SEPTEMBER 23, 1898. No. 8259.

Amendment of Judgment. In an action dismissed for want of jurisdiction, a simple judgment for the value of the property, entered upon the express waiver by the defendant of the return of the property to him, cannot, as a matter of right, almost a year later, be amended upon his motion, so that the judgment shall be for the return of the property or for its value.

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

Thomas C. Patterson, for plaintiff in error.

T. Fulton Gantt, contra.

RYAN, C.

In the district court of Lincoln county, Emma Daly began this action of replevin for the possession of certain household goods which she alleged were wrongfully detained from her by Jacob Miller, the sheriff of said county. After the property had been appraised and an undertaking had been given, Miller appeared specially and objected to the jurisdiction of the court in the cause on various grounds. This objection was sustained November 16, 1894. On December 17, 1894, there was filed on behalf of Emma Daly a motion "To assess the value of the property wrongfully taken by plaintiff from defendant in said action, and render judgment for the value thereof in favor of defendant and against plaintiff, in accordance with the provisions of section 193*a* of the Civil Code of the state of Nebraska." On December 18, 1894, this motion was sustained, and in this connection the record of the district court contains the recitations that "Defendant waives return of property, and on hearing the court finds the value of the property to be $300, and adjudges the damages of the defendant against plaintiff to be $300, defendant to recover costs from plaintiff, to

all of which findings plaintiff duly excepts." On December 19, 1894, Emma Daly filed a motion for a rehearing in which were assigned various grounds, of which none was the same as that now presented. This motion was overruled December 20, 1894. On December 16, 1895, Jacob Miller, pursuant to a notice given a few days before, moved the court for an order as recited in the motion—"Correcting the mistake of the clerk of said court in entering up a judgment in said cause for money only, instead of in the alternative as required by section 190 of the Code." This motion was overruled and the error assigned is this ruling of the district court.

The order originally obtained was granted, as recited in the record, upon defendant's waiver of the return of the property replevied. Nearly a year after this order had been made upon the assent of the defendant in the district court, he appeared therein and moved for an alternative order for the return of the property, or its value, under the provisions of a section of the Code of Civil Procedure applicable where there had been a trial to a jury, and this right to a correction at so late a date he predicates upon the alleged mistake of the clerk of the court. There is no bill of exceptions in this case and we cannot therefore consider the matters of evidence upon which the district court reached its conclusions of fact. If there was any mistake in this matter, it certainly was not the mistake of the clerk of the court, judging from the record upon which this case is submitted. Plaintiff in error assented to what, from the record, seems to have been the proper order. He acquiesced in that order for nearly a year, until after the return of an execution *nulla bona* against the defendant in error, and now asks to correct the alleged mistake as being one committed by the clerk of the court. The judgment for the simple value of the property was justified by the express waiver of the return of the property, and the correction sought is not a clerical error, omission, or oversight. The relief sought requires to be made a radical

change of the recitation of a solemn admission upon which the court acted. Under the circumstances the district court very properly refused to sustain the motion for relief, and its ruling is therefore

AFFIRMED.

D. R. DANIEL ET AL. V. HENRY SCHOMBERG ET AL.

FILED SEPTEMBER 23, 1898. No. 8270.

Trial on Motion for Deficiency Judgment: EVIDENCE. In the trial for the purpose of ascertaining whether or not a deficiency judgment should be rendered, it is not prejudicially erroneous to receive in evidence copies of the pleadings and of the return of the sheriff on the order of sale; neither is it prejudicially erroneous to permit the clerk of the district court to testify that the costs have been paid out of the proceeds of the foreclosure sale.

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

Beels & Schoregge and *G. N. Beels*, for plaintiffs in error.

Robertson & Wigton and *Powers & Hays, contra.*

RYAN, C.

This error proceeding is for the reversal of a deficiency judgment rendered by the district court of Madison county.

It is assigned as error that the petition or order did not state facts sufficient to constitute a cause of action. There is in the record no petition, except as found in the bill of exceptions, and the order is one requiring cause to be shown by a time fixed why a deficiency judgment for a certain amount should not be entered. There was no attempt to make such a showing. There were introduced in evidence a copy of the petition and all other pleadings in the original case as well as the return of the sheriff on the order of sale showing how much had

been realized therefrom. Though objected to, we think these papers, while probably some of them were unnecessary, were not prejudicial to any right of the plaintiffs in error.

The clerk of the district court aforesaid was sworn and testified as to the amount of the costs and that they had been paid out of the proceeds of the foreclosure sale. Plaintiffs in error could have suffered no injury from this kind of testimony, and, as no other points are presented by the petition in error, the judgment of the district court is

AFFIRMED.

FARMERS BANK OF KEARNEY V. EDWARD OLIVER.

FILED SEPTEMBER 23, 1898. NO. 8271.

Usury: RENEWALS: DEFENSE TO NOTE. Where a usurious loan has been repeatedly renewed, and the notes evidencing the indebtedness have been taken in the name of a bank, or of its cashier, indifferently, and each transfer has been after due, the holder of the final note, who prosecutes the action, does so subject to any defense of usury which might have been set up against said note or any of its antecedents.

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

Dryden & Main, for plaintiff in error.

E. C. Calkins, H. V. Calkins, and *F. G. Hamer, contra.*

RYAN, C.

This action was brought in the district court of Buffalo county by the Farmers Bank of Kearney on a promissory note of date August 16, 1893, payable December 16, 1893, to S. H. Graves or order. The defense was usury, and the evidence was not conflicting that there was usury, but there was a contradiction as to the rate per cent charged and collected in excess of the maximum allowed by stat-

ute. The note sued on was one finally given after a series of renewals. When the first note in the series was made, which was May 4, 1884, S. H. Graves and H. J. Robbins were the payees. From that time until July, 1889, Graves conducted the banking business as the successor of Graves & Robbins. At the date last named the Shelton Bank was actually incorporated, though during the time when Graves alone was conducting the business he used the name of the Shelton Bank. It is unnecessary to discuss the rights of innocent purchasers of usurious notes, for there was none such in this case, for the Shelton Bank, after its incorporation, was managed by Graves as its cashier, and whenever there was a transfer in the course of the several transactions it was of a note past due by its terms. Mr. Graves testified as a witness for Oliver, and in his testimony stated that the first loan to Mr. Oliver, May 4, 1884, was of $1,215. The next loan was on September 5, 1885, of $617.72. On August 4, 1886, there was a further loan of $351.75. On August 19, 1887, there was still another loan of $781.05. And on May 12, 1888, there was a loan of $519. On May 29, 1888, there was a loan of $578.42. On January 17, 1890, there was a note made for $152.75, of which $121 had been evidenced by a small note. The defendant testified that he paid interest at the rate of 18 per cent per annum for three years, and thereafter at a less rate, decreasing to 12 per cent per annum, which last named rate was paid on the final note. Some of these payment were made in cash and some were included in the renewals. It was admitted by Mr. Graves that there had been a payment of $2,500 on August 16, 1893. Now, giving him credit for all the money he would testify there was actually loaned, the sum total is $4,094.69, from which having deducted the payment of $2,500 there remained $1,594.89 of the principal without reference to interest. The evidence was not explicit or satisfactory as to the amounts of interest paid. The jury evidently accepted the general statement of Mr. Oliver as to the rate per cent at which

he paid during deferred periods, and the amounts thus fixed exceeded the face of the note sued on.

It is however insisted—and one citation* is made of an adjudicated case, which perhaps somewhat tends to establish the proposition—that, as the transaction at one time branched into two notes, one of which was overpaid by the $2,500 payment, the proportioned usury on that note could not be availed of by the defendant on this note. The transactions were treated by Graves as indivisible, and the taking of the two notes was a mere matter of his own convenience. The defendant in error, it was stipulated, took the note in suit after its maturity. He was therefore in the same situation that his grantor would have been in had he sued, and the note was subject to the same defense of usury.

There is found no error in the record, and the judgment of the district court is

AFFIRMED.

NYE & ORMSBY V. NORTHERN ASSURANCE COMPANY OF LONDON.

FILED SEPTEMBER 23, 1898. No. 8282.

Insurance: AMOUNT OF RECOVERY FOR LOSS: DIRECTING VERDICT. The evidence in this case examined and *held* to justify the giving of an instruction to find for plaintiff in a certain definite sum.

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

Greene & Hostetler, for plaintiffs in error.

Ira D. Marston, contra.

RYAN, C.

This action was for the amount of loss by the partial destruction of a stock of confectionery and baking goods,

Aiken v. Waco State Bank, 16 S. W. Rep. [Tex.] 747.

owned by the plaintiffs in error. The district court of Buffalo county, from which this error proceeding is prosecuted, instructed the jury that as the parties had agreed that the damage to the goods not destroyed was $100, and the value of those destroyed was by the insurance company admitted to be $27.90, a verdict should be returned for $127.90, and accordingly there was a verdict and judgment. In the testimony of F. H. Ormsby, a member of the firm of Nye & Ormsby, he admitted that it was agreed between himself, acting for the said firm, and the agent of the insurance company, that the damage to the goods not destroyed was $100. This was not contradicted. The proof of loss of goods destroyed fixed their value at $27.90, so that as to both items the court properly instructed the jury to find as it did. The judgment of the district court is

AFFIRMED.

CHARLES MCVEY V. STATE OF NEBRASKA.

FILED SEPTEMBER 23, 1898. No. 9883.

1. **Witnesses**: IMPEACHMENT. Preliminary to the impeachment of a witness because of inconsistent statements made at a previous time, the attention of the witness should be called to the time and place where such alleged statements had been made.
2. ———: ———. If it is sought to impeach a witness because she is a prostitute, inquiry should be made as to that fact, and not with reference to habits which are not characteristics peculiar to prostitutes alone.
3. **Criminal Law**: PRESUMPTION OF INNOCENCE. Instruction examined, and *held* not to state that the presumption of innocence exists in favor of the accused when no evidence has been introduced.

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

W. S. Shoemaker, for plaintiff in error.

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

RYAN, C.

In the district court of Douglas county Charles McVey was convicted of feloniously stealing from the person of Rosa Schmidt, without threats of violence, certain described property and money of the aggregate value of $14 and was sentenced to imprisonment in the penitentiary for a period of three years. The alleged errors of which he makes complaint in this court shall now be considered, though it may be well to premise that the evidence was amply sufficient to justify the verdict of the jury.

Minnie Sauers, a married woman, had testified to seeing the accused commit the offense with which he was charged. On cross-examination she was asked whether or not she frequented wine rooms. An objection that this was incompetent, immaterial, and irrelevant was sustained, and it is now insisted that this was prejudicially erroneous, for the reason that if an answer had been made to the question, it would have been followed by others which would have shown that the witness not only frequented wine rooms, but, as we understand it, solicited patronage as a prostitute. If this was the character of this woman, and by reason of this fact it was intended to impeach her credibility, there should have been propounded questions bearing directly upon that fact, if it existed. We cannot assume that if the inquiry had been permitted as to whether or not this witness frequented wine rooms, her answer would have justified other inquiries damaging to her credibility. At most, the question, on the theory of plaintiff in error, was but introductory. The material questions should have been propounded, and their effect not left to mere conjecture based upon mere assumption.

It was sought to impeach the testimony of Mrs. Schmidt by showing that shortly after her pocket had been picked she had said she thought Mr. McVey was the culprit, but would not say so positively. Her at-

tention, on direct examination, had not been directed to the time and place and in whose presence these statements had been made. There was, therefore, no proper foundation for her impeachment on this line, and the district court committed no error in its ruling on this point.

It is urged that the court improperly asked questions of different witnesses, but, as there was no objection, ruling, or exception as to any question thus propounded, we cannot say there was error by reason of the part thus taken in the trial by the court.

There were objections urged to the ruling of the court refusing to permit witnesses to answer immaterial questions—for instance, whether one had filed an information; whether another was as sure the accused wore a light hat as that the person whom the witness had identified was the accused; what a witness saw witness doing at a certain time and place, the question being clearly intended to fix such time and place as introductory to testimony directly connecting the accused with the commission of the offense charged. It would be a needless consumption of time to consider these matters to the extent argued. Our estimate of their lack of materiality has already been sufficiently indicated.

There was evidence that two officers, shortly after the commission of the offense charged, had unsuccessfully attempted to find McVey in Omaha, but this we do not regard as specially important in view of the fact that Mrs. McVey, the mother of the accused, admitted on her cross-examination that he left Omaha on the morning of the day the offense was committed and did not return for four weeks thereafter. The testimony of the officers but slightly justified the inference of guilt from flight, but the admission of the mother rendered it quite likely that the absence of the accused was attributable to his own guilty consciousness. There was no error in admitting the testimony of the officers for whatever it was worth. The objections to the introduction of testi-

mony have been noted separately, or are of the general nature which has been noted.

In respect to a part of an instruction, exception was taken to this language: "And if no evidence was introduced, under the presumption of innocence you should acquit him." It is argued that the language just quoted admits the force and effect of the presumption of innocence to cases where no evidence is introduced on either side. As it is admitted that this language, if it stood alone, would be proper, but it is claimed that in the connection in which it occurs it is erroneous, we quote the entire instruction: "The law presumes the defendant innocent until he is proved guilty beyond a reasonable doubt. This presumption partakes of the nature of evidence, and if no evidence was introduced, under the presumption of innocence you should acquit him; and this presumption continues throughout the trial until he has been proven guilty beyond a reasonable doubt. The defendant has been arraigned on the information in this case, and has pleaded not guilty. The plea of not guilty casts upon the state the burden of establishing by evidence all the material allegations in the information as herein explained by the court, beyond a reasonable doubt, before you would be warranted in returning a verdict of guilty against him." It is quite probable that nothing was gained by stating what the rule would be if no evidence had been introduced, for no such conditions confronted the jury; but this part of the instruction we regard as being but a rhetorical flourish which in no way could have harmed the accused. The jury must have understood from the instruction as an entirety that the law presumed the defendant innocent, and that his guilt, if it existed, must be established by such weight of evidence as left no reasonable doubt thereof in the minds of the jurors. There are found no errors in the record prejudicial to the plaintiff in error, and the judgment of the district court is

AFFIRMED.

DAVID E. JOHNSON V. STATE OF NEBRASKA.

FILED SEPTEMBER 23, 1898. No. 10018.

Bastardy: EVIDENCE. To sustain a finding of guilty in the trial of a bastardy case in the district court of the proper county, it is necessary to show by the evidence that the mother, at the time of the birth of the alleged bastard, was an unmarried person.

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

Randolph McNitt, for plaintiff in error.

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

RYAN, C.

Before the county judge of Webster county, Lillie Churches, an unmarried woman, on April 20, 1897, made complaint under oath that she was pregnant with a child, which, if born alive, would be a bastard, and that David E. Johnson was the father of said child. Upon a hearing the said Johnson was required to give bonds for his appearance at the next ensuing term of the district court, which he did, and upon a trial therein had was found guilty.

The only question argued is as to the necessity of proving that, at the time of the birth of her child, Lillie Churches was an unmarried woman. She testified as to her age, and that the defendant was the father of the infant, following which testimony the bill of exceptions contains this language:

Q. You may tell the court where and under what circumstances the child was begotten?

A. It was over in brother's shed.

Q. Where were you?

A. I went over there to milk.

Q. And he came to you?

A. Yes, sir.
Q. And had intercourse with you?
A. Yes, sir.
Q. When was that?
A. About the 26th of September, 1896.
Q. And when was this child born?
A. June 11, 1897.
Q. Where is Mr. Johnson now; do you know?
A. No, sir, I do not.
Q. You were an unmarried woman at the time this occurred?
A. Yes, sir.
Q. Living where? With your parents?
A. Yes, sir.
Q. And you were about nineteen years old at that time or a little less?
A. A little less than nineteen.

The trial took place on January 10, 1898, and the witness testified that she was 20 years of age on October 17, 1897. It is not clear what occurrence was referred to when she stated what was her age, unless we take into account her statement that at the time of said occurrence she was less than 19 years of age. As the birth of the child was when she had nearly reached the age of 20, it is quite clear that the occurrence she testified concerning was the act of coition. There was therefore no evidence as to whether or not she was a married person when her child was born. Under this condition of the evidence, what rule is applicable? Plaintiff in error, to sustain the proposition that the complainant must at the time of the birth of the child be unmarried, cites *People v. Volksdorf*, 112 Ill. 292, and *Haworth v. Gill*, 30 O. St. 627. In the first of these two cases the mother was unmarried when the child was born, but married subsequently, and it was held that this fact did not disqualify her to make the complaint upon which the reputed father was tried. In *Haworth v. Gill, supra*, it was held incompetent to prove non-intercourse between married persons with the view

of letting in evidence which rendered it probable that the accused was the father of a child whose mother had procured a divorce from the husband before the child was born. It will be readily seen that these cases afford no light with respect to our present inquiry.

By chapter 37, Compiled Statutes, it is provided that on complaint of any unmarried woman, pregnant with a child, which, if born alive, may be a bastard, a warrant shall issue for the apprehension of the person in such complaint alleged to be the father of such child, and that thereupon there shall be an examination of the complainant under oath. If the accused shall pay, or give sufficient security for the payment, to complainant, of such sum as shall be satisfactory to her, and shall give bond to the county commissioners of the proper county to save the county free from all charges toward the maintenance of such child, the magistrate who issued the warrant may discharge the accused from custody upon payment of costs. In case of non-compliance with the above requirements, the magistrate must bind the accused to appear at the next term of the district court to answer the accusation against him, and in default of such recognizance the accused meantime must be confined in the county jail. When the accused shall plead not guilty to such charge before the court to which he is recognized, that court must order the issues to be tried by a jury; and if the accused be found guilty, he shall be judged the reputed father of the child, and shall stand charged with its maintenance as the court may direct, and give bond accordingly, or be committed to the county jail. This statute was evidently not framed so much for the protection of the accused as for the indemnification of the public against expense. In order that this end may be met the accused is denied the right to a hearing and discharge by the examining magistrate, no matter how clearly he may demonstrate his innocence. The magistrate can only take security for the appearance of the accused at the next term of the district court; otherwise there must

be a commitment to jail. Under section 302 of the Code of Criminal Procedure a person even accused of murder might be discharged by a magistrate, if there exists no probable cause for holding him; but in a bastardy proceeding the examining magistrate can exercise no discretion, but must exact bonds, not for the appearance of the accused but for the performance of certain conditions for the benefit of the public, and to the satisfaction of his accuser, or require a recognizance for his appearance. The theory on which these harsh requirements are based is that the woman in the case, if she has no protector, will become a helpless public charge, as will also her offspring upon its birth. When that event takes place, if she has a husband, there exists no justification for holding the accused liable to her for the support of herself or her offspring and it may be safely assumed the public then has no further concern for the support of either the mother or child. A statute as arbitrary as that under consideration should not, by implication, be extended beyond its reasonable purpose. The statutory requirement that the child, if born alive, will be a bastard, implies that it shall not be born in wedlock, for if its mother at the time of its birth is a married woman, the child would not in law be deemed a bastard. The provisions of the statute fix the liability of the putative father, and none of its essentials can be ignored. Because of the failure of proof indicated the judgment of the district court is reversed and the cause remanded for further proceedings.

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5. A written contract requiring certain services to be rendered personally by a party thereto and forbidding a transfer by him of his interest and liabilities cannot be assigned to a third person so as to vest in the assignee a right, in equity, to an accounting for the value of services rendered by him. *Zetterlund v. Texas Land & Cattle Co*..... 355

Assignments—*concluded.*

6. An agreement of a debtor to pay his creditor's claim out of the moneys of a particular fund, but which gives the creditor no present right in or control over such fund or any part thereof, does not operate as an equitable assignment of any part of such fund to the creditor. *Fairbanks v. Welshans* 362

Assignments for Benefit of Creditors. See VOLUNTARY ASSIGNMENTS.

Assignments of Error. See REVIEW, 9-17.

Associations. See CORPORATIONS.

Attachment. See EVIDENCE, 36, 37. FRAUDULENT CONVEYANCES, 6.

1. Sheriff's possession of goods justified by verdict of jury because of writs of attachment. *Brown v. Sloan*..... 29
2. An attachment based on a false affidavit of defendant's non-residence is void. *German Nat. Bank v. Kautter*..... 103
3. Where plaintiff in attachment seizes a resident's property as that of a non-resident and sells it under a judgment rendered on constructive service, defendant, in absence of an appearance, may attack such judgment in a later suit by him wherein the attachment plaintiff invokes such judgment as a defense. *Id.*
4. Under a sale of a non-resident's realty seized on attachment, the purchaser acquires a title not subject to collateral attack, though the publication of notice preceding the judgment might have been held defective if it had been properly assailed. *Brown v. Bose*..... 200

Attorney and Client. See WITNESSES, 8.

1. Advising with the sheriff as to the proper levying of a writ of attachment is a proper service to a client for which an attorney is entitled to compensation. *People's Nat. Bank v. Geisthardt*..... 232
2. Rendition of a rejected bill for services does not estop the attorney from suing for a larger amount. *Id.*

Attorneys. See NEW TRIAL, 7.

Attorneys' Fees. See CONFLICT OF LAWS, 1. COSTS, 1.

Bailment. See PAYMENT, 3.

Banks and Banking. See CORPORATIONS, 9, 10. INSURANCE, 4. NEGOTIABLE INSTRUMENTS.

1. A bank to which a note had been sent for collection may be held liable to the owner for the amount due thereon, where the bank forwarded the note to another bank which, pursuant to instructions, made collection and credited the proceeds to the former bank, though the collecting bank failed immediately thereafter. *First Nat. Bank of Omaha v. First. Nat. Bank of Moline*..... 303

Banks and Banking—*concluded.*

2. A bank holding paper for collection merely, and charged with no duty other that its due presentment, if it discharges that duty, and is guilty of no misrepresentation or fraudulent concealment, is not forbidden to obtain a preference for a debt owing to itself from the same debtor. *United States Nat. Bank v. Westervelt*..... 425

Bastardy. See JUDGMENTS, 16-19.

To sustain a finding of guilty it is necessary to show by evidence that the mother, at the time of the birth of the alleged bastard, was an unmarried person. *Johnson v. State*.. 781

Bids. See EXECUTIONS, 20.

Bill of Exceptions. See REVIEW, 18-21.

1. Solely by stipulation, a bill of exceptions in one case cannot be made a part of the record of another case, though the two cases are between the same parties. *Murphy v. Warren*, 220

2. A bill of exceptions, to be considered in reviewing the judgment of a district court, must be a part of the record of the case, and to make it such it must be settled as the bill of exceptions in the case under review, in pursuance of section 311 of the Code. *Id.*

Bill Rendered. See ESTOPPEL, 3.

Billiards. See MUNICIPAL CORPORATIONS, 5.

Bills and Notes. See NEGOTIABLE INSTRUMENTS.

Bonds. See ABSTRACTS OF TITLE. OFFICE AND OFFICERS, 1, 2. PRINCIPAL AND SURETY, 2-4. REPLEVIN, 3, 4.

Boundaries.

Evidence *held* to sustain a finding that a certain street is a thoroughfare 66 feet wide. *McCague v. Miller*..... 762

Breach of Contract. See CONTRACTS, 5. DAMAGES, 3, 4.

Brokers. See FACTORS AND BROKERS.

Burden of Proof. See HUSBAND AND WIFE, 1. MASTER AND SERVANT, 4. TAXATION, 4, 8. TRESPASS. TRUSTS, 2.

Cancellation of Instruments. See CORPORATIONS, 15.

Sufficiency of evidence to justify cancellation of mortgage. *German Nat. Bank v. Kautter*..... 103

Carlisle Tables. See EVIDENCE, 16.

Carriers. See TELEPHONE COMPANIES.

Cattle Stealing.

Evidence *held* insufficient to sustain a verdict against accused. *Hilligas v. State*..... 586

Census. See EVIDENCE, 5, 6.

Chattel Mortgages. See INSURANCE, 11. REPLEVIN, 7. SALES, 4.

A chattel mortgage made and filed in accordance with an agreement that mortgagor would give security of that kind, *prima facie* vested the mortgagee with right of possession of the property as against an officer levying thereon in the interval between such filing and the mortgagee's acquisition of knowledge that such filing had actually taken place. *Rein v. Kendall*..... 583

Clerk of Court.

Evidence *held* insufficient to sustain a finding that the population of Valley county was large enough to entitle it to elect a clerk of the district court. *Kokes v. State*..... 698

Collateral Attack. See ATTACHMENT, 4. RES JUDICATA, 1.

Collateral Security. See PLEDGES.

Commercial Paper. See NEGOTIABLE INSTRUMENTS.

Common Law.

While a mortgage by the deposit of title deeds is recognized in England, and while the law of England has been adopted by statute in Nebraska, the statute does not extend to those rules of the English law which contravene the object and purpose of Nebraska's statutes. *Bloomfield State Bank v. Miller* 243

Compromise and Settlement.

Offer of compromise *held* inadmissible in an action for deceit. *Boice v. Palmer*..... 389

Confirmation. See EXECUTIONS, 7-10, 16-20.

Conflict of Laws.

1. A provision, in a note, for payment of attorney's fees in case suit should be brought against the maker will not be enforced in Nebraska, though the note was executed and made payable in Iowa where the provision was lawful. *Hallam v. Tellcren*..... 255

2. The laws of another state, in absence of proof, are presumed to be the same as the laws of the forum. *Lonergan v. Lonergan*..... 642
Welton v. Atkinson..... 674

Consequential Damages. See DAMAGES, 3, 4.

Consideration. See MORTGAGES, 18. NEGOTIABLE INSTRUMENTS, 1.

Constitutional Law. See STATUTES.

1. The bill of rights is not an enumeration of all the powers reserved to the people. *State v. Moores*..... 480

2. The right of local self-government in cities and towns existed at the time the constitution was framed, and was not surrendered upon the adoption of that instrument, but vested in the people of the respective municipalities; and the legislature is powerless to take it away. *Id.*

Constitutional Law—*concluded.*

3. The right to maintain a fire department in a city or town is one of the rights vested in the people of municipalities, and is to be exercised by them, without legislative interference, except to the extent the lawmaking body may prescribe rules to aid the people of the municipalities in the exercise of such right. *Id.*

4. Courts cannot exercise legislative functions. *Nebraska Telephone Co. v. State*..... 627

Constructive Service. See ATTACHMENT, 3, 4.

Contempt.

Ordinarily the non-compliance with an order for payment of permanent alimony is not punishable as for contempt of court. *Leeder v. State*..... 133

Continuance.

1. An application for a continuance grounded on the absence of a material witness is properly denied where the party making the application has not been diligent in attempting to procure the testimony or compulsory attendance of such witness. *Life Insurance Clearing Co. v. Altschuler*..... 342

2. There was no prejudicial error in denying an application for a continuance in order to secure the testimony of witnesses who afterward appeared and testified at the trial. *Id.*

Contracts. See ABSTRACTS OF TITLE. ASSIGNMENTS, 5, 6. COVENANTS, 1. DAMAGES, 3, 4. EVIDENCE, 26. INSURANCE. MUNICIPAL CORPORATIONS, 21-23. PARENT AND CHILD, 1. PARTITION. PLEDGES. PRINCIPAL AND SURETY. SPECIFIC PERFORMANCE. STATUTE OF FRAUDS. TRUSTS, 2.

1. A court of equity cannot give effect to an oral contract declared void by the statute of frauds, under pretense of aiding an imperfect attempt to execute a contract. *Bloomfield State Bank v. Miller*..... 243

2. Facts stated in opinion *held* ample to sustain a finding that an agency existed, embracing the right to make the contract sued on. *Allsman v. Richmond*..... 540

3. Parties to a mortgage may contract that mortgagee, upon default in payment of interest, may declare the entire debt due. *Eastern Banking Co. v. Seeley*..... 660

Actions. Parties.

4. In a suit on a joint contract, all who are jointly liable should be joined as defendants, and if service of summons cannot be had upon all, the action may proceed against those served. *Perkins County v. Miller*..... 141

5. An action for a breach of executory contract cannot be maintained upon a mere declaration by the other party, before performance is due, that he does not intend to comply with the terms of his agreement. *King v. Waterman*.... 324

Contracts—*concluded.*

Advertisements.

6. Construction of a contract for publishing an advertisement in a newspaper. *Call Publishing Co. v. Edson*..... 394

Assignments.

7. Contract for lighting streets of a city *held* not assignable. *City of Omaha v. Standard Oil Co*..... 337

Elevators.

8. Contract set out in opinion construed and *held* that certain elevators therein mentioned were not capital invested in the enterprise in which the parties were engaged. *Murphy v. Warren* 215

Interest.

9. Instrument set out in opinion and construed, *held* to draw interest from date. *Jewett v. McGillicuddy*..... 588

Promise of Third Person.

10. Where the promise of a party to pay the debt of another is expressly contingent upon the happening of a certain event, the happening of such event must be alleged and proved to render the promisor liable. *Husenetter v. Gullikson*..... 32

Conveyances. See FRAUDULENT CONVEYANCES. VENDOR AND VENDEE.

Coroner. See EVIDENCE, 14, 37.

Corporations. See BANKS AND BANKING. MUNICIPAL CORPORATIONS. RECEIVERS. TELEPHONE COMPANIES.

1. Evidence as to validity of transfer involving stock. *Lewis v. Holdrege*..... 173

2. An action against a dissolved corporation may be commenced and prosecuted to final judgment. *Wehn v. Fall*.... 548

Assessments. Dues.

3. An assessment, as that term is understood in corporation law, is a levy made upon the stock of the corporation requiring the stockholder to pay in proportion to the amount of stock owned by him. *Omaha Law Library Ass'n v. Connell*, 396
Omaha Law Library Ass'n v. Hunt..... 400

4. Charter of a library association *held* to confer authority on the board of directors of the corporation to enact a by-law imposing an annual due on each of its stockholders. *Id.*

5. By-laws of a library association *held* not to attempt an assessment of the stock of the corporation. *Id.*

Conversion.

6. Where the president, one director, and a stockholder sold all visible assets of an insolvent corporation and turned the proceeds over to a corporation in which two of the persons so acting were interested, it was *held* that such acts amounted to a conversion of the corporate property. *German Nat. Bank v. First Nat. Bank*..... 86

Corporations—*continued.*

Fraud of Directors.

7. If a transaction between two corporations, effected by the votes of directors common to both, can in any event be sustained, it must only be on an affirmative showing of good faith. *German Nat. Bank v. First Nat. Bank*..... 86

Insolvency. Preferring Creditors.

8. An insolvent corporation, merely because it is a corporation, is not prohibited from preferring particular creditors. *Id.*

Liability of Stockholders. Actions.

9. 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. *Hastings v. Barnd*..... 93

10. The liability of stockholders in banking corporations under section 7, article 11, of the constitution (Miscellaneous Corporations), must be enforced by or on behalf of all creditors, and against all stockholders liable; and a suit by and on behalf of one out of many creditors against certain selected stockholders will not lie. *Id.*

11. To maintain an action at law for the purchase price of corporation stock plaintiff, ordinarily, must plead and prove a delivery or tender of such stock before the bringing of his suit. *Bartlett v. Scott*..... 477

12. Until the legal remedy has been exhausted a creditor of an insolvent and dissolved corporation cannot obtain satisfaction of his claim by suit against a stockholder who has in any way come into possession of corporate assets. *Wehn v. Fall*..... 548

Lien of Creditors.

13. Creditors of an insolvent corporation do not acquire any specific lien on the corporate assets. *Id.*

Receivers.

14. Where wrong-doers are in control of a corporation, both through its stock and by being officers, it is not essential for a complaining stockholder to show, as a condition of maintaining his suit for a receiver, that he first made demand on the officers to proceed on behalf of the corporation to remedy the wrongs. *Ponca Mill Co. v. Mikesell*..... 98

15. In a suit by a stockholder for appointment of a receiver on the ground of fraud and mismanagement of officers and other stockholders and to foreclose a lien created by plaintiff's payment of money as a condition of cancelling conveyances fraudulently executed by such officers, the corporation is the essential defendant, and it is not necessary to join all the directors. *Id.*

Corporations—*concluded.*

Sale of Assets. Ratification. Trusts.

16. Conduct stated in opinion *held* not a ratification of acts of the president, one director, and a stockholder of an insolvent corporation in selling its assets and in turning the proceeds over to a corporation in which two of the persons so acting were interested. *German Nat. Bank v. First Nat. Bank* 86

17. Corporation's arrangement to remove a portion of its goods to a distant city, and to retain the balance for sale, the proceeds to be applied in payment of debts, *held* not to constitute the goods thus retained a trust fund for payment of creditors *pro rata*. *Id.*

Costs. See CONFLICT OF LAWS, 1.

1. Where plaintiff recovers judgment in a suit for insurance on realty, a reasonable attorney's fee is allowable as costs, and the allowance may be made upon the overruling of defendant's motion for a new trial, though it was not ruled on during the term at which the verdict and judgment were rendered. *Home Fire Ins. Co. v. Weed*..... 146

2. Where plaintiff declines to accept defendant's offer to confess judgment before a justice of the peace and recovers a less sum, he is not entitled to recover subsequent costs. *Flower v. Nichols* 314

3. Defendant's offer to confess judgment before a justice of the peace need not be renewed on appeal in order to defeat plaintiff's right to recover subsequent costs on final judgment, where he fails to recover the sum offered. *Id.*

Counter-Claim. See SET-OFF AND COUNTER-CLAIM.

Counties. See HIGHWAYS.

Appeal from County Board.

1. A taxpayer may prosecute an appeal to the district court from the decision of a county board in the allowance of claims. *Taylor v. Davey*..... 153

County Board. Orders.

2. An order of a county board allowing or rejecting claims against the county has the force and effect of a judgment, and is conclusive unless vacated or reversed on appeal. *Id.*

3. Upon due notice to parties interested a county board may once reconsider its action in allowing or disallowing a claim against the county. *Dean v. Saunders County*..... 759

4. Before an order of the county board has been formally entered on the record it may be proved by the clerk's memorandum. *Id.*..... 760

5. Where an order disallowing a claim against a county has been reconsidered, such disallowance will not operate as an adjudication of the claim. *Id.*

Counties—*concluded.*

Population.

6. Evidence as to population of Valley county. *Kokes v. State*, 698

County Clerk. Bond.

7. The official bond of a county clerk is not void by reason of its being, in form, joint, instead of joint and several as required by statute, nor because it fails to designate the term for which he was elected. *Perkins County v. Miller*..... 141

Offices. Rent.

8. Where a county rents rooms for one of its officers and puts him in possession thereof with the records and property pertaining to his office, it is bound to pay the stipulated rental so long as such officer continues in possession. *Dean v. Saunders County*..... 759

County Board. See COUNTIES.

County Clerk. See COUNTIES, 7.

County Court. See COURTS, 2. EXECUTORS AND ADMINISTRATORS. JUDGMENTS, 22. JUSTICE OF THE PEACE.

County Superintendent. See SCHOOLS AND SCHOOL DISTRICTS, 2.

Courts.

1. The district court has original jurisdiction in an action in the nature of quo warranto to hear and determine conflicting claims to a public office. *State v. Frantz*..... 167
2. In a case appealed from the county court to the district court, plaintiff may allege damages in a greater sum than was claimed in the county court, provided the amount alleged in the district court be within the jurisdictional limit of the county court. *People's Nat. Bank v. Geisthardt*..... 232
3. The length of time devoted by the court to an examination of a case is not the standard for testing the sufficiency of the court's consideration of questions presented for review. *Bartley v. State*..... 295
4. Power to make a valid order is only co-existent with jurisdiction of the cause. *Anheuser-Busch Brewing Ass'n v. Hier*.. 557
5. The jurisdiction of the courts is limited to declaring what the law is, and they are forbidden by the constitution to perform legislative functions. *Nebraska Telephone Co. v. State* 627
6. A judge who presided at the trial of an action and rendered judgment therein is not, from that fact, interested and disqualified to hear another suit to vacate such judgment. *Chicago, B. & Q. R. Co. v. Kellogg*..... 754

Covenants.

1. In a suit for breach of a covenant against incumbrances, an answer, charging that the deed executed by grantors does not contain a correct expression of the intention of the par-

Covenants—*concluded.*

ties in regard to the transaction, sufficiently alleges the mutuality of the mistake. *Hotaling v. Tecumseh Nat. Bank*.. 6

2. Where grantees covenanted that the premises should not be used for hotel purposes, and grantor afterward waived the covenant on condition that the maximum rate should be $1 per day and that the waiver should be void upon the charging of a higher rate, the waiver having been made when grantees were contemplating a sale to a stranger, *held*, on violation of the rate agreement, that original grantees became liable on their covenant. *Wittenberg v. Mollyneaux*.... 429

Coverture. See HUSBAND AND WIFE, 1.

Creditors' Bill.

1. Where a surety on notes, after demand for payment of interest due, conveyed part of his realty to his sons and the balance to his attorney, it was *held*, under facts stated in opinion, that the realty was properly subjected to payment of a judgment on the notes. *Knight v. Larby*..... 16

2. A creditors' bill may be maintained by a judgment creditor to reach any assets of the debtor subject to the payment of his debts, which cannot be reached by ordinary process of law. *German Nat. Bank v. First Nat. Bank*..... 86

3. Where the debtor's property, subject to the payment of his debts, has been wrongfully converted by a stranger, the creditor may, by suit in the nature of a creditors' bill, reach the debtor's cause of action for conversion. *Id.*

4. Petition set out in opinion *held* to be a creditors' bill, and as such not to state a cause of action. *Fairbanks v. Welshans*.. 362

5. Right of a non-judgment creditor of an insolvent partnership dissolved by death of one of the partners, the surviving member and the estate of the deceased partner being insolvent, to maintain an action, in the nature of a creditors' bill, to set aside a fraudulent and void disposition made of the partnership assets by the surviving partner. *Id.*

Criminal Law. See INSTRUCTIONS, 3, 12-14. LARCENY. ROBBERY. LIMITATION OF ACTIONS, 1, 2.

Character of Accused.

1. Previous good character of accused is a fact which he is entitled to have submitted to the jury, precisely as any other circumstance favorable to him, without any disparagement by the court. *Latimer v. State*..... 610

Excessive Sentence. Habeas Corpus.

2. Habeas corpus will not lie on behalf of a convict on the ground that the sentence is in excess of the statutory period, since such a sentence is erroneous merely, and not void. *In re Fanton*..... 703

Criminal Law—*concluded.*

Plea in Bar. Jury Trial.

3. Where the allegations of a plea in bar, liberally and fairly construed, substantially state that the prisoner has previously, by a court having jurisdiction, had a judgment of acquittal, the truth of the averments of the plea must be determined by a jury. *Bush v. State*..... 195

4. A plea in bar is to be deemed a waiver of a plea in abatement, and this is held to follow where both pleas are presented by a single pleading. *Id.*

Preliminary Examination. Waiver. Plea.

5. District courts are without jurisdiction to try on information one accused of a felony, except he be a fugitive from justice, unless he has been first accorded the privilege of a preliminary examination. *Latimer v. State*..... 609

6. Preliminary examination of accused is not a trial. *Id.*

7. When one charged with having committed a crime is arrested and brought before a magistrate, it is not essential that he should be asked to plead, or plead to the complaint. *Id.*

8. The object of a preliminary examination is to ascertain whether the crime charged has been committed, and, if so, whether there is probable cause to believe the accused committed it, and, if so, to insure his appearance in the district court to answer the complaint of the state. *Id.*

9. Where accused waives a preliminary examination the magistrate should recognize him to appear in the district court, and a certified transcript of the record of such proceedings, when filed in the district court, invests that court with jurisdiction to try accused on information for the crime with which he was accused before the examining magistrate. *Id.*

10. Where one who was arrested and brought before an examining magistrate voluntarily pleads that he is guilty of the crime charged, he thereby waives his right to a preliminary examination. *Id.*

11. The statute authorizing a preliminary examination was enacted for the benefit of accused, and he may waive such preliminary examination. *Id.*

Damages. See ABSTRACTS OF TITLE. EMINENT DOMAIN. EXEMPTION. INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS, 19.

1. Where a personal injury is permanent in its character, although plaintiff be a minor, evidence as to his expectancy of life, from experience tables, must be based on his actual age and not on the age of majority. *Swift v. Holoubek*..... 228

2. In an action for personal injuries, where there is no evi-

Damages—*concluded.*
dence of emancipation, recovery should not be permitted for loss of earning power during plaintiff's minority. *Id.*

3. Evidence set forth in the opinion *held* to leave the damages too uncertain to be allowed. *Wittenberg v. Mollyneaux*..... 430

4. A party injured by breach of contract may recover for gains prevented, provided they are within the established rules permitting consequential damages, and provided they can be proved to a reasonable degree of certainty. *Id.*

5. Market value is not what property is worth solely for the purpose for which it is devoted, but the highest price it will bring for any and all uses to which it is adapted, and for which it is available. *Maul v. Drexel*..... 447

6. Evidence *held* sufficient to sustain a judgment for plaintiff in an action by a widow to recover from a railroad company damages for injury to her child. *Missouri P. R. Co. v. Palmer*..... 559

7. Verdict for $9,000 for personal injuries *held* excessive and reduced to $6,500. *Chicago, B. & Q. R. Co. v. Kellogg*..... 749

Death by Wrongful Act. See MASTER AND SERVANT, 9.

Declarations. See EVIDENCE, 3.

Dedication.

1. An effectual statutory dedication of land for use as a public street cannot result from the filing of a plat, in the office of the county clerk or register of deeds, by one who is not the owner of the fee. *Lewis v. City of Lincoln*..... 1

2. Evidence *held* to sustain a finding that a certain street is a thoroughfare 66 feet wide. *McCague v. Miller*..... 762

Deeds. See COVENANTS, 1. MORTGAGES, 10, 11. VENDOR AND VENDEE. VOLUNTARY ASSIGNMENTS.

1. Evidence *held* to justify a finding that the insertion in a deed of covenants of warranty against incumbrances was the result of a mutual mistake. *Hotaling v. Tecumseh Nat. Bank*..... 6

2. The fact that a deed of conveyance has been recorded affords *prima facie* evidence of its delivery, which is a question of fact. *Gustin v. Michelson*..... 22

3. The mere circumstance that a deed was found among the papers of the deceased grantor *held* to be without significance, in view of the fact that such grantor—a resident of Nebraska—had, since the making of the deed, been constituted by the grantee—a resident of New York—his attorney in fact to sell, manage, and convey the property described in such deed. *Id.*

4. A quitclaim deed for realty passes all the interest of grantor at date of delivery, in absence of a contrary intent. *Leavitt v. Bell*..... 57

Deeds—*concluded.*

5. A quitclaim deed is sufficient to vest in grantee the equitable title to a tax-sale certificate of realty owned by grantor. *Id.*

6. An instrument, although in form a deed, which by its terms was to operate only after the death of the maker or grantor, is testamentary in its character, and not a deed, and passes no present estate in the premises therein described. *Pinkham v. Pinkham*..... 729

Default. See JUDGMENTS, 6, 22, 23.

Deficiency Judgments. See JUDGMENTS, 9. MORTGAGES, 8, 9.

Delivery. See DEEDS, 2, 3.

Demurrer. See PLEADING, 10.

Depositions.

1. An objection to a deposition on the ground that the witness did not testify to all the elements of a valid contract is without merit. *Zobel v. Bauersachs*..... 20

2. Depositions *held* inadmissible where the notary failed to authenticate them by his seal. *Welton v. Atkinson*..... 674

Description. See SALES, 1. VOLUNTARY ASSIGNMENTS.

Dismissal. See JUDGMENTS, 12. REPLEVIN, 2. REVIEW, 69.

1. On facts set out in the opinion, *held* that the appellant was entitled to dismiss her appeal. *Tuttle v. City of Omaha*..... 55

2. Plaintiff's right to dismiss his cause does not control defendant's right to proceed to trial of a set-off or counterclaim properly pleaded in the answer. *Adams v. Osgood*.... 766

District Courts. See COURTS, 2.

Divorce.

1. A decree awarding permanent alimony is enforceable in the same manner as judgments at law. *Leeder v. State*..... 133

2. Ordinarily the non-compliance with an order for payment of permanent alimony is not punishable as for contempt of court. *Id.*

Docket Entry. See JUSTICE OF THE PEACE, 5.

Domicile.

1. To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. *State v. School District*..... 318

2. The residence of a person is the place where he has his established home, and to which, when absent, he intends to return. *Id.*

3. Where one, who owns a farm which has been his domicile for many years, moves his family and a portion of his furniture to a neighboring city during the fall temporarily for

Domicile—*concluded.*

the purpose of educating his children, and not with the intention of gaining a new home, and returns to the farm at the end of each school year with his family and furniture, his legal residence remains at the farm. *Id.*

Dower. See MORTGAGES, 3.

1. The wife may make her release of her dower interest, or by signature to a mortgage that it be subjected to the lien and operation thereof, matter of forceful consideration for the conveyance to her of other property. *Adler & Sons Clothing Co. v. Hellman* 266
2. The dower right of a wife in realty of her husband, while inchoate, is not a possessory right, but is a present, subsisting right of a legal character, and can only be extinguished by her voluntary release or act or by operation of law. *Id.*
3. A widow is entitled to dower in all lands whereof her husband was seized of an estate of inheritance at any time during marriage, unless she has been lawfully barred thereof. *Pinkham v. Pinkham* 729

Drunkenness. See INSTRUCTIONS, 11.

Elections. See DOMICILE. EVIDENCE, 6, 8. MANDAMUS, 5.

Where a candidate for a public office has received and holds the certificate of election, such certificate is conclusive evidence of his right to the office until it is judicially determined that some other person has a better title. *State v. Frantz* 167

Elevators. See CONTRACTS, 8.

Embezzlement.

1. A state treasurer, who for an unauthorized purpose draws a check on a state depository bank having money of the state therein, which he delivers to the payee with intent to defraud the state, and the bank, on presentation of the check, places the amount thereof to the credit of a third party, whom the payee represents in the transaction, and at the same time charges the account of the state with a like sum, is guilty of embezzlement of the state's money. *Bartley v. State* 294
2. Liability of state treasurer for acts of his deputy and clerks. *Id.* 296
3. To sustain a conviction for embezzlement of public moneys proof that specie was used in the transactions, *held* unnecessary. *Id.* 297
4. Section 420 of the Criminal Code relating to indictments and to descriptions of money, *held* not applicable to proofs in a prosecution of the state treasurer for embezzlement of public moneys. *Id.* 298

Eminent Domain.

1. Under section 21, article 1, of the constitution declaring that "the property of no person shall be taken or damaged for public use without just compensation therefor," a landowner cannot be required to surrender his land for public use until his damages are first ascertained and either paid or proper provision made for their payment. *Lewis v. City of Lincoln*..... 2
2. Where a railroad is built in an alley, the owner of the lot abutting thereon is entitled to recover from the railroad company the depreciation in the value of the lot resulting from such construction of the railroad. *Chicago, R. I. & P. R. Co. v. Stuvey*..... 137
3. The damages to real estate occasioned by the construction of a railroad contiguous or adjacent thereto is the difference in the value of the property immediately before and immediately after the improvement, unaffected by any increase or depreciation of property values generally in the same vicinity. *Id.*
4. In estimating the value of real estate, its rental value may be taken into consideration. *Id*..... 138

Equalization. See MUNICIPAL CORPORATIONS, 11-15.

Equitable Lien. See REPLEVIN, 6.

Equity. See CONTRACTS, 1. INJUNCTION. JUDGMENTS, 14-19. LACHES. SET-OFF AND COUNTER-CLAIM, 1. TRUSTS, 2.

Error. See REVIEW.

Estates. See EXECUTORS AND ADMINISTRATORS. MORTGAGES, 17.

Estoppel. See NEW TRIAL, 5. VENDOR AND VENDEE, 3.

1. Estoppel by laches in delaying the commencement of an action is not available as a defense unless pleaded. *German Nat. Bank v. First Nat. Bank*..... 86
2. To be available as a defense to an action an estoppel *in pais* must be pleaded. *Boales v. Ferguson*..... 566
3. The rendition of a bill for services does not estop the person rendering it from claiming and recovering a larger amount in a subsequent action on a *quantum meruit*, when the other party did not accept or acquiesce in the bill, but refused at once to recognize it as correct. *People's Nat. Bank v. Geisthardt*..... 232
4. As against persons who gave credit to a husband on the faith of his title to property which his wife allowed him to retain, she may be estopped from claiming the property. *Adler & Sons Clothing Co. v. Hellman*..... 267
5. One who assigned his interest in a judgment pending appeal therefrom, filed the assignment in the case, and afterward brought suit on the appeal bond, *held* estopped from urging

Estoppel—*concluded.*

that the assignment was incomplete because there was no proof of assignee's acceptance. *Crum v. Stanley*..... 351

Evidence. See BASTARDY. INSURANCE, 9. JUDGMENTS, 9. MASTER AND SERVANT, 6. NEGOTIABLE INSTRUMENTS, 1. OFFICE AND OFFICERS, 7. REPLEVIN, 8. REVIEW, 26. SALES, 3. WITNESSES.

Abstracts of Title.

1. Abstracts of title may be admitted in evidence. *Gate City Abstract Co. v. Post*..... 746

Accounts.

2. Where the relation of debtor and creditor exists, an account rendered, and not objected to within a reasonable time, is to be regarded as *prima facie* correct. *Missouri P. R. Co. v. Palmer*..... 560

Admissions Against Interest.

3. Ordinarily, declarations against interest made by a party to a suit, or by one through whom he has derived title to the thing in controversy, are admissible as evidence against him; but one who has purchased property cannot be affected by statements made in relation thereto by his vendor after the latter had parted with his title and possession. *Zobel v. Bauersachs*..... 20

4. Admissions of a party against interest are receivable in evidence against him. *Maul v. Drexel*..... 447

Census. Population.

5. Whether a person has been enumerated in the census taken by a school board, should be established by the production of the proper record disclosing the facts. *State v. School District* 318

6. Courts will take judicial notice of a United States census, a school census, and an authorized election and its results. *Kokes v. State*..... 691

7. Evidence *held* insufficient to sustain a finding as to the population of Valley county. *Id.*

8. Propriety of estimating the number of inhabitants by multiplying the number of votes cast at an election by five. *Id.*.. 698

Character of Accused.

9. Previous good character of one accused of a crime is a fact which he is entitled to have submitted to the jury, without disparagement by the court. *Latimer v. State*..... 610

Compromise.

10. Offer of compromise *held* inadmissible. *Boice v. Palmer*..... 389

Conclusions.

11. A non-expert witness may testify to a conclusion when, from the nature of the subject under investigation, it is not possible to lay before the jury all the facts from which such conclusion is drawn. *Missouri P. R. Co. v. Palmer*..... 560

Evidence—*continued.*

Documents. Receipts. Letters. Bonds.

12. The genuineness of a letter is sufficiently established to permit its introduction in evidence when it is shown that it was received in due and regular course of mail in response to a letter addressed to the supposed writer. *People's Nat. Bank v. Geisthardt*..... 232

13. Hotel registers, without proof that the names thereon are true entries of the guests, that they were paying guests, or the duration of their visits, are inadmissible to prove the extent of business of such hotel. *Wittenberg v. Mollyneaux*.. 429

14. In a suit on the official bond of a coroner the introduction in evidence of a copy of such bond is not prejudicial error, where the execution, delivery, and approval of said bond are admitted by the answer. *Maul v. Drexel*..... 446

15. A tax receipt is insufficient to establish a tax levy disputed by the pleadings. *Adams v. Osgood*..... 767

Experience Tables.

16. Where a personal injury is permanent in its character, though plaintiff be a minor, evidence as to his expectancy of life, from experience tables, must be based on his actual age and not on the age of majority. *Swift v. Holoubek*..... 228

Foreign Laws.

17. In a suit on a foreign judgment from which an appeal had been taken, it will not be presumed that the judgment was superseded. *Lonergan v. Lonergan*..... 642

18. The laws of another state, in absence of proof, are presumed to be the same as the laws of the forum. *Id.* *Welton v. Atkinson*..... 674

Issues.

19. Evidence should not be permitted to digress from the issues into an investigation of collateral questions. *Swift v. Holoubek* 228

20. It is not error to exclude testimony concerning a matter upon which no issue has been raised by the pleadings. *Missouri P. R. Co. v. Palmer*..... 560

21. Evidence in support of averments erroneously stricken from the pleadings should not be admitted. *Lonergan v. Lonergan*, 641

Money.

22. To sustain a conviction for embezzlement of public moneys proof that specie was used in the transactions *held* unnecessary. *Bartley v. State*..... 297

Parol. Contracts.

23. In an action on a contract for the sale of "all patterns that are staple and down to date," where no criterion was fixed by which to determine what patterns came within that description, it was error to exclude evidence of competent wit-

Evidence—*continued.*

nesses regarding the standard usually adopted by the trade in selecting and purchasing such patterns. *Hayden v. Frederickson* 156

24. A restrictive, unambiguous indorsement of a note cannot be contradicted or explained by evidence resting in parol. *United States Nat. Bank v. Geer*..... 462

25. Where commercial paper is indorsed in blank, the terms of the contract may be shown by parol evidence to be different from that which the law implies in such cases. *Id.*

26. Where negotiating parties reduce their agreement to writing, and sign and deliver the same, the writing, in absence of fraud, mistake, or ambiguity, constitutes the best and only competent evidence of the contract originally made. *Sylvester v. Carpenter Paper Co*..... 621

Preponderance.

27. In a civil action, a preponderance of the evidence proves any issue. *First Nat. Bank of Omaha v. Goodman*..... 409

Privileged Communications. Witnesses.

28. In a suit against a testatrix to set aside an alleged fraudulent conveyance by testator to her and to subject the property to payment of grantor's debts, an attorney who was present as adviser of the parties was *held* competent to testify to the conversation between them. *Adler & Sons Clothing Co. v. Hellman*..... 266

29. In a suit against a testatrix to set aside an alleged fraudulent conveyance by testator to her and to subject the property to payment of grantor's debts, it was *held* that she was incompetent, under section 329 of the Code, to testify to the transaction out of which the conveyance originated. *Id.*

Records. Officers.

30. Registration of deed is evidence of delivery. *Gustin v. Michelson* 22

31. An officer's return on the back of a summons that he served the same "on C., one of defendants herein," is sufficient evidence of service on J. C., who was named in the writ as a defendant. *Gate City Abstract Co. v. Post*..... 743

32. A public officer may give evidence of the uniform course of business in his office, for the purpose of showing the performance of a specific official act which it was his duty to perform, but concerning which he has no independent recollection. *Id.*

33. Before an order of a county board has been formally entered on the record it may be proved by the clerk's memorandum. *Dean v. Saunders County*..... 760

Sympathies.

34. Competent evidence bearing on the issues cannot be excluded from the jury because it may incidentally arouse

Evidence—*concluded.*

their sympathies or influence their prejudices. *Missouri P. R. Co. v. Palmer*..... 559

Values.

35. Market value is not what property is worth solely for the purpose for which it is devoted, but the highest price it will bring for any and all uses to which it is adapted, and for which it is available. *Maul v. Drexel*..... 447

36. In a suit against a sheriff for conversion of property seized on attachment, the amount the officer received for the goods at the attachment sale is not a proper criterion for determining their value at the time of conversion. *Id.*

37. In an action against a sheriff or coroner for conversion of property seized by him under a writ of attachment the inventory and appraisement made and signed by such officer in the attachment proceedings are admissible in evidence against him on the question of the value of the property. *Id.*

38. One may testify to the value of his own services although his information in regard to the matter is chiefly derived from others adequately informed on the subject. *Missouri P. R. Co. v. Palmer*..... 559

Exceptions. See NEW TRIAL, 7. REVIEW, 38, 39. TRIAL, 2.

Executions. See ATTACHMENT. JUDGMENTS, 2. REFORMATION OF INSTRUMENTS.

1. An order of sale headed, "The State of Nebraska, County of Gage, to the Sheriff of said County," complies with section 24, article 6, of the constitution, providing that "all process shall run in the name of the state of Nebraska." *Hoyt v. Little*..... 71

Appraisement. Notice.

2. Special notice to defendant of an appraisal of lands to be sold under a decree is not required. *Tillson v. Benschoter*.... 443

3. Failure to notify defendants of the issuance of an order of sale and of the meeting of the appraisers is not a valid objection to confirmation. *Mills v. Hamer*..... 445

4. Objections to appraisement of realty under a decree of foreclosure must be made prior to the sale by a motion to vacate the appraisement. *Id.*

Certificate of Incumbrance.

5. Certificates of incumbrances before judicial sale of realty may be waived by plaintiff. *Nye v. Rogers*..... 353

6. Failure to file applications for and certificates of liens as parts of an appraisal of lands for sale under a decree of foreclosure is without prejudice to the rights of defendants who own, in whole or in part, the equity of redemption. *Tillson v. Benschoter*..... 443

Executions—*continued.*

Confirmation.

7. The court did not err in refusing to set aside a sale made under a decree foreclosing a real estate mortgage, on the motion of the owner of the equity of redemption based on the ground that, when the sale was made, a motion made by him to vacate the decree was pending in court. *Hoyt v. Little* 71

8. Objections to the confirmation of a sale of realty not urged in the lower court will be unavailing in the supreme court. *Philadelphia Mortgage & Trust Co. v. Mockett*..... 323

9. A judicial sale will not be set aside for harmless errors in conducting it. *Tillson v. Benschoter*..... 443

10. On review, objections to confirmation *held* not founded on facts disclosed by the record. *Wagenknecht v. Seeley*..... 769

Notice of Sale.

11. Where the sheriff's return recited that publication had been made in a newspaper printed and in general circulation in the proper county, naming it, it devolved upon the party attacking the sale to show why there was not sufficient compliance with section 497 of the Code, relating to notice, where that is the defect relied upon. *Nye v. Rogers*..... 353

Officers Making Sales.

12. In a decree foreclosing a mortgage, the person designated to make the sale is not required to take and file an oath. *Wright v. Stevens*..... 676

13. If the taking of an oath by a master commissioner is an essential requirement, compliance therewith will be presumed in absence of evidence to the contrary. *Id.*

14. Where a decree of foreclosure contains no direction to the officer charged with its execution touching the appraisement and sale of the mortgaged property, he is vested with a discretion in regard to the matter which will not be disturbed, in the absence of a showing of prejudice to the party complaining. *Kane v. Jonasen*..... 757

15. Nothing appearing to the contrary, it will be presumed that an officer charged with the execution of a decree was regardful of the rights of the parties to the action, and in a lawful manner performed the duties imposed upon him. *Id.*

Order of Sale.

16. Changing an order of sale to recite that the decree foreclosing the mortgage was rendered for the amount due after a remittitur had been filed, *held* not prejudicial to the owner of the equity of redemption, and there was no error in refusing to set aside the sale on that ground. *Hoyt v. Little*.. 71

17. The sale of realty under foreclosure proceedings is by virtue of the decree, the terms of which cannot be modified by an order of sale issued by the clerk of the court. *Wagenknecht v. Seeley*..... 769

Executions—*concluded.*

Redemption.

18. Where an appeal has been taken from confirmation of a foreclosure sale and a proper appeal bond executed and approved, mortgagor may redeem the realty any time before the supreme court affirms the confirmation. *Philadelphia Mortgage & Trust Co. v. Gustus* 435
Gosmunt v. Gloe 709

19. The right of the owner of real estate to redeem the same from sale under an execution or order of sale is purely statutory, and he must avail himself of the right prior to the confirmation of the sale. *Gosmunt v. Gloe* 709

20. The failure of the purchaser at a judicial sale to pay the amount of the bid prior to confirmation does not render the sale void, nor does it extend the statutory period for redemption. *Id.*

Sale in Gross.

21. Where the affidavit resisting confirmation stated that "the property was divided, assessed, and recognized as distinct, separate, subdivisions, one having no relation to the other," *held*, that, for the purpose of reversing the order of confirmation, this language would not be construed as stating that the lots were in fact distinct, separate, subdivisions. *Nye v. Rogers* 353

22. Where a decree of foreclosure gives no direction concerning the appraisement and sale of mortgaged premises, an appraisement and sale in gross of two city lots will not be set aside unless it be made to appear that the party complaining has been thereby prejudiced. *Kane v. Jonaven* 757

Stay.

23. To stay execution of a mortgage-foreclosure decree the request must be filed within twenty days after rendition of the decree, and the filing of a remittitur does not extend the time. *Hoyt v. Little* 71

Title of Purchaser. Liens.

24. In mortgage foreclosure, where the equity of redemption is sold on judicial process against the owner thereof, the mortgagee may purchase and hold the same either for himself or in trust for such owner. *Wyatt-Bullard Lumber Co. v. Bourke* 9

25. The title of a stranger derived through a sale under a judgment is not defeated by a subsequent vacation of the judgment in a proceeding in error or in a proceeding under section 602 of the Code. *Manfull v. Graham* 646

26. Where real estate is sold under a decree of foreclosure, subject to a prior lien, the purchaser must discharge such lien, or suffer the land to be sold for its satisfaction. *Lyons v. Godfrey* 755

Executors and Administrators. See WITNESSES, 7, 8.

1. An administrator may maintain an action to foreclose a real estate mortgage executed to secure the payment of purchase-money notes, one of which was made to his intestate, a married woman, as an inducement for releasing her dower and homestead rights in the mortgaged premises; and the fact that the note was, by her direction, delivered to her husband and never came into her personal possession, is no impediment to the maintenance of such action. *Gruver v. Walkup* 544
2. Interlocutory orders made by the county court adjusting the current accounts of an administrator are only *prima facie* correct; and such accounts are subject to re-examination and correction at any time before the allowance of the administrator's final report. *Boales v. Ferguson*..... 565
3. An administrator who undertakes, without an adjudication of heirship, to distribute funds in his hands as the residue of an estate administered by him, assumes the responsibility of making distribution to the proper persons. *Id.*
4. The curative act of 1895 (Session Laws, ch. 32) was intended to legalize orders, judgments, and findings of the county court which depended for their validity on the decedents' act of 1889 (Session Laws, ch. 57), and has no relation to orders, judgments, and findings which were valid independent of that act. *Id*..... 566
5. The county court possesses exclusive original jurisdiction in probate matters, and questions relating to the settlement of estates must be adjudicated there in the first instance. *Id.*

Exemption.

A judgment for damages because of an assignment of a cause of action to a non-resident, for the purpose of evading the exemption laws, cannot be sustained, when, on the trial, there was no proof of the controverted fact that the right of exemption existed. *Stull v. Miller*..... 30

Expectancy. See EVIDENCE, 16.

Factors and Brokers.

1. Instructions *held* correct in an action by real estate agents for commission for making a sale. *Traynor v. Morse*..... 595
2. In an action by real estate agents for commission for making a sale, evidence *held* to sustain a verdict for plaintiffs. *Id.*

False Imprisonment.

Plaintiff cannot appeal to the supreme court from a dismissal of his petition for false imprisonment rendered because of a failure to state a cause of action, the remedy being by petition in error. *Collins v. City of Omaha*..... 208

False Pretenses.

Prosecution for obtaining money under false pretenses *held* barred by the statute of limitations. *State v. Robertson*..... 41

False Representations. See SALES, 3.

Fees. See ATTORNEY AND CLIENT, 1.

Final Order. See REVIEW, 40.

Findings. See JUSTICE OF THE PEACE, 5.

Fire and Police Commissioners. See MUNICIPAL CORPORATIONS, 9.

Foreclosure. See TAXATION, 2-5.

Foreign Judgments. See JUDGMENTS, 10.

Foreign Laws. See CONFLICT OF LAWS.

Former Jeopardy. See CRIMINAL LAW, 3, 4.

Fraud. See CORPORATIONS, 6, 16. JUDGMENTS, 16-19.

Frauds. See STATUTE OF FRAUDS.

Fraudulent Conveyances. See CORPORATIONS, 15. WITNESSES, 7, 8.

1. Where a surety on notes, after demand for payment of interest due, conveyed part of his realty to his sons and the balance to his attorney, it was *held*, under facts stated in opinion, that a decree setting aside the conveyances should not be disturbed. *Knight v. Darby*..... 16

Assignment.

2. Evidence examined and found to show that assignments through which plaintiff claims an interest in the subject-matter in controversy were fraudulent and void. *Lewis v. Holdrege* 173

Evidence. Intent.

3. In an attack by creditors on an alleged fraudulent conveyance the intent with which the conveyance was made is a question of fact and not of law. *Adler & Sons Clothing Co. v. Hellman*..... 266

4. When conveyances are assailed by creditors of grantor, the question of fraudulent intent is one of fact. *United States Nat. Bank v. Westervelt*..... 424

5. There exists no rule of law avoiding a mortgage to secure an existing debt, induced by hope or agreement that extensions will be granted and payments accepted in installments; and the recital of such purpose in the mortgage does not, in itself, establish an intent to hinder, delay, or defraud other creditors. *Id.*

6. The question of fraudulent intent in the making and acceptance of a chattel mortgage is a question of fact as between the parties thereto and an officer who levies on the mortgaged property nothwithstanding the record of said instrument and in defiance of the rights of the mortgagee asserted

Fraudulent Conveyances—*concluded.*

thereunder; and, to sustain an attack on the mortgage as fraudulent against creditors, there must be some evidence of the *mala fides* charged. *Rein v. Kendall*..... 583

Husband and Wife. Gifts.

7. A man may make a gift to his wife or relatives where he retains sufficient property subject to execution to satisfy his debts. *Adler & Sons Clothing Co. v. Hellman*..... 267

8. Where a man retains sufficient property to satisfy his debts, a gift to his wife does not of itself stamp the transfer to her as fraudulent. *Id.*

9. Where a conveyance of property by a husband to his wife is assailed by creditors for fraud, the burden is on her to establish the *bona fides* of the transfer. *Id*..... 266

10. Evidence *held* to sustain the *bona fides* of a transfer from a husband to his wife. *Id*..... 267

Insurance. Premiums.

11. As a general rule, premiums paid by assured for life insurance in favor of his wife or children cannot be recovered by his creditors as having been paid in fraud of their rights, though the debts existed when the payments were made. *Id.*

Games. See MUNICIPAL CORPORATIONS, 5.

Garnishment.

There being no evidence of the garnishment alleged by the plaintiff and denied by appellees, and the proofs failing to disclose that the garnishee has in hands any money for which he is liable to account, it is not deemed necessary to retain the case merely to settle the matter of garnishment. *Lewis v. Holdrege*..... 173

Guardian and Ward. See INFANTS, 3, 4, 5. PARENT AND CHILD.

Habeas Corpus.

1. The writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for appeal or proceeding in error. *In re Langston*..... 310

2. Non-jurisdictional errors or irregularities in a criminal trial will not be considered on application for a writ of habeas corpus. *In re Fanton*..... 703

3. Habeas corpus will not lie on behalf of a convict on the ground that the sentence of imprisonment is in excess of the statutory period, since such a sentence is erroneous merely, and not void. *Id*..... 703

4. The excessive portion of a sentence extending beyond the statutory period is invalid, but relief therefrom cannot be had on habeas corpus until the valid portion has been served. *Id*..... 706

Harmless Error. See INSTRUCTIONS, 8, 9. REVIEW, 41-45.

Highways.

1. To establish a highway by prescription there must be a continuous user by the public, under an asserted claim of right, for a period equal to that required to bar an action for the recovery of title to land. *Lewis v. City of Lincoln*..... 1
2. A resolution adopted by a county board purporting to establish a section-line road, within the county, is valid as a preliminary order; but before such road can be opened there must be a proceeding upon proper notice to ascertain damages. *Id.*
3. Finding that a public road had not been opened or established *held* sustained by the evidence. *Peterson v. Hopewell*.. 671

Homestead. See MORTGAGES, 3.

A debtor's homestead exemption is limited to two contiguous lots in a city, town, or village, or to 160 acres of outside land, and in any case to $2,000 in value. *Beach v. Reed*..... 605

Hotels. See EVIDENCE, 13.

Husband and Wife. See DOWER. ESTOPPEL, 4. FRAUDULENT CONVEYANCES, 7-11. PLEDGES, 1.

1. Coverture is a complete defense to a note signed by a married woman, unless plaintiff establishes by a preponderance of evidence that the note was made with reference to, or upon the faith and credit of, her separate estate or business, or with an intention on her part to charge her separate estate with its payment. *State Nat. Bank of Lincoln v. Smith* 54
2. The contract of a married woman, made with reference to, and upon the faith and credit of, her separate estate, is valid and enforceable. *Kloke v. Martin*..... 554

Impeachment. See WITNESSES, 4, 5.

Incompetent Persons. See INSANITY.

Inconsistency. See PLEADING, 11-13.

Indorsements. See NEGOTIABLE INSTRUMENTS, 6-8.

Infants.

1. Section 119, article 1, chapter 77, Compiled Statutes, providing for redemption of land from tax sales, does not forbid the owner of a real-estate tax-sale certificate from maintaining an action to foreclose the same, though the owner of the realty is an infant. *Leavitt v. Bell*..... 57
2. In an action for personal injuries, where there is no evidence of emancipation, recovery should not be permitted for loss of earning power during plaintiff's minority. *Swift v. Holoubek*..... 228
3. Where infant defendants have been regularly summoned,

Infants—*concluded.*

the failure to appoint a guardian *ad litem* to represent them is an error merely and does not render void the judgment entered. *Manfull v. Graham*..... 645

4. Under section 442 of the Code permitting an infant to show cause against a judgment, he is not entitled to a day in court, after reaching his majority, to show cause against a judgment ordering the sale of his land. *Id.*

5. Section 442 of the Code permitting an infant to show cause against a judgment does not give an infant on arriving at his majority an absolute right to have the judgment set aside and does not extend that right beyond the cases in which, under the old practice, such right was reserved in the decree. *Id.*

6. An original suit cannot be maintained to vacate an erroneous judgment against an infant, without at least showing a good defense to the first action. *Id.*..... 646

7. An infant against whom an erroneous judgment has been entered may have it set aside under section 602 of the Code, provided his disability did not appear in the record, nor the error in the proceedings; but if these facts did so appear he must proceed by petition in error. *Id.*

Injunction.

Action Against Tenant.

1. Under facts stated in opinion *held* that injunction was properly allowed to prevent a tenant from interfering with the landlord's right, under the lease, to enter upon the premises, plow certain land, and sow wheat. *State Bank of Nebraska v. Rohren*..... 223

Remedy by Appeal.

2. A court of equity will not, at the suit of a private individual, enjoin the payment of a warrant issued upon a claim duly audited by the county board, the remedy being complete at law by appeal from the order allowing the claim. *Taylor v. Davey*..... 153

Remedy at Law. Irreparable Injury.

3. To authorize a court of equity to interfere by injunction, the facts averred in the petition must show that if the injunction be denied, the complainant will suffer an irreparable injury for which he has no adequate remedy at law. *State Bank of Nebraska v. Rohren*..... 223

4. The mere averment in a petition for an injunction that the applicant will suffer an irreparable injury, unless the injunction be granted, is not of itself sufficient to authorize its issuance. *Id.*

Removal of Officer.

5. Injunction to prevent a board having jurisdiction from pro-

Injunction—*concluded.*

ceeding under charges for removal of an officer *held* erroneously granted. *Cox v. Moores*..... 34

6. A court of equity should not interfere by injunction to prevent the removal of an officer when the power of removal is vested in a board or officer. *Id*..... 40

Trespass on Land.

7. Petition to restrain defendant from trespassing on plaintiff's realty, *held* to state a cause of action. *Peterson v. Hopewell* 670

8. An injunction may be granted to restrain defendant from committing a threatened trespass upon plaintiff's realty, where the act would result in a destruction of the premises in the character of their use and enjoyment. *Id*..... 671

Innkeepers. See EVIDENCE, 13.

Insanity.

That one is an infant, idiot, or insane person does not prevent his being sued either at law or in equity. *Leavitt v. Bell*.... 57

Insolvency.

1. Insolvency may mean the inadequacy of a man's funds or property to pay his debts. *Adler & Sons Clothing Co. v. Hellman* 267

2. As a general rule, insolvency means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions. *Id.*

Instructions. See INTOXICATING LIQUORS. MASTER AND SERVANT, 4.

Accomplice.

1. An instruction admonishing the jury to consider the evidence of an accomplice "with great care and caution," without giving them a definition of that phrase, is not erroneous. *Home Fire Ins. Co. v. Decker*..... 346

Agent's Commission.

2. Instructions *held* correct in an action by real estate agents for commission for making a sale. *Traynor v. Morse*..... 595

Construction.

3. Where instructions construed together correctly announce the rule applicable to the issues and the evidence, they should be upheld, though a paragraph, standing alone, is faulty. *Bartley v. State*..... 302

Evidence.

4. An instruction must not submit to the jury the consideration of facts the existence of which the evidence does not tend to establish. *Swift v. Holoubek*..... 228

5. An instruction erroneously assuming there was evidence which might entitle defendant to a verdict for a sum

Instructions—*continued.*

claimed, followed by a verdict accordingly, *held* to show reversible error as against plaintiff, though in form the judgment entry was that defendant recover of plaintiff the amount found due by the verdict less that same amount. *Fairbanks v. Davis*..... 574

Exceptions. Review.

6. In absence of a bill of exceptions, instructions will be presumed to be free from error, unless they contain statements of the law which could not be correct in any possible case made by the proofs under the issues. *Home Fire Ins. Co. v. Weed* 146

7. Instructions will not be reviewed where no exceptions were taken to them by the party complaining at the time the charge was given to the jury. *State v. School District*..... 318

Harmless Error.

8. The failure to write the word "given" on an instruction read to the jury is not sufficient grounds for reversing a judgment when such failure was not prejudicial to the losing party. *Home Fire Ins. Co. v. Decker*..... 346

9. Harmless error in an instruction is not ground for reversing a judgment. *Maul v. Drexel*..... 447

Interest of Witnesses.

10. Where a defendant to a suit testifies on the trial in his own behalf it is error for the court to charge the jury that, "as a general rule, a witness who is interested in the result of a suit will not be as honest, candid, and fair in his testimony as one who is not so interested." *Boice v. Palmer*..... 390

Intoxication.

11. On trial of accused for robbery where the evidence tends to show that he was intoxicated when the crime was committed, there being no evidence that he premeditated the commission of the crime and then became intoxicated, it was *held* error to charge the jury that no state of mind resulting from drunkenness, short of actual insanity or loss of reason, was any excuse for a criminal act. *Latimer v. State*..... 609

Presumption of Innocence.

12. Instruction *held* equivalent to the rule that the presumption of innocence is a matter of evidence, to the benefit of which accused is entitled. *Bartley v. State*..... 302

13. Instruction *held* not to state that the presumption of innocence exists in favor of the accused when no evidence has been introduced. *McVey v. State*..... 777

Reasonable Doubt.

14. The giving of the following instruction *held* not error: "You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men; your oath imposes on you no

Instructions—*concluded.*

obligation to doubt where no doubt would exist if no oath had been administered." *Bartley v. State*..... 300

Repetitions.

15. A repetition of a proposition of law in the instructions is not reversible error, unless it appears that it operated to the prejudice of the unsuccessful party. *Chicago, R. I. & P. R. Co. v. Storey*..... 137

16. It is not error to refuse a proper instruction requested by a party to a case, the principles of which have been covered by the charge of the court. *State v. School District*..... 318

Requests.

17. The giving of an instruction which states a correct and pertinent proposition of law is not error, and a party who complains that such instruction lacks explicitness should himself formulate and tender a better one. *Home Fire Ins. Co. v. Decker*..... 346

Theory of Plaintiff.

18. A party is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence. *Boice v. Palmer*..... 389

Insurance. See PLEDGES, 1.

Actions. Venue.

1. A cause of action, or some part thereof, on a life insurance policy arises, within the meaning of section 55 of the Code, in the county where the insured died. *Bankers Life Ins. Co. v. Robbins*..... 117

Agency. Service of Process.

2. The language of section 8, chapter 16, Compiled Statutes, stating what acts or conduct shall constitute one the agent of an insurance company applies to domestic insurance companies created under the laws of the state. *Id.*

3. The language, "shall be deemed to all intents and purposes an agent or agents of such company," employed in section 8, chapter 16, Compiled Statutes, includes the purpose of service of summons in a suit on a policy to recover a loss. *Id.*

4. Summons served on a bank may bind an insurance company, where the bank performed an act enumerated in section 8, chapter 16, Compiled Statutes, stating what acts shall constitute one the agent of an insurer. *Id.*

5. Agent's knowledge that insurer, in violation of the contract, procured additional insurance which rendered the first policy voidable at insurer's option, *held* knowledge of insurer. *Home Fire Ins. Co. v. Bernstein*..... 260

Insurance—*continued.*

Attorneys' Fees.

6. Where plaintiff recovers judgment in a suit for insurance on realty, a reasonable attorney's fee is allowable as costs, and the allowance may be made upon the overruling of defendant's motion for a new trial, though it was not ruled on during the term at which the verdict and judgment were rendered. *Home Fire Ins. Co. v. Weed*..... 146

Divisible Policy.

7. A policy stating the amount of insurance in the aggregate, but expressing a specific sum on each of several separately described divisions of the insured property, is divisible, but is entire as to each division though several articles may be included therein; and a condition in such a policy will not be construed as applicable to the property considered as a whole, but as applicable to each separate division. *Home Fire Ins. Co. v. Bernstein*..... 260

Fraud of Assured.

8. A defendant, in an action on a policy of life insurance, which claims that it was induced to accept payment of a past-due premium by the fraud of the beneficiary named in the contract, must, to avail itself of that defense, plead and prove the fact. *Life Insurance Clearing Co. v. Altschuler*, 341

Health of Assured.

9. Evidence *held* sufficient to warrant the jury in finding that the assured was in good health when the policy in suit was delivered and the first premium paid. *Id.*

Inconsistent Defenses to Action.

10. An answer in an action on a contract of insurance which alleges a failure to furnish proofs of loss and that plaintiff caused the premises to be burned does not present inconsistent defenses. *Home Fire Ins. Co. v. Decker*..... 346

Incumbrances.

11. Where each of several separately described divisions of the property is insured in gross for a definite sum under a policy containing a provision against incumbrances, the execution of a mortgage on any article in one of such divisions invalidates the insurance as to that division. *Home Fire Ins. Co. v. Bernstein*..... 260

Limitation of Liability.

12. Where there has been a total loss by fire of insured realty, a clause in the policy limiting the amount of recovery to a sum less than the amount written in the contract is invalid and will not be enforced. *Home Fire Ins. Co. v. Weed*..... 146

Premiums. Rights of Assured's Creditors.

13. As a general rule, premiums paid by assured for life insurance in favor of his wife or children cannot be recovered by his creditors as having been paid in fraud of their rights,

Insurance—*concluded.*

though the debts existed when the payments were made. *Adler & Sons Clothing Co. v. Hellman*..... 267

Proofs of Loss.

14. Conduct of insurer *held* to constitute a waiver of defects in proofs of loss. *National Masonic Accident Ass'n v. Day*..... 127

Recovery on Policy.

15. Evidence *held* sufficient to sustain a verdict for plaintiff in a suit for accident insurance. *Id*..... 128

16. Evidence *held* to justify the giving of an instruction to find for plaintiff in a certain sum. *Nye v. Northern Assurance Co.* 776

Interest.

1. It is competent for parties to contract for payment of interest at stated periods, and that installments of interest not paid at the time they fall due shall themselves bear interest, provided, however, that the whole interest so reserved shall not exceed ten per cent per annum, simple interest, on the debt. *Hallam v. Telleren*..... 256

2. Instrument set out in opinion and construed *held* to draw interest from date. *Jewett v. McGillicuddy*..... 588

Intoxicating Liquors.

In a suit against a saloon-keeper to recover damages sustained by plaintiff by reason of his having disposed of property while intoxicated by liquor furnished by defendant, it is error to instruct that the jury may award plaintiff such damages as he has thus sustained, in absence of evidence of the value of the property. *Roberts v. Hopper*..... 599

Intoxication. See INSTRUCTIONS, 11.

Issues. See REVIEW, 46.

Joinder of Causes of Action. See ACTIONS.

Joinder of Parties. See REPLEVIN, 3, 4.

Journal Entries. See REVIEW, 62.

Judgments. See COSTS, 2, 3. INFANTS, 3-7. JUSTICE OF THE PEACE, 5. MORTGAGES, 5, 16. REFORMATION OF INSTRUMENTS. RES JUDICATA. REVIEW, 40, 52, 69. TRIAL, 6. VENDOR AND VENDEE, 7, 8.

1. An order for the restitution of money, paid pursuant to the direction of an erroneous judgment, cannot be made after such judgment has been reversed and the action dismissed. *Anheuser-Busch Brewing Ass'n v. Hier*..... 557

Alimony.

2. A decree awarding permanent alimony is enforceable in the same manner as judgments at law. *Leeder v. State*..... 133

Judgments—*continued.*

Amendment.

3. In an action dismissed for want of jurisdiction, a simple judgment for the value of the property, entered upon the express waiver by the defendant of the return of the property to him, cannot, as a matter of right, almost a year later, be amended upon his motion, so that the judgment shall be for the return of the property or for its value. *Miller v. Daly*..... 771

Consent of Parties. Review.

4. On review the supreme court may remand a cause for further proceedings in disregard of a stipulation fixing the amount for which judgment should be rendered in case of reversal, where subsequent proceedings may have avoided the stipulation in whole or in part. *Kendall v. Garneau*..... 403

5. After the granting of a conditional order, on motion to set aside a judgment by default, an order of the county judge, in vacation, finally overruling the motion will, in absence of evidence to the contrary, be presumed to have been entered at that time by consent of the parties. *Royal Trust Co. v. Exchange Bank*..... 664

6. In the county court, where a conditional order to set aside a judgment has been made in a case for trial within term time, an order finally overruling the motion to set aside the judgment may be made by the county judge in vacation, if the parties consent to a ruling at that time. *Id.*

Deficiency.

7. Prior to the act of 1897 a deficiency judgment in a suit to foreclose a real estate mortgage could not be rendered until the coming in of the report of the sale. *Devries v. Squire*... 438

8. In a mortgage-foreclosure proceeding where issue has been joined as to the debtor's liability for a deficiency, the issue may be determined by a finding in the original decree. *Id.*

9. In a trial to ascertain whether a deficiency judgment should be rendered, it is not prejudicially erroneous to receive in evidence copies of the pleadings and of the return of the sheriff on the order of sale; neither is it prejudicially erroneous to permit the clerk of the district court to testify that the costs have been paid out of the proceeds of the foreclosure sale. *Daniel v. Schomberg*..... 773

Foreign Judgment.

10. Courts cannot refuse to give effect to a foreign judgment which has not been superseded, merely because it was erroneously rendered, or because it seems probable that it may be reversed by an appellate court. *Lonergan v. Lonergan*.... 642

Personal Judgment. Notice.

11. In mortgage-foreclosure a decree finding the amount due, directing payment within a fixed time, and providing for

Judgments—*continued.*

sale of the realty in case of default is not a personal judgment. *Alling v. Nelson*..... 161

12. A personal judgment against a party who is no longer in court is void. *Anheuser-Busch Brewing Ass'n v. Hier*..... 557

13. Refusal to enter a personal judgment against one upon whom only constructive service had been made, *held* proper. *Campbell v. O'Connor*..... 638

Proceedings to Vacate. Equity. Defenses. Laches.

14. A party seeking relief in equity from a judgment taken against him by default must exhibit a defense to the action, and also show that the rendition of such judgment was not due to his failure to take such proper steps for his own protection as an adequate foresight of consequences would naturally suggest. *Cleland v. Hamilton Loan & Trust Co.*... 13

15. A judgment will not be set aside on the application of a party who has by his own laches failed to avail himself of an opportunity to defend. *Id.*

16. Where a judgment depends for its support upon the evidence of the successful party and the defeated party has a valid defense which he was prevented from establishing by reason of the former's perjury, and where he has been guilty of no negligence and has exhausted all his ordinary legal remedies for obtaining a vacation of such judgment, then equity, in a proper proceeding, will vacate such judgment and grant the defeated party a new trial. *Munro v. Callahan* 75

17. Neither an action under section 602 of the Code, nor an independent suit in equity, will lie to vacate a judgment, after the term at which it was rendered, on account of the fraud of the successful party, unless such fraud occurred or was practiced in connection with the trial of the case. *Id.*

18. Equity will not vacate a judgment on account of an innocent mistake or want of recollection on the part of the plaintiff or his witnesses, nor, generally, on account of the perjury of other witnesses in the case. *Id.*

19. Allegations of petition *held* to support a decree of the district court vacating a judgment at law procured by the perjury of the successful party on the trial. *Id.*

20. To entitle a party to a judgment to be relieved from its provisions, on motion after term, it is an essential prerequisite that he have a defense to the judgment as it stands. *Clark v. Charles*..... 202

21. The district court may vacate or modify its own judgments at any time during the term at which they were rendered. *Bradley v. Slater*..... 334

22. Section 1001 of the Code relative to setting aside a judgment by default applies to practice in the county court in civil

Judgments—*concluded.*

actions regardless of the amount in controversy. *Royal Trust Co. v. Exchange Bank*..... 663

23. An order by a county court to set aside a judgment by default must be conditional in the first instance, and cannot be made final in absence of notice to the adverse party of the time and place of trial. *Id*..... 664

Judicial Notice. See EVIDENCE, 6.

Judicial Sales. See EXECUTIONS.

Jurisdiction. See COURTS, 2-5. CRIMINAL LAW, 5, 9. EXECUTORS AND ADMINISTRATORS, 5.

Jury. See CRIMINAL LAW, 3.

1. Where the answer in a suit for damages for a breach of contract presents an equitable counter-claim which is traversed by a reply, the issues of fact thus arising are triable to the court without a jury. *Hotaling v. Tecumseh Nat. Bank*..... 5

2. Where several issues are joined in a cause, some triable by jury and some by the court, it is not error to refuse a demand for a jury to try all the issues. *Id*..... 7

3. A juror should not be permitted to state to his fellow jurors, while they are considering their verdict, facts in the case within his own personal knowledge but not given in evidence, but should make the same known during the trial and, if desired, testify as a witness. *Ewing v. Hoffine*..... 131

Justice of the Peace.

1. Defendant's offer to confess judgment before a justice of the peace need not be renewed on appeal in order to defeat plaintiff's right to recover subsequent costs on final judgment, where he fails to recover the sum offered. *Flower v. Nichols* 314

2. On appeal to the district court the cause must be tried with the issues unchanged. *Western Cornice & Mfg. Works v. Meyer* 440

3. A justice of the peace has no jurisdiction to set aside the verdict of a jury except for fraud, partiality, or undue means. *Glaze v. Keith*..... 593

4. The following was *held* to be a verdict for defendant: "We, the jury, impaneled and sworn in the above entitled cause, do find that the plaintiff had no cause of action until the assignor and executor of the lease had settlement on old account." *Id.*

5. Following docket entry *held* to import a sufficient finding to support the judgment: "After hearing the evidence on both sides, and argument, it is considered by me that the plaintiff shall recover of the defendant the sum of $18.15 and costs of this action." *Michaut v. McCart*..... 654

Justice of the Peace—*concluded.*

6. It is the duty of a justice of the peace to make out a transcript, and, on demand, to deliver it to appellant or his agent, but the demand and delivery should be at the office of the justice; and it is not his duty to deliver the transcript at some other place, by mail or messenger. *Van Sant v. Francisco* 650

Laches. See JUDGMENTS, 14, 15. REVIEW, 47.

Estoppel by laches in delaying the commencement of an action is not available as a defense unless pleaded. *German Nat. Bank v. First Nat. Bank* 86

Landlord and Tenant. See SCHOOL LANDS.

1. Under facts stated in opinion *held* that injunction was properly allowed to prevent a tenant from interfering with the landlord's right, under the lease, to enter upon the premises, plow certain land, and sow wheat. *State Bank of Nebraska v. Rohren* 223
2. In an action by a landlord against his tenant to recover for heating the demised premises, the lease being silent as to the landlord's duties in that respect, evidence set out in the opinion *held* to tend to show that payment for heat was included in the rent reserved, and that it was error to peremptorily instruct the jury to find for plaintiff. *Bettman v. McConnell* 401
3. To absolve himself from the payment of rent, a tenant must, in addition to giving notice of the termination of the tenancy, surrender possession of the leased premises. *Dean v. Saunders County* 759

Larceny.

Evidence *held* insufficient to sustain a verdict against accused. *Hilligas v. State* 586

Law of the Case. See REVIEW, 63.

Library Associations. See CORPORATIONS, 3, 4, 5.

License. See MUNICIPAL CORPORATIONS, 5.

Liens. See CORPORATIONS, 13. MECHANICS' LIENS. MORTGAGES. PARTNERSHIP, 2-4. REPLEVIN, 6. TAXATION.

Limitation of Actions. See REVIEW, 48.

1. The filing of an information in the district court in term time, and not the filing of the complaint with the county judge, *held* the commencement of the prosecution. *State v. Robertson* 41
2. Under section 256 of the Criminal Code limiting the time for bringing criminal actions, complaint, arrest, and preliminary examination do not prevent the running of the statute, unless the magistrate before whom the complaint was

Limitation of Actions—*concluded.*

filed had jurisdiction to punish accused for the offense charged. *Id.*

3. An action to foreclose a mechanics' lien must be commenced within two years after the filing of the claim. *Calkins v. Miller* 602

Lis Pendens. See VENDOR AND VENDEE, 1.

Mandamus.

1. The remedy by mandamus rests upon the legal rights of the relator upon one hand and the legal obligations and duties of the respondent on the other, and cannot be predicated solely upon the equities existing between the parties. *State v. Wenzel*..... 210
2. One will not be granted redress by mandamus, where a statute affords him another adequate remedy. *Nebraska Telephone Co. v. State*..... 627
3. Writ requiring a telephone company to furnish telephonic service to relator for $3 per month when its regular charges are $5 per month, *held* improperly granted. *Id.*
4. Title to office cannot be tried in mandamus. *Kokes v. State*, 691
5. In a suit to require the proper officer to issue to relator a certificate of his election to fill an office, the question of the propriety or validity of an election at the alleged time to fill the office may be litigated. *Id.*

Married Women. See HUSBAND AND WIFE.

Master and Servant.

Dangerous Machinery. Defective Appliances.

1. A master does not insure an infant servant from injury by dangerous machinery. *Swift v. Holoubek*..... 228
2. In a suit for personal injuries it is erroneous to give an instruction permitting the jury to find for plaintiff if the machinery was dangerous and plaintiff was not guilty of contributory negligence. *Id.*
3. Unless mental immaturity or infirmity is shown, a servant is charged with notice of dangers obvious to persons of ordinary intelligence and foresight, and cannot recover from his master because of injuries resulting therefrom on the ground that he was inexperienced in the use of the machinery in which such danger existed, and was not warned thereof. *Norfolk Beet-Sugar Co. v. Preuner*..... 656
4. In an action to recover for injuries caused by defective appliances, an instruction that it was the "duty of the defendant to exercise reasonable care in keeping such machinery and appliances in a reasonably safe condition for use," does not place the burden of proof on the defendant. *Chicago, B. & Q. R. Co. v. Kellogg*..... 748

Master and Servant—*concluded.*

5. An averment in a petition that the defendant negligently permitted a certain appliance to become defective, and negligently suffered it to remain in a defective condition, implies that the defendant knew or was culpably ignorant of the defect. *Id.*

6. Where a servant sues his master on account of injuries resulting from the use of a defective tool or appliance, the fact that the accident happened cannot be taken as evidence of the master's negligence. *Id.*

7. To entitle plaintiff to a verdict in a suit for damages resulting from the use of a defective tool, he must affirmatively show that defendant either knew or was inexcusably ignorant of the defect. *Id.*

Negligence. Evidence.

8. Evidence *held* sufficient to sustain a verdict for plaintiff in a suit by a servant who was injured through negligence of the master. *Norfolk Beet-Sugar Co. v. Burnett*..... 360

9. In an action against a corporation for damages for negligently causing the death of a servant, it was *held* that there was no evidence to support a verdict for plaintiff, and a direction to the jury to find for defendant was approved. *Nelson v. Swift*..... 598

10. The essential elements of a petition charging actionable negligence are that the plaintiff, without fault on his part, has sustained an injury as the proximate consequence of a specific negligent act or omission of the defendant. *Chicago, B. & Q. R. Co. v. Kellogg*..... 748

Master Commissioner. See EXECUTIONS, 12, 13.

Mechanics' Liens. See EXECUTIONS, 26.

1. One who furnishes materials for all the buildings on several lots under one contract may make the entire debt a charge upon all the land, but not a charge upon a portion thereof: but where a portion of the premises has been absorbed by a prior lien thereon, such material-man may have a lien for his entire debt on the remainder of the premises. *Badger Lumber Co. v. Holmes*..... 473

2. Where a decree in favor of plaintiff foreclosing a mechanic's lien is reversed on appeal by defendants, and the cause remanded for further proceedings, the situation of plaintiff is the same as if his rights had never been tried. *Id.*

3. An action to foreclose a mechanic's lien must be commenced within two years after the filing of the claim. *Calkins v. Miller*..... 602

4. An action to foreclose a mechanic's lien is commenced on the date of the summons which is served. *Id.*

Memoranda. See EVIDENCE, 33.

Merger. See MORTGAGES, 17.

Misconduct of Counsel. See NEW TRIAL, 7. REVIEW, 6, 7.

Misconduct of Jury. See JURY, 3.

Mistake.

Evidence *held* to justify a finding that the insertion in deeds of covenants of warranty against incumbrances was the result of a mutual mistake. *Hotaling v. Tecumseh Nat. Bank.* 6

Money Had and Received. See PRINCIPAL AND AGENT, 8.

Mortgage Foreclosure. See EXECUTIONS.

Mortgages. See FRAUDULENT CONVEYANCES, 5. REFORMATION OF INSTRUMENTS. SPECIFIC PERFORMANCE. VENDOR AND VENDEE, 3, 5.

1. A mortgage is a mere security, in the form of a conditional conveyance. *Barber v. Crowell*..... 571

Cancellation.

2. Sufficiency of evidence to justify cancellation of mortgage. *German Nat. Bank v. Kautter*..... 103

Consideration. Married Woman.

3. Relinquishment by a married woman of dower and homestead rights in her husband's land is a sufficient consideration for the execution to her of a note and mortgage representing a portion of the price for which such land was sold. *Gruver v. Walkup*..... 544

Decree of Foreclosure.

4. A decree in a foreclosure suit which finds the amount due, directs that it be paid within a fixed time, and provides for the sale of the premises in default of payment, is not a personal judgment. *Alling v. Nelson*..... 161

5. It is within the province of the district court in a decree of foreclosure to provide for the appraisement and sale of the premises in parcels or *en masse*, as the best interests of the parties may require. *Kane v. Jonasen*..... 757

Deeds as Security.

6. Evidence *held* to sustain a finding that deeds absolute in form were intended as mortgages. *Hotaling v. Tecumseh Nat. Bank*..... 6

Default. Option to Foreclose.

7. When authorized by the terms of the mortgage, mortgagee, after default in payment of interest, may declare the entire debt due and foreclose the mortgage without previous notice to mortgagor of his election to do so. *Eastern Banking Co. v. Seeley*..... 660

Deficiency.

8. Prior to the act of 1897 a deficiency judgment in a suit to foreclose a real estate mortgage could not be rendered until the coming in of the report of the sale. *Devries v. Squire*... 438

Mortgages—*continued.*

9. In a mortgage-foreclosure proceeding where issue has been joined as to the debtor's liability for any deficiency, the issue may be determined by a finding in the original decree. *Id.*

Deposit of Title Deeds.

10. A mortgage by the deposit of title deeds violates the statute of frauds and is contrary to the policy of the recording acts. *Bloomfield State Bank v. Miller*..... 243

11. A mortgage by the deposit of title deeds, without writing, is not effective. *Id.*

Foreclosure. Pleading. Exhibits. Parties.

12. By section 129 of the Code any instrument for the unconditional payment of money only may be attached to and made part of a pleading founded thereon; but an action to foreclose a mortgage is not based on an instrument for the unconditional payment of money only. *Lincoln Mortgage & Trust Co. v. Hutchins*..... 158

13. In an action of foreclosure copies of instruments evidencing and securing the debt cannot properly be made a part of a pleading by annexation and averment; but such copies, under appropriate averment, may become, and will be considered, part of a pleading to which they are attached, unless stricken out on motion. *Id*..... 159

14. An administrator may maintain an action to foreclose a real-estate mortgage executed to secure purchase-money notes, one of which was made to his intestate, a married woman, as an inducement for releasing her dower and homestead rights in the mortgaged premises; and the fact that the note was, by her direction, delivered to her husband and never came into her personal possession, is no impediment to the maintenance of such action. *Gruver v. Walkup*..... 544

15. A petition in a suit to foreclose a real-estate mortgage executed to "Western Trust and Security Company," and by it sold and assigned to the plaintiff, did not fail to state a cause of action, although the mortgagee's character as a legal entity did not affirmatively appear. *Barber v. Crowell*, 571

Lien of Judgment.

16. A money judgment of a district court becomes a general lien upon all the lands of the debtor in the county, at least, from the date of its rendition, and a mortgage executed upon such lands thereafter will not invest the mortgagee with a lien superior to the judgment for anything more than the debtor's homestead interest. *Beach v. Reed*..... 605

Merger.

17. Ordinarily, when one having a mortgage on realty becomes the owner of the fee the former estate is merged in the

Mortgages—*concluded.*

latter, but he may keep his mortgage alive when it is essential to his security against an intervening title; and if there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself. *Wyatt-Bullard Lumber Co. v. Bourke*..... 9

Payment. Rights of Transferee.

18. Where mortgagee agreed to pay with the loan a prior lien, failed to do so, but paid the money to an unauthorized person, and afterward transferred his mortgage, *held* that the failure of consideration was not available to mortgagor as against the innocent transferee. *Campbell v. O'Connor*..... 638

Redemption.

19. Where an appeal has been taken from confirmation of a foreclosure sale and a proper appeal bond executed and approved, mortgagor may redeem the realty any time before the supreme court affirms the confirmation. *Philadelphia Mortgage & Trust Co. v. Gustus*..... 435

Tax Liens.

20. Plaintiff is entitled to have the amount of all valid tax liens owned by him, and taxes paid to protect the same, included in the decree foreclosing his mortgage. *Learitt v. Bell*..... 58

21. In a foreclosure proceeding where a lien is sought to be enforced for the non-payment of special taxes, the person asserting the lien has the burden of showing its validity. *Equitable Trust Co. v. O'Brien*..... 735

Municipal Corporations. See DEDICATION, 1. QUIETING TITLE, 1.

Annexation of Territory.

1. The statute (Compiled Statutes 1895, ch. 14, art. 1, sec. 99) authorizes the boundaries of a village to be extended so as to include adjacent lands, where either they will be materially benefited from the annexation, or justice and equity require that it be done. *Village of Syracuse v. Mapes*..... 738

2. Under the statute (Compiled Statutes 1895, ch. 14, art. 1, sec. 99) the corporate limits of a village may be extended so as to embrace contiguous territory which is in such close proximity to the platted portion as to have some unity of interest therewith in the maintenance of municipal government; and such territory may be annexed, though the same may not have been subdivided into tracts of ten acres or less. *Id.*

Contracts. Agents.

3. Contract for lighting streets of a city *held* not assignable. *City of Omaha v. Standard Oil Co*..... 337

4. A public corporation is bound by the acts and contracts of

Municipal Corporations—*continued.*

its authorized agents within the scope of their authority. *Dean v. Saunders County* 759

License. Pool Rooms.

5. The legislature, by section 68*, article 2, chapter 13*a*, Compiled Statutes, has conferred upon cities to which said chapter applies power to enact an ordinance to license and prohibit the keeping of billiard and pool tables for hire or gain, and to provide for the imposing of a fine upon a conviction of a breach of such ordinance, and also imprisonment in the city jail in default of the payment of said fine. *In re Langston* 310

Ordinance. Invalid Portions.

6. When a city ordinance contains valid and void provisions, the valid portion will be upheld if it is a complete law in itself, capable of enforcement, and is not dependent upon that which is invalid. *Id.*

Self-Government. Fire Department.

7. The right of local self-government in cities and towns existed at the time the constitution was framed, and was not surrendered upon the adoption of that instrument, but vested in the people of the respective municipalities; and the legislature is powerless to take it away. *State v. Moores*, 480

8. The right to maintain a fire department in a city or town is one of the rights vested in the people of municipalities, and is to be exercised by them, without legislative interference, except to the extent the lawmaking body may prescribe rules to aid the people of municipalities in the exercise of such right. *Id.*

9. The act of 1897 (Compiled Statutes, ch. 12*a*), in so far as it assumes to confer authority upon the governor to appoint fire and police commissioners in cities of the metropolitan class, is void, as being an unlawful attempt to deprive the people of such cities of the right of local self-government. *Id.*

Taxation. Equalization. Notice. Streets. Paving.

10. Section 69, chapter 12*a*, Compiled Statutes 1887, construed, and *held* that the presenting to a metropolitan city council of such petition as the one required by said section is a jurisdictional prerequisite to authorize it to charge by ordinance the cost of paving streets to the property abutting thereon. *Leavitt v. Bell* 57

11. The phrase "for at least six days prior," in section 85, chapter 12*a*, Compiled Statutes 1887, relating to equalization of taxes in metropolitan cities, is not complied with by publishing a notice once in the official paper of the city six days before the council convenes as a board of equalization. *Id* 58

Municipal Corporations—*continued.*

12. Where the board of equalization of a metropolitan city convenes on the 28th of the month, in pursuance of a notice published on the 23d of the month, it is without jurisdiction to act, and its proceedings are void. *Id.*

13. Special paving taxes, levied on property by ordinance passed by the mayor and council of the city of Omaha, *held* void, because the paving of the streets was not petitioned for in accordance with the provisions of section 69, chapter 12*a*, Compiled Statutes of 1887, relating to improvement of streets in cities of the metropolitan class. *Id.*

14. A metropolitan city council has no jurisdiction to pass an ordinance levying special taxes against real estate until, sitting as a board of equalization, it has first determined the amount of such special taxes to be assessed against such real estate as benefits. *Id.*
Equitable Trust Co. v. O'Brien..... 735

15. A metropolitan city council, sitting as a board of equalization, has no jurisdiction to determine and fix the benefits to be levied as special taxes against real estate, until it has given notice of its sitting as such board, "for at least six days prior thereto," by publication in the official paper of the city. *Id.*

16. One seeking to enforce against realty a lien for non-payment of special taxes has the burden of showing the validity of the tax lien. *Id.*

17. Whether or not the opening of a street benefits abutting or adjacent lots is in such a degree a question of fact that a finding of the district court upon conflicting evidence will not be disturbed. *Kuhns v. City of Omaha*..... 183

18. Facts stated, and *held* sufficient to justify a finding of the district court that the alleged lack of continuity of a street did not constitute the parts thereof distinct streets, in such sense that for benefits because of an extension of one part, the lots abutting upon and adjacent to the other part could not be assessed. *Id.*

19. The compensation of appraisers for the assessment of damages for the opening of a street *held* a proper item to be charged against the real property specially benefited by such public improvement. *Id.*

20. Under the provisions of section 69, chapter 12*a*, Compiled Statutes 1891, the costs of making ordinary repairs in street pavements cannot be assessed against the abutting lot owner, but must be paid by the city. *Robertson v. City of Omaha*..... 718

21. A paving contract which binds the contractor to bear the expense for the term of ten years of "all repairs which may from any imperfection in the said work or material become

Municipal Corporations—*concluded.*

necessary within that time," does not include ordinary repairs, nor is said stipulation in violation of chapter 12*a*, Compiled Statutes 1891. *Id.*

22. Where worthless wooden blocks laid on a concrete base have been removed from a street and replaced with vitrified brick pursuant to a contract with the city, the improvement is not an ordinary repair, but a repavement for which a special assessment may be levied on abutting realty. *Id.* 719

23. Contract for repaving a street *held* not to cast on an abutting lot owner the burden of making ordinary repairs. *Id.*

24. Evidence *held* to sustain a finding that a certain street is a thoroughfare 66 feet wide. *McCague v. Miller* 762

Necessaries. See PARENT AND CHILD, 2.

Negligence. See MASTER AND SERVANT, 3, 8-10.

Negotiable Instruments. See ALTERATION OF INSTRUMENTS. FRAUDULENT CONVEYANCES, 1. HUSBAND AND WIFE, 1. MORTGAGES. PLEADING, 8, 9. PLEDGES, 2. USURY.

1. Where one gave his note in renewal of his past due note which had been given partly in consideration of the conveyance to him of certain lots by payee, such maker cannot defeat an action on the renewal note, in the hands of an assignee thereof before due, by showing that, at the time said renewal note was executed, payee promised to cause improvements to be made which would enhance the value of the lots; the time fixed for the performance of such promise being subsequent to the date when the note was assigned to plaintiff. *Nebraska Nat. Bank v. Pennock* 188

Attorney's Fees.

2. A provision, in a note, for payment of attorney's fees in case suit should be brought against the maker will not be enforced in Nebraska, though the note was executed and made payable in Iowa where the provision was lawful. *Hallam v. Telleren* 255

Collections.

3. A bank to which a note had been sent for collection may be held liable to the owner for the amount due thereon, where the bank forwarded the note to another bank which, pursuant to instructions, made collection and credited the proceeds to the former bank, though the collecting bank failed immediately thereafter. *First Nat. Bank of Omaha v. First Nat. Bank of Moline* 303

Consideration.

4. Relinquishment by a married woman of dower and homestead rights in her husband's land is a sufficient consideration for the execution to her of a note and mortgage representing a portion of the price for which such land was sold. *Gruver v. Walkup* 544

Negotiable Instruments—*concluded.*

Extension of Time.

5. A payee who transferred his note cannot afterward extend the time of payment. *Zobel v. Bauersachs*..... 20

Indorsements. Evidence.

6. Where commercial paper is indorsed in blank, the terms of the contract may be shown by parol evidence to be different from that which the law implies in such cases. *United States Nat. Bank v. Geer*..... 462

7. A restrictive indorsement in unambiguous language cannot be contradicted or explained by evidence resting in parol. *Id.*

8. A certificate of deposit indorsed by the payee, "Pay to the order of R. C. O. Cash., for account," of the indorser, is a restrictive indorsement, and vests no general property to the paper in the indorsee, but merely constitutes him an agent for the purpose of collection; and parol evidence is not admissible to establish that the transfer of title was absolute. *Id.*

Interest. Penalty.

9. A provision in a note, for a legal rate until maturity, and, if the note should not then be paid, a higher rate from the date of the note, is, so far as it provides for a higher rate before maturity, in the nature of a penalty and will not be enforced. *Hallam v. Tellerem*..... 255

10. A note providing for a legal rate of interest until maturity, and for a higher, but still legal, rate after maturity, is valid and will be enforced according to its terms. *Id.*

Party to Action.

11. The equitable owner of a negotiable promissory note may maintain an action thereon in his own name. *Leavitt v. Bell*, 61

Payment to Agent.

12. One claiming the benefit of a payment of a negotiable instrument, to a person other than the owner, who does not produce the instrument or have it in his possession, must show that such person had authority or apparent authority, under the law of agency, to receive payment. *Campbell v. O'Connor* 638

New Trial. See COSTS, 1. JUDGMENTS, 16. REVIEW, 38, 50-53, 66.

1. Where a verdict in favor of one party is set aside by the district court, and a second trial results in favor of the other party, the first verdict will not be reinstated upon a reversal by the supreme court of a judgment based on the second verdict. *Zobel v. Bauersachs*..... 20

2. An order of the district court granting a new trial on conditions to be performed by the moving party after the ad-

New Trial.—*concluded.*

journment of the term is valid, and in such case the right to a new trial becomes absolute on performance of the condition. *Ogden v. Rosenthal*..... 163

3. An order of the district court construed and *held* not to be a mere declaration of intention on the part of the court, but a positive adjudication establishing at once plaintiff's right to a retrial of the cause on compliance with certain conditions named in the order. *Id*..... 164

4. Where a consideration of questions presented for review results in a proper and just disposition thereof, a rehearing should not be granted on the ground that the court did not devote sufficient time to an examination of the record and to the preparation of an opinion. *Bartley v. State*..... 295

5. A party who has induced the court to permit him to open and close the trial by representing that there was only one issue of fact for decision cannot, after an adverse verdict, recede from his position and obtain a new trial on the ground that there were other questions of fact which should have been submitted to the jury. *Home Fire Ins. Co. v. Decker* 346

6. The trial court is justified in overruling an assignment of error in the motion for a new trial unless it can be sustained in the form in which it is presented. *Missouri P. R. Co. v. Palmer*..... 560

7. A party desiring to review misconduct of counsel in argument should make an objection, and except to any adverse ruling; but where misconduct is so flagrant, and of such a character, that neither a complete retraction nor an admonition from the court can entirely destroy its sinister influence, a new trial should be awarded regardless of the want of an objection and exception. *Chicago, B. & Q. R. Co. v. Kellogg*..... 749

Newspapers.

Construction of contract for publishing an advertisement in a newspaper. *Call Publishing Co. v. Edson*..... 394

Non-Residents. See DOMICILE.

Nonsuit. See DISMISSAL.

Notary Public.

A notary public, by impression of his official seal, must authenticate his official acts, and a certificate lacking such authentication is without force. *Welton v. Atkinson*..... 674

Notice. See EXECUTIONS, 2-4. MORTGAGES. 7. MUNICIPAL CORPORATIONS, 11, 12, 15. SUMMONS. TAXATION, 9.

Oath. See EXECUTIONS, 12, 13. TAXATION, 6.

Office and Officers. See JUSTICE OF THE PEACE.

Bonds.

1. The official bond of a county officer is not void because it does not specify or designate the term for which the principal obligee was elected or appointed. *Perkins County v. Miller* 141

2. The official bond of a county clerk is not void by reason of its being, in form, joint, instead of joint and several as required by statute. *Id.*

Certification of Election.

3. Where a candidate for a public office has received and holds the certificate of election, such certificate is conclusive evidence of his right to the office until it is judicially determined that some other person has a better title. *State v. Frantz* 167

4. It is the duty of one in possession of an elective office, at the end of his term, to surrender that possession to one who holds the certificate of election for the ensuing term. *Id.*

Evidence of Official Acts.

5. A public officer may give evidence of the uniform course of business in his office, for the purpose of showing the performance of an act which it was his duty to perform, but concerning which he has no independent recollection. *Gate City Abstract Co. v. Post*..... 743

Removal of Officer. Injunction.

6. Injunction to prevent a board having jurisdiction from proceeding under charges for removal of an officer *held* erroneously granted. *Cox v. Moores*..... 34

7. On application for injunction to prevent a board from proceeding under charges for removal of an officer, it was *held* that the difference in the political affiliations of the parties should not be considered. *Id*..... 38

8. A court of equity should not interfere by injunction to prevent the removal of an officer when the power of removal is vested in a board or officer. *Id*..... 40

Right to Qualify.

9. The statutory provisions (Compiled Statutes, ch. 10, sec. 15), requiring any person appointed or elected to a public office to qualify at the time and in the manner therein directed, do not apply to a claimant for an office who, through the carelessness, negligence, or willful omission of the precinct election boards in the discharge of their duties, failed to receive the certificate of election to such office. *State v. Frantz* 167

10. A candidate who has failed to secure the certificate of elec-

Office and Officers—*concluded.*

tion may qualify and be inducted into office upon establishing his claim thereto in a quo warranto proceeding. *Id.*

Title.

11. Title to office cannot be tried in mandamus. *Kokes v. State,* 691

Official Bonds. See EVIDENCE, 14.

Opening and Closing. See NEW TRIAL, 5.

Opening Judgments. See JUDGMENTS, 6, 14-23.

Opinion Evidence. See EVIDENCE, 11, 38.

Opinions. See NEW TRIAL, 4.

Order of Sale. See EXECUTIONS.

Ordinances. See MUNICIPAL CORPORATIONS, 6.

Parent and Child.

1. Personal services rendered by a child to a parent are presumed, in the absence of special circumstances, to have been gratuitously rendered; but this presumption may be overcome by sufficient evidence tending to establish a contract for remuneration. *Kloke v. Martin*..... 554
2. A widow is the natural guardian of her minor child and as such is ordinarily liable for necessaries furnished it. *Missouri P. R. Co. v. Palmer*..... 560

Parties. See ACTIONS, 2. CORPORATIONS, 2, 10, 15. INSANITY. MORTGAGES, 15. REPLEVIN, 4. REVIEW, 50.

1. The assignee of a chose in action is the proper and only party who can maintain an action thereon. *Crum v. Stanley,* 353
2. Where no exception is taken to an order substituting a party plaintiff, such order cannot be reviewed. *Maul v. Drexel* 446
3. In error proceedings for the review of a final order by which the inseparable interests of several defendants are affected, all persons interested must be made parties to such proceedings as plaintiffs or defendants. *Collins Mfg. Co. v. Seeds Dry Plate Co*..... 576

Partition.

Where one accepts lands awarded to him by the provisions of a consent decree partitioning realty, he thereby ratifies the entire decree; and he may not hold his lands and be relieved from the burdens imposed by such decree. *Clark v. Charles* 202

Partnership. See CREDITORS' BILL, 5.

1. The assets of a copartnership, though insolvent, are not held in trust by members of the firm for payment of firm debts, nor has the creditor a lien on such assets. *Brown v. Sloan* 28

Partnership—*concluded.*

2. Where one partner is indebted to another partner on transactions of the firm, the creditor has no lien, because of the partnership relation, upon the debtor's individual property. *Murphy v. Warren*..... 215

3. The assets of an insolvent partnership, dissolved by the death of one of its members, are not held in trust by the surviving partner of the firm for the payment of partnership debts. *Fairbanks v. Welshans*..... 362

4. Firm creditors, merely because they are such, are not given a lien by law upon assets of the partnership. *Id.*

5. On the dissolution of a partnership by the death of one of its members the right to the possession and disposition of the partnership assets vests in the surviving partner. *Id.*

6. A partnership, as such, possesses no capacity to take a conveyance of the legal title to real estate. *Barber v. Crowell*... 571

7. A lien on real estate to secure an indebtedness may accrue to a partnership in its firm name. *Id.*

Pavements. See MUNICIPAL CORPORATIONS, 20-23.

Payment. See JUDGMENTS, 1. NEGOTIABLE INSTRUMENTS, 5. PRINCIPAL AND AGENT, 8.

1. Evidence *held* insufficient to establish the defense of payment of taxes. *Twinting v. Finlay*..... 152

2. One who receives and appropriates to his own use money sent him for a particular purpose will be held to have received and retained it in accordance with the purpose for which it was sent. *Life Insurance Clearing Co. v. Altschuler*.. 341

3. Money sent to a person as a payment cannot, without the consent of the sender, be received and held as a bailment. *Id.*

4. The collection by a third person of installments of interest on a note confers no authority or apparent authority on such person to receive payment of the principal when it matures. *Campbell v. O'Connor*..... 638

5. One claiming the benefit of a payment of a note to a third person who does not produce the note or have it in his possession, must show that such person had authority or apparent authority, under the law of agency, to receive payment. *Id.*

Penalties. See NEGOTIABLE INSTRUMENTS, 9.

Perjury. See JUDGMENTS, 16-19.

Personal Injuries. See DAMAGES, 1, 2.

Plea in Bar. See CRIMINAL LAW, 3, 4.

Pleading. See ALTERATION OF INSTRUMENTS. CONTRACTS, 10. CORPORATIONS, 14. COVENANTS, 1. INJUNCTION, 3, 4. MASTER AND SERVANT, 5, 10. MORTGAGES, 15. REPLEVIN, 8. SALES, 6.

Allegations Undenied.

1. Averments not denied by the answer to a petition or to a supplemental petition are taken as true, and need not be proved. *Lonergan v. Lonergan*..... 642
2. All material allegations of new matter in the answer, which are not put in issue by a reply, will be taken as true and need not be proved. *Equitable Trust Co. v. O'Brien*..... 735

Amendments.

3. Amendments to pleadings should always be permitted when in furtherance of justice, and the rulings of the trial court in that regard will be reversed when the record presents a clear abuse of discretion. *Perkins County v. Miller*..... 141
4. Where a bill of particulars filed before a justice of the peace and a petition filed on appeal to the district court declare on an account in favor of plaintiff as the original creditor, the petition cannot be amended during the trial in the district court, to show that plaintiff claims by assignment. *Western Cornice & Mfg. Works v. Meyer*..... 440
5. An amendment to conform a pleading to facts proved is not allowable, where it will change the cause of action. *Id.*
6. It is not reversible error to refuse to permit a petition to be amended on the trial, when such amendment, taken in connection with the other averments of the petition, did not state a cause of action. *Bartlett v. Scott*..... 477
7. An affidavit or petition in replevin may be amended to make general statements more definite and specific. *Swain v. Savage* 687

Copies of Instruments.

8. By section 129 of the Code any instrument for the unconditional payment of money only may be attached to and made part of a pleading founded thereon, but an action to foreclose a mortgage is not based on an instrument for the unconditional payment of money only. *Lincoln Mortgage & Trust Co. v. Hutchins*..... 158
9. In an action of foreclosure copies of instruments evidencing and securing the debt cannot properly be made a part of a pleading by annexation and averment, but such copies, under appropriate averment, may become, and will be considered, part of a pleading to which they are attached, unless stricken out on motion. *Id*..... 159

Demurrer.

10. A demurrer does not reach the commingling of two causes of action in a single count, where they are of such character that they may be joined. *Ponca Mill Co. v. Mikesell*..... 102

Pleading—*concluded.*

Inconsistency.

11. Where a petition pleaded a contract made through an agent of defendant and also that defendant had adopted and ratified it, it was *held* that the averments were not inconsistent, the test of inconsistency being that proof of one averment disproves the other. *People's Nat. Bank v. Geisthardt*..... 232

12. Defendant may plead as many consistent grounds of defense as he may have. *Home Fire Ins. Co. v. Decker*..... 346

13. In a suit on an insurance policy an answer alleging a failure to furnish proofs of loss and that plaintiff caused the premises to be burned does not present inconsistent defenses. *Id.*

Issues.

14. Testimony concerning a matter upon which no issue has been raised by the pleadings may be excluded. *Missouri P. R. Co. v. Palmer*..... 560

Petition.

15. Sufficiency of cross-petition. *German Nat. Bank v. Kautter*.. 103

16. Petition in an action in the nature of a creditors' bill *held* not to state a cause of action. *Fairbanks v. Welshans*..... 362

17. Where the sufficiency of the petition is not raised before trial it will be liberally construed, and, if possible, sustained. *Peterson v. Hopewell*..... 670

Reply.

18. Where, in the trial of a cause, both parties treat an affirmative defense as traversed, it will be so considered in the supreme court, though the plaintiff filed no reply either before or after judgment. *Missouri P. R. Co. v. Palmer*..... 559

Striking Out Matter.

19. Refusal to strike irrelevant matter from a pleading is not reversible error unless it affirmatively appears that the rights of the moving party are prejudiced. *Lincoln Mortgage & Trust Co. v. Hutchins*..... 159

20. Where an answer included a general denial and also admissions accompanied by special denials, it was *held* that defendant was not prejudiced by an order striking out all except the general denial. *People's Nat. Bank v. Geisthardt*... 232

21. Rejection of evidence in support of averments erroneously stricken from the pleadings *held* proper, the ruling on the pleadings being the error assailable. *Lonergan v. Lonergan*.. 641

22. An order striking from an answer a counter-claim disproved by a transcript of a foreign judgment upon which the suit was brought, *held* not reversible error. *Id.*

Pledges.

1. Evidence *held* to sustain a finding that policies of insurance in favor of a wife on the life of her husband, admitted to

Pledges—*concluded.*

have been by her pledged for his debt, had been deposited as a continuing security, and were not discharged by granting him extensions. But see Pledges 2. *First Nat. Bank of Omaha v. Goodman*..... 409

2. A pledge of property by a wife to secure an indebtedness of her husband, and to prevent his creditor from enforcing immediate payment, will not, of itself, entitle the creditor to hold such property as security for further advances to the husband; neither will it entitle the creditor to hold the property for satisfaction of the original indebtedness, after having made a valid contract extending the time for its payment; and such an extension, made by a creditor without the knowledge or consent of the wife, will operate to release the pledge. *Id*..... 419

Police Commissioners. See MUNICIPAL CORPORATIONS, 9.

Pool-Rooms. See MUNICIPAL CORPORATIONS, 5.

Preferred Creditors. See BANKS AND BANKING, 2. CORPORATIONS, 8.

Preliminary Examination. See CRIMINAL LAW, 5-11.

Prescription. See HIGHWAYS, 1.

Presumptions. See EVIDENCE, 17, 18. REVIEW, 52.

Principal and Agent. See BANKS AND BANKING, 1. INSURANCE, 5. NEGOTIABLE INSTRUMENTS, 8. REVIEW, 49.

Dual Capacity of Agent.

1. Where a person acted in a fiduciary relation to two contracting parties having antagonistic interests, and one of them was unaware of such person's fiduciary relation to the other, such person, when he seeks in an action at law to assert an advantage to himself as against the party ignorant of the dual capacity in which the claimant had acted, must show that the advantage claimed was not inequitable. *Duesman v. Hale*..... 577

Evidence of Relation.

2. Whether the relation of principal and agent exists between two parties is generally a question of fact, and, while it is not necessary to prove an express contract between the parties to establish such relation, either that must be done, or the conduct of the parties must be such that the relation may be inferred therefrom. *Bankers Life Ins. Co. v. Robbins*, 117

3. The facts stated in the opinion *held* ample to sustain a finding that an agency existed, embracing the right to make the contract on which the action was grounded. *Allsman v. Richmond*..... 540

4. The collection by a third person of installments of interest on a negotiable instrument confers no authority or appar-

Principal and Agent—*concluded.*

ent authority on such person to receive payment of the principal when it matures. *Campbell v. O'Connor*..... 638

Officers. Deputy.

5. Liability of state treasurer for acts of his deputy and clerks. *Bartley v. State*..... 296

Public Corporations.

6. A public corporation is bound by the acts and contracts of its authorized agents within the scope of their authority. *Dean v. Saunders County*..... 759

Ratification.

7. The acceptance by the principal, with knowledge of the facts, of the fruits of an unauthorized act of an agent is a ratification of such act, and relates back to the time of performance and binds the principal. *People's Nat. Bank v. Geisthardt* 232

Rights of Third Person.

8. An agent, the fact of agency and the name of principal being disclosed, who receives money for his principal which he fails to pay to the latter, is not liable to the payer, either in an action for conversion or for money had and received. *Huffman v. Newman*..... 713

Principal and Surety. See ABSTRACTS OF TITLE. FRAUDULENT CONVEYANCES, 1.

Alteration of Contract.

1. Where the contract of a surety is altered without his consent, it ceases to be his contract, and he is no longer bound to its performance. *First Nat. Bank of Omaha v. Goodman*.. 418

Conditional Obligation.

2. Where a joint bond is signed by a surety on condition that others are to sign it as sureties, it is invalid as to him if delivered without compliance with the condition, unless obligee received the bond without notice of the condition, or such surety, after signing, waived it. *Middleboro Nat. Bank v. Richards*..... 682

3. Where a joint bond, signed by a surety on condition that others are to sign it as sureties, discloses on its face, when delivered, such an irregularity as to cast on obligee the duty to inquire as to one of the requisite signatures, and he fails to do so, a breach of the condition may be a ground of defense to such surety in a suit on the bond. *Id.*

4. A surety may insist on compliance with his contract that he signed a bond on condition it should also be signed by other sureties; and such a condition is not satisfied by subsequent ratification of a signature written by an unauthorized person. *Id.*

Principal and Surety—*concluded.*

Construction of Contract.

5. A surety is entitled to stand upon the strict terms of his contract, and is bound only to the extent and in the manner pointed out in his obligation. *First Nat. Bank of Omaha v. Goodman* 418

6. In ascertaining the extent to which a surety has become obligated, unreasonable and overstrained constructions should not be adopted. *Id.*

7. A contract of suretyship is to be given a fair and reasonable interpretation, in accordance with established rules, with a view of determining upon what proposition the minds of the contracting parties have met. *Id.*

Priorities. See MORTGAGES, 16.

Privileged Communications. See WITNESSES, 8.

Process. See SUMMONS.

An order of sale headed, "The State of Nebraska, County of Gage, to the Sheriff of said County," complies with section 24, article 6, of the constitution, providing that "All process shall run in the name of the state of Nebraska." *Hoyt v. Little* 71

Promises. See CONTRACTS.

Protest. See TAXATION, 8, 9.

Public Lands. See SCHOOL LANDS.

Publication. See SUMMONS, 1, 2.

Quantum Meruit. See ESTOPPEL, 3.

Questions for Court. See MUNICIPAL CORPORATIONS, 17. VOLUNTARY ASSIGNMENTS, 5.

Questions for Jury. See CRIMINAL LAW, 3. SALES, 2. WITNESSES, 3.

Quieting Title.

1. Where a city asserts the existence of a public street, and seeks to have its title thereto quieted and confirmed as against the general owner of the land, it must show affirmatively every fact essential to the establishment of its claim. *Lewis v. City of Lincoln* 2

2. Evidence *held* to sustain a decree quieting title to realty. *Brown v. Murphey* 81

Quitclaim Deeds. See DEEDS, 4, 5.

Quo Warranto. See MANDAMUS, 5. OFFICE AND OFFICERS.

The district court has jurisdiction in an action in the nature of quo warranto to hear and determine conflicting claims to a public office. *State v. Frantz* 167

Railroad Companies. See EMINENT DOMAIN, 2, 3, 4.

Ratification. See ALTERATION OF INSTRUMENTS. CORPORATIONS, 16. PARTITION. PRINCIPAL AND AGENT, 7. PRINCIPAL AND SURETY, 2-4.

Real Estate Agents. See FACTORS AND BROKERS.

Reasonable Doubt. See INSTRUCTIONS, 14.

Receipts. See EVIDENCE, 15.

Receivers.

1. A receiver will not be appointed for a corporation, at the instance of a stockholder, merely because of a difference of opinion between him and the officers, or the holders of a majority of the stock, as to the proper policy of managing the corporate affairs. *Ponca Mill Co. v. Mikesell*..... 98

2. A receiver may be appointed for a corporation at the instance of a stockholder when it is shown that the officers and the holders of a majority of the stock are fraudulently mismanaging the corporate business, converting its property to their individual use, and abusing their powers to the injury of other stockholders. *Id.*

Redemption. See EXECUTIONS, 18-20.

Reformation of Instruments.

On facts disclosed by the record *held* that a mortgagee who purchased the real estate sold at judicial sale to satisfy the decree foreclosing his mortgage was not entitled to have the decree and sheriff's deed reformed so as to include therein lands not adjudged by the decree to be subject to the lien of the mortgage. *Beach v. Reed*..... 605

Registration. See MORTGAGES, 10.

Rehearing. See NEW TRIAL, 4.

Relation. See PRINCIPAL AND AGENT, 7. REPLEVIN, 1.

Remittitur.

Judgment for $9,000 for personal injuries *held* excessive and the filing of a remittitur for $2,500 made a condition of affirmance. *Chicago, B. & Q. R. Co. v. Kellogg*..... 749

Replevin. See JUDGMENTS, 3.

Amendment of Affidavit.

1. An affidavit or petition may be amended to make general statements more definite and specific, and the amendment may relate back to the inception of the cause. *Swain v. Savage* 687

Dismissal.

2. Dismissal of plaintiff's action and an order to impanel a jury to ascertain property rights of defendant and damages *held* a final judgment as to plaintiff. *Id.*

Bond. Liability of Sureties.

3. The obligation of the sureties in the undertaking, by virtue

Replevin—*concluded.*

of which the plaintiff in replevin obtains possession of property taken under the writ, is to the party or parties obligees to whom the judgment on the issues accords a recovery. *Pilger v. Marder*..... 114

4. Where there are two or more defendants and the property has been taken under the writ and delivered to the plaintiff after execution by sureties of the prescribed undertaking, if, by the judgment, the entire property is awarded to one defendant, the rights thus accorded may be enforced in an action by such defendant alone, without a joinder of other parties named obligees in the undertaking. *Id.*

Judgment.

5. By a judgment in replevin a part of the property may be awarded to each of two defendants. *Id.*

Lien of Creditor.

6. In replevin prosecuted by one who claimed the right of possession of goods as against a sheriff who held them under writs of attachment it was prejudicially erroneous to instruct the jury that a creditor has an equitable lien on property owned by his debtor merely because the relation of debtor and creditor exists between them. *Brown v. Sloan*.. 28

Ownership. Pleading.

7. In replevin, where plaintiff bases his right to possession of the property upon a special ownership by virtue of a chattel mortgage, he must plead the facts which create such special ownership and right to possession. *Paxton v. Learn*, 459

8. An allegation of general ownership and right of possession cannot be proved by introducing in evidence a mortgage on the chattels replevied. *Id.*

9. Evidence *held* not to establish an absolute ownership of the property in plaintiff. *Id.*

Residence. See DOMICILE.

Res Judicata.

1. Where plaintiff in attachment seizes a resident's property as that of a non-resident and sells it under a judgment rendered on constructive service, defendant, in absence of an appearance, may attack such judgment in a later suit by him wherein the attachment plaintiff invokes such judgment as a defense. *German Nat. Bank v. Kautter*..... 103

2. In replevin all who are parties are bound by the judgment. *Pilger v. Marder*..... 113

3. An order of a county board allowing or rejecting claims against the county has the force and effect of a judgment, and is conclusive unless vacated or reversed on appeal. *Taylor v. Davey*..... 153

Res Judicata—*concluded.*

4. When a decree is entered conforming to the agreement and consent made in open court of all the parties to the action, the court having jurisdiction to enter such decree, then no party to that decree, nor one claiming under such party, can be heard to question it except for fraud or mistake, even though the pleadings would not support the decree had the action been contested. *Clark v. Charles*..... 202

5. Where an order of a county board disallowing a claim against a county has been reconsidered, such disallowance will not operate as an adjudication of the claim. *Dean v. Saunders County*..... 760

Review. See COSTS, 2, 3. INFANTS, 6, 7. INSTRUCTIONS.

1. There being no evidence of the garnishment alleged by plaintiff and denied by appellees, and the proofs failing to disclose that the garnishee has in hands any money for which he is liable to account, it is not deemed necessary to retain the case merely to settle the matter of garnishment. *Lewis v. Holdrege*..... 173

2. In a case appealed from the county court to the district court, plaintiff may allege damages in a greater sum than was claimed in the county court, provided the amount alleged in the district court be within the jurisdictional limit of the county court. *People's Nat. Bank v. Geisthardt*..... 232

3. Objections to confirmation of judicial sale *held* not founded on facts disclosed by the record. *Wagenknecht v. Seeley*.... 769

Abstracts.

4. Under section 1 of rule 2 (52 Neb. ix.) the agreed printed abstract must be complete in itself, without reference to the transcript, and, when error does not affirmatively appear from an examination of such abstract, the judgment sought to be reviewed will be affirmed. *Grand Lodge Ancient Order United Workmen v. Higgins*..... 741

Appeal and Error.

5. An appeal will not lie to the supreme court from the judgment of a district court rendered in an action purely legal in its nature. *Collins v. City of Omaha*..... 208

Arguments of Counsel.

6. On review comment made by counsel in argument to the jury, with reference to a matter in evidence, will be presumed to have been made for a proper purpose and within the limits of legitimate argument, the contrary not appearing. *People's Nat. Bank v. Geisthardt*..... 232

7. A party desiring to review misconduct of counsel in argument should make an objection, and except to any adverse ruling; but where misconduct is so flagrant, and of such a character, that neither a complete retraction nor admonition from the court can entirely destroy its sinister influ-

Review—*continued.*

ence, a new trial should be awarded regardless of the want of an objection and exception. *Chicago, B. & Q. R. Co. v. Kellogg* 749

Assignment Pending Appeal. Estoppel.

8. One who assigned his interest in a judgment pending appeal therefrom, filed the assignment in the case, and afterward brought suit on the appeal bond, *held* estopped from urging that the assignment was incomplete because there was no proof of assignee's acceptance. *Crum v. Stanley*..... 351

Assignments of Error.

9. Assignments of error as to erroneous admission of testimony, as to improper cross-examination, and as to incorrect order of introducing evidence in trial to court, *held* without force. *German Nat. Bank v. Kautter*..... 103

10. 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. *National Masonic Accident Ass'n v. Day*..... 128
Kloke v. Martin 554
Missouri P. R. Co. v. Palmer..... 559

11. To entitle instructions to be reviewed they should be separately assigned in the motion for a new trial, as well as in petition in error. *Flower v. Nichols*..... 314

12. The rulings on the admission of testimony cannot be reviewed unless the same were either by general or specific assignments called to the attention of the trial court by the motion for a new trial. *Id.*

13. An assignment in a petition in error that "the court erred in overruling the motion for a new trial" cannot be considered when the motion is based on several distinct grounds. *Bradley v. Slater*..... 334

14. An assignment of error, that "the court erred in overruling the motion for a new trial," is too indefinite, where there are several grounds of error set forth in such motion. *Allsman v. Richmond*..... 540

15. An assignment of error that the district court erred in admitting the evidence of certain witnesses will be overruled if any of the evidence given by such witnesses was competent. *Id.*

16. Alleged errors will not be reviewed, unless assigned in the petition in error with such definiteness as to clearly indicate the particular ruling complained of. *Id.*

17. An assignment of error as to admission of evidence must specifically designate the ruling of which complaint is made. *Davis v. Otoe County*..... 677

Review—*continued.*

Bill of Exceptions.

18. In the absence of a bill of exceptions, instructions will be presumed to be free from error, unless they contain statements of the law which could not be correct in any possible case made by the proofs under the issues. *Home Fire Ins. Co. v. Weed*..... 146

19. When a bill of exceptions has been quashed, no question will be considered a determination of which necessarily involves an examination of the evidence adduced in the trial court. *Id.*

20. If a bill of exceptions discloses that important evidence has been therefrom omitted, authentication of the bill that it contains all the evidence will not control, and in such case the finding will not be disturbed as unsupported by the evidence. *Alling v. Fisher*..... 239

21. A finding of the trial court on a question of fact cannot be reviewed in the absence of a bill of exceptions. *Mills v. Hamer* 445

Court. Consideration of Questions.

22. The length of time devoted by the court to an examination of a case is not the standard for testing the sufficiency of the court's consideration of questions presented for review. *Bartley v. State*..... 295

Dismissal.

23. On facts stated in opinion *held* that appellant was entitled to dismiss her appeal. *Tuttle v. City of Omaha*..... 55

Evidence.

24. Evidence *held* to sustain a decree quieting title to realty. *Brown v. Murphey*..... 81

25. A party who brings a case to the supreme court by appeal impliedly consents to submit the issues for decision upon the evidence actually in the record. *Alling v. Nelson*..... 161

26. Where a case is tried to the court without the aid of a jury, it will be presumed that the court did not consider improper evidence. *Knight v. Darby*..... 16

27. Where a case is tried to the court without the aid of a jury the admission of improper evidence is not prejudicial error. *Alling v. Nelson*..... 161

28. The rulings of the trial court rejecting evidence tendered by a party cannot be reviewed by the supreme court on appeal. *Id.*

29. An appeal in an equity case will not present to the supreme court for review the rulings of the trial court excluding or admitting evidence. *Village of Syracuse v. Mapes*..... 738

30. Admission of evidence as to quality of goods sold, *held* not

Review—*continued.*

prejudicially erroneous in an action for damages for false representations. *Darner v. Daggett*..... 198

31. The supreme court will not weigh conflicting evidence, nor pass on the credibility of witnesses. *Bartlett v. Scott*..... 477

32. Where the verdict is the result of conflicting testimony, a judgment based thereon will not be reversed on the ground that the evidence is insufficient. *Home Fire Ins. Co. v. Decker* 346

33. The finding of a jury on conflicting evidence will not be disturbed, unless clearly wrong. *Allsman v. Richmond*..... 540

34. A judgment will not be reversed on account of a mere difference of opinion between the supreme court and the trial judge or jury regarding the weight of evidence. *Missouri P. R. Co. v. Palmer*..... 560

35. Where the evidence is insufficient to sustain the findings below the judgment may be reversed. *Kokes v. State*..... 691

36. A finding based on conflicting evidence will not be disturbed. *Robertson v. City of Omaha*..... 719

37. A judgment based on a verdict supported by sufficient competent evidence will not be disturbed. *Shafer v. Whiting*.... 756

Exceptions.

38. To obtain a review of points presented below by motion for a new trial there must be an exception to the overruling of the motion. *Devries v. Squire*..... 438

39. Where no exception is taken to an order substituting a party plaintiff, such order cannot be reviewed. *Maul v. Drexel* 446

Final Order.

40. Dismissal of plaintiff's action of replevin and an order to impanel a jury to ascertain property rights of defendant and damages, *held* a final judgment as to plaintiff. *Swain v. Savage*..... 687

Harmless Error.

41. A repetition of a proposition of law in the instructions is not reversible error, unless it appears that it operated to the prejudice of the unsuccessful party. *Chicago, R. I. & P. R. Co. v. Sturey*..... 137

42. Refusal to strike irrelevant matter from a pleading is not reversible error unless it affirmatively appears that the rights of the moving party are prejudiced. *Lincoln Mortgage & Trust Co. v. Hutchins*..... 159

43. A judgment will not be reversed for the giving of an instruction which could not have prejudiced the complaining party. *Flower v. Nichols*..... 314

44. Where it appears that the evidence of an absent witness, if

Review—*continued.*

given on the trial, could not possibly change the result, an order refusing a continuance to obtain his testimony, if erroneous, would not be prejudicially so. *Life Insurance Clearing Co. v. Altschuler* 342

45. An order striking from an answer a counter-claim disproved by a transcript of a foreign judgment upon which the suit was brought, *held* not reversible error. *Lonergan v. Lonergan* 641

Issues.

46. On appeal to the district court the cause must be tried with the issues unchanged. *Western Cornice & Mfg. Works v. Meyer* 440

Jurisdiction. Time to Appeal.

47. To invest the supreme court with jurisdiction to review on error a judgment of the district court a petition in error must be filed within one year after rendition of the judgment sought to be reviewed. *Collins v. City of Omaha* 208

48. The rule whereby the right to appeal from the county court or a justice of the peace is not destroyed by failure to perfect the appeal within the time limited by law, where the delay is caused solely by the default of the officer, relates only to the failure of the officer to perform a duty imposed upon him by law. *Van Sant v. Francisco* 650

49. Where a county judge's neglect to perform an act not imposed by law results in appellant's failure to perfect an appeal within the time limited by statute, the neglect is attributable to appellant. *Id.*

New Trial.

50. Where several defendants join in a single motion for a new trial, and also join in the petition in error, an affirmance as to any one of them requires an affirmance as to all. *Knight v. Darby* 16

51. Where a verdict in favor of one party is set aside by the district court, and a second trial results in favor of the other party, the first verdict will not be reinstated upon a reversal by the supreme court of a judgment based on the second verdict. *Zobel v. Bauersachs* 20

52. In reviewing without a bill of exceptions an order granting a new trial on a motion alleging insufficiency of evidence and several other grounds, it may be presumed, the reasons for the action of the lower court not appearing, that the evidence was insufficient to support the judgment and that the motion was sustained for that reason. *Bradley v. Slater*, 335

53. Rulings of the court below during the trial, instructions given and refused, and the sufficiency of the evidence to sustain the verdict, to be available must have been raised by the motion for a new trial. *Hake v. Woolner* 471

Review—*continued.*

Order of Reversal. Effect.

54. The supreme court may remand a cause for further proceedings in disregard of a stipulation fixing the amount for which judgment should be rendered in case of reversal, where subsequent proceedings may have avoided the stipulation in whole or in part. *Kendall v. Garneau*..... 403

55. Where a decree in favor of plaintiff foreclosing a mechanic's lien is reversed on an appeal by defendants, and the cause remanded for further proceedings, the situation of plaintiff is the same as if his rights had never been tried. *Badger Lumber Co. v. Holmes*..... 473

56. An order for the restitution of money paid pursuant to the direction of an erroneous judgment cannot be made after such judgment has been reversed and the action dismissed. *Anheuser-Busch Brewing Ass'n v. Hier*..... 557

Parties in Appellate Court.

57. A taxpayer may prosecute an appeal to the district court from the decision of a county board in the allowance of claims. *Taylor v. Davey*..... 153

58. In a proceeding in error to review a joint judgment, all parties to the judgment must be made parties in the appellate court. *Collins Mfg. Co. v. Seeds Dry Plate Co*..... 576

Pleadings.

59. Where, in the trial of a cause, both parties treat an affirmative defense as traversed, it will be so considered on review, though the plaintiff filed no reply either before or after judgment. *Missouri P. R. Co. v. Palmer*..... 559

Presumptions.

60. In the supreme court, in reviewing cases, the transcript being silent as to matters before the district court, it will be presumed that the facts there disclosed were of such character as to warrant the judgment rendered. *Alling v. Fisher*, 239

61. From the fact that a judgment has been assailed in an appellate proceeding, it will not be presumed that the judgment was superseded. *Lonergan v. Lonergan*..... 642

62. Where the journal entry of a ruling recites that a party noted an exception to the order, it will be presumed that he was present in person or by counsel. *Royal Trust Co. v. Exchange Bank*..... 664

Stare Decisis.

63. The determination of a question presented in reviewing proceedings below becomes the law of the case, and, ordinarily, will not be re-examined on review of the proceedings on a second trial in the lower court. *Omaha Life Ass'n v. Kettenbach* 330

Review—*concluded.*

Supersedeas.

64. Where an appeal has been taken from confirmation of a foreclosure sale and a proper appeal bond executed and approved, mortgagor may redeem the realty any time before the supreme court affirms the confirmation. *Philadelphia Mortgage & Trust Co. v. Gustus* 435

Transcript.

65. A transcript of the proceedings in the particular case wherein judgment was rendered is a necessary part of a record to review such judgment. *Tuttle v. City of Omaha* 55

66. A paper included in the transcript purporting to be a motion for a new trial will be disregarded, unless authenticated by the certificate of the clerk of the district court. *Hake v. Woolner* 471

67. It is the duty of a county judge or justice of the peace to make out a transcript, and, on demand, to deliver it to appellant or his agent, but the demand and delivery should be at the office of the officer; and it is not his duty to deliver the transcript at some other place, by mail or messenger. *Van Sant v. Francisco* 650

68. Filing in the supreme court original papers and pleadings used below is not a compliance with the statute requiring a transcript. *Royal Trust Co. v. Exchange Bank* 663

69. A proceeding in error may be dismissed where the transcript does not contain a copy of the judgment below. *Casler v. Nordgren* 669

Robbery.

1. Whether accused at the time of the assault, by reason of being intoxicated, was incapable of controlling his will and forming and entertaining a felonious intent is a question for the jury in determining whether accused is guilty of the crime charged. *Latimer v. State* 610

2. The taking of money or property from the person or custody of one assaulted with a felonious intent on the part of the accused to steal the same is an essential ingredient of the crime of robbery. *Id.*

Sales. See EVIDENCE, 3.

1. In an action on a contract for the sale of "all patterns that are staple and down to date," where no criterion was fixed by which to determine what patterns came within that description, it was error to exclude evidence of competent witnesses regarding the standard usually adopted by the trade in selecting and purchasing such patterns. *Hayden v. Frederickson* 156

2. Evidence *held* sufficient to require a submission of the case

Sales—*concluded.*

to the jury on an issue as to whether goods came within the description in the contract of sale. *Id.*

3. In a suit for damages because of seller's false representations as to correctness of invoice of goods sold, *held* no prejudicial error in permitting a witness to testify that certain goods were old when the fact was important in determining their real value tested by the invoice, the jury afterward having been instructed that it should not take such evidence into account as furnishing a basis for recovery because of the quality of the goods being defective. *Darner v. Daggett* 198

4. In an action of trover against a mortgagee of goods by one claiming to have purchased from the mortgagor prior to the mortgage, evidence *held* to sustain a finding that the contract relied on was executory and that title had not passed. *Simpson v. State Bank of Ceresco* 240

5. In an action for damages for inducing the purchase of property by false representations an offer of plaintiff to compromise before suit was brought is incompetent evidence. *Boice v. Palmer* 389

6. To maintain an action at law for the purchase price of corporation stock plaintiff, ordinarily, must plead and prove a delivery or tender of such stock before the bringing of his suit. *Bartlett v. Scott* 477

School Lands.

1. The rights of a lessee of state school lands are to be determined by the law in force governing the leasing of school lands at the date of the execution of his lease. *State v. Wenzel* 210

2. By section 1, chapter 71, Session Laws 1897, the state withdrew from sale all its unsold and unleased school lands, and the school lands leased prior to the taking effect of the act of 1879 (Session Laws, p. 110), the lessees of which had not availed themselves of the privilege of purchasing prior to the taking effect of the act of 1897. *Id.*

3. The act of 1879 (Session Laws, p. 111, sec. 2), granting to the lessees of school lands the privilege of purchasing the same at private sale, was a mere offer or option to such lessees which the state might withdraw at any time before its acceptance by a lessee whose lease antedated the passage of such act. *Id.*

Schools and School Districts. See DOMICILE.

1. Non-resident pupils are not entitled, either under the provisions of section 4, subdivision 5, chapter 79, Compiled Statutes, or section 3, subdivision 6, of the same chapter, to attend the public school without payment of tuition. *State v. School District* 317

Schools and School Districts—*concluded.*

2. No cause of action will accrue to a school district, as a corporation, against the county superintendent for the manner in which he may change boundaries of such district. *School District v. School District*..... 716

Seal. See NOTARY PUBLIC.

Section-Lines. See HIGHWAYS, 2.

Sentence. See CRIMINAL LAW, 2.

Set-Off and Counter-Claim. See NEGOTIABLE INSTRUMENTS, 1. PLEADING, 22.

1. Where the answer in a suit to recover damages for a breach of contract presents an equitable counter-claim, which is traversed by a reply, the issues of fact thus arising are triable to the court without a jury. *Hotaling v. Tecumseh Nat. Bank*..... 5

2. In an action by a stockholder of an insolvent corporation to enjoin an execution sale of realty which had been purchased by him from members of a firm against whom defendant had recovered the judgment on which the execution was issued, an answer charging that all stockholders were liable for payment of the debt which was the basis of the judgment and asking that they be brought in and required to pay the same, *held* not to constitute a counter-claim. *Wehn v. Fall*..... 548

3. Plaintiff's right to dismiss his cause does not control defendant's right to proceed to the trial of a set-off or counter-claim properly pleaded in the answer. *Adams v. Osgood*.... 766

Sheriffs and Constables. See EVIDENCE, 36. EXECUTIONS. VOLUNTARY ASSIGNMENTS, 3.

Sheriffs' Deeds. See EXECUTIONS. REFORMATION OF INSTRUMENTS.

Sheriff's Return. See SUMMONS, 4.

Special Assessments. See MUNICIPAL CORPORATIONS, 10, 13, 16.

Special Findings. See TRIAL, 6-10.

Specific Performance.

A court of equity cannot enforce a mortgage by deposit of title deeds because the loan which the deposit was made to secure has been actually received by the depositor. *Bloomfield State Bank v. Miller*..... 243

Stare Decisis. See REVIEW, 63.

State and State Officers. See SCHOOL LANDS.

Statute of Frauds.

1. The exception of the statute of frauds with regard to estates arising by act or operation of law does not embrace cases where the creation of the estate depends solely

Statute of Frauds—*concluded.*
on the intention of parties to a contract. *Bloomfield State Bank v. Miller*..... 243

2. That portion of our statute of frauds which brings within its inhibition verbal or unsubscribed agreements which by their terms are not to be performed within one year from the time of making does not extend to agreements wholly performed on one side within the year. *Kendall v. Garneau*, 403

3. The grantee in a deed, though he does not subscribe the same, is bound by a covenant to pay a mortgage not due for more than a year after the delivery of the deed. *Id.*

Statute of Limitations. See LIMITATIONS OF ACTIONS.

Statutes. See EXECUTORS AND ADMINISTRATORS, 4. MUNICIPAL CORPORATIONS, 6.

1. Where there was an abortive attempt by subsequent legislation to limit the operation of an existing statute, such statute must be deemed to have the force it would have possessed if no limitation of it had been attempted. *Barker v. Potter*..... 25

2. A law authorizing a city to charge the entire cost of paving a public street to abutting property-owners should be strictly construed. *Learitt v. Bell*..... 65

3. When the legislature, in a statute, employs language which has elsewhere received a fairly well settled construction, it will be presumed that such construction was in the contemplation of the legislature, and expresses the true meaning. *Kendall v. Garneau*..... 403

4. A statute is unconstitutional when it is repugnant to rights, express or implied, retained by the people. *State v. Moores*, 410

5. To justify the courts in declaring a statute invalid it is not essential that it should contravene some express provision of the constitution. *Id.*

6. An act inhibited by the general scope and purpose of the constitution is as invalid as though forbidden by the letter of that instrument. *Id.*

7. An unconstitutional act is as ineffectual as though it had never been passed, and its invalidity dates from its enactment, and not from the time it is declared to be void. *Boales v. Ferguson*..... 565

Stay of Execution. See EXECUTIONS, 23.

Stipulations. See BILL OF EXCEPTIONS, 1. REVIEW, 54.

Stockholders. See CORPORATIONS.

Streets. See DEDICATION, 1. MUNICIPAL CORPORATIONS, 10, 13, 16-24. QUIETING TITLE, 1.

Subscription. See TRUSTS, 2.

Substitution. See PARTIES, 2.

Summons. See ATTACHMENT, 4. INSURANCE, 3, 4.

1. Service by publication should be quashed on motion, where the notice requires defendant to answer on or before the second, instead of the third, Monday after the fourth publication. *Calkins v. Miller*..... 601
2. Published notice taking the place of a summons must inform defendant on what date he is required to answer,—the date fixed by the Code; and neither the clerk nor the court is invested with any discretion with respect to the time notice shall be published, what it shall contain, or on what date defendant shall be notified to answer. *Id.*
3. Refusal to enter a personal judgment against one upon whom only constructive service had been made, *held* proper. *Campbell v. O'Connor*..... 638
4. An officer's return on the back of a summons that he served the same "on C., one of the defendants herein," is sufficient evidence of service on J. C. who was named in the writ as a defendant. *Gate City Abstract Co. v. Post*..... 743

Supersedeas. See REVIEW, 61.

Suretyship. See PRINCIPAL AND SURETY.

Taxation. See MUNICIPAL CORPORATIONS, 10-24.

Evidence of Levy.

1. A tax receipt is insufficient to establish a levy disputed by the pleadings. *Adams v. Osgood*..... 767

Foreclosure of Lien. Infants. Parties.

2. Section 119, article 1, chapter 77, Compiled Statutes, providing for redemption of land from tax sales, does not forbid the owner of a real-estate tax-sale certificate from maintaining an action to foreclose the same, though the owner of the realty is an infant, idiot, or insane person. *Leavitt v. Bell*..... 57
3. The equitable owner and holder of a real-estate tax-sale certificate may maintain an action in his own name to foreclose the same, although it has never been formally indorsed by the original purchaser at the tax sale in accordance with statutory provisions. *Id.*
4. Where a lien is sought to be enforced for general taxes, the presumption is that the statute in reference to the levy and assessment of the taxes and to the sale of the real estate for their non-payment has been complied with; and the burden of showing irregularties, or that the tax sale is void, is upon the party asserting such fact, but this rule does not apply to special assessments. *Id*..... 58
Equitable Trust Co. v. O'Brien..... 735
5. On foreclosure of a tax lien based on a valid tax sale the

Taxation—*concluded.*

holder is entitled to recover the amount bid at the tax sale, together with interest thereon at the rate of twenty per cent per annum for two years from the date of his certificate and ten per cent thereafter. *Alling v. Nelson*..... 161

Irregularities of Assessor.

6. The failure of an assessor to attach his oath to, and return the same with, the assessment roll are irregularities merely which do not affect the validity of the tax. *Twinting v. Finlay* 152

Payment.

7. Evidence *held* insufficient to establish the defense of payment. *Id.*

Protest. Repayment.

8. In a suit to recover taxes paid under protest, the burden is on plaintiff to prove his allegations as to the invalidity of the taxes, where such allegations are not admitted. *Davis v. Otoe County*..... 677

9. A protest pursuant to statute (Compiled Statutes, ch. 77, art. 1, sec. 144, sub. 1), against payment of taxes must state the grounds specifically, and repayment cannot be enforced for grounds other than those set forth in the notice of protest. *Id.*

Telephone Companies.

1. A private corporation engaged in the business of operating a telephone plant is a common carrier of news and intelligence. *Nebraska Telephone Co. v. State*..... 627

2. It is the duty of a telephone company to furnish for a reasonable compensation to any citizen a telephone and telephonic service, and to charge each patron for the service rendered the same price it charges every other patron for the same service under substantially the same or similar conditions. *Id.*

3. To determine what compensation a public telephone company may exact for services is a legislative, and not a judicial, function. *Id.*

4. A writ of mandamus requiring a telephone company to furnish telephonic service to relator for $3 per month when its regular charges were $5 per month, *held* improperly granted. *Id.*

Time. See EXECUTIONS, 23. REVIEW, 47.

Title Deeds. See MORTGAGES, 10, 11.

Transcript. See BILL OF EXCEPTIONS. REVIEW, 4, 48, 49, 65-69.

Trespass.

Where defendant pleads as a justification that the acts of which complaint was made—the removal of a fence, and the

Trespass—*concluded.*

making of a grade and ditch—were done within a public road, the burden is on him to prove such facts by a preponderance of the evidence. *Peterson v. Hopewell*..... 670

Trial. See INSTRUCTIONS. JURY. NEW TRIAL. REVIEW, 6.

Effect of Reversal.

1. Where a decree in favor of plaintiff foreclosing a mechanic's lien is reversed on appeal by defendants, and the cause remanded for further proceedings, the situation of plaintiff is the same as if his rights had never been tried. *Badger Lumber Co. v. Holmes*..... 473

Exceptions.

2. Where the journal entry of a ruling recites that a party noted an exception to the order, it will be presumed that he was present in person or by counsel. *Royal Trust Co. v. Exchange Bank*..... 664

Harmless Error.

3. Where a case is tried to the court without the aid of a jury, it will be presumed that the court did not consider improper evidence. *Knight v. Darby*..... 16

4. Where a case is tried to the court without the aid of a jury the admission of improper evidence is not prejudicial error. *Alling v. Nelson*..... 161

Jurors. Evidence.

5. A juror will not be permitted to state to his fellow jurors, while they are considering their verdict, facts in the case within his own personal knowledge but not given in evidence, but should make the same known during the trial and, if desired, testify as a witness in the case. *Ewing v. Hoffine*..... 131

Verdict. Special Findings.

6. To entitle a party to a judgment on the special findings of a jury, where the general verdict is against him, such findings must establish all the ultimate facts from which his right to a judgment results as a necessary legal conclusion. *Omaha Life Ass'n v. Kettenbach*..... 330

7. Where no special findings are made, a general verdict in favor of a party includes a finding in his favor on every material issue made by the pleadings. *Rosenfield v. Bee Publishing Co*..... 388

8. The following was *held* to be a verdict for defendant: "We, the jury, impaneled and sworn in the above entitled cause, do find that the plaintiff had no cause of action until the assignor and executor of the lease had settlement on old account." *Glaze v. Keith*..... 593

9. Special findings in a personal injury case examined and found not to be inconsistent with one another, but to estab-

Trial—*concluded.*

lish contributory negligence and so to be inconsistent with a general verdict for plaintiff. *Norfolk Beet-Sugar Co. v. Preuner* 656

10. A special finding controls a general verdict, and when inconsistent with the general verdict it is the duty of the court to render judgment accordingly. *Id.*

11. Evidence *held* to justify the giving of an instruction to find for plaintiff in a certain sum. *Nye v. Northern Assurance Co.*, 776

Witness. Striking Out Answer.

12. Where the answer of a witness is not responsive to the question propounded, the proper practice is to move the court to have such answer eliminated from the record. *Chicago, R. I. & P. R. Co. v. Sturcy*..... 137

Trover and Conversion. See CORPORATIONS, 6. EVIDENCE, 36, 37. PRINCIPAL AND AGENT, 8. SALES, 4.

Evidence *held* sufficient to sustain a verdict for defendant in an action for conversion. *Rosenfield v. Bee Publishing Co*..... 388

Trusts. See CORPORATIONS, 17. PARTNERSHIP, 1, 3.

1. Evidence *held* to sustain a finding that grantee in a deed, intended as a mortgage, purchased the equity of redemption at an execution sale in trust for grantor. *Wyatt-Bullard Lumber Co. v. Bourke*..... 9

2. Where a person acted in a fiduciary relation to two contracting parties having antagonistic interests, and one of them was unaware of such person's fiduciary relation to the other, such person, when he seeks in an action at law to assert an advantage to himself as against the party ignorant of the dual capacity in which the claimant had acted, must show that the advantage claimed was not inequitable. *Duesman v. Hale*..... 577

Usury.

Where a usurious loan has been repeatedly renewed, and the notes evidencing the indebtedness have been taken in the name of a bank, or of its cashier, indifferently, and each transfer has been after due, the holder of the final note, who prosecutes the action, does so subject to any defense of usury which might have been set up against said note or any of its antecedents. *Farmers Bank of Kearney v. Oliver*, 774

Value. See DAMAGES, 5. EVIDENCE, 35-38.

Vendor and Vendee. See ABSTRACTS OF TITLE. ATTACHMENT, 4. EXECUTIONS, 25, 26. MORTGAGES, 3.

1. A purchaser of real estate during the pendency of a suit for its partition, from a party to such suit, is as much bound by the disposition made of the real estate by the decree rendered in such action as his grantor. *Clark v. Charles*..... 202

2. A vendor of land, who delivers to his vendee a deed absolute,

Vendor and Vendee—*concluded.*

does not retain a lien thereon for the unpaid purchase-money. *Bloomfield State Bank v. Miller*..... 250

3. One who purchases land incumbered by mortgage, receiving a deed excepting the mortgage from the covenant against incumbrances, and in paying the consideration deducts the lawful amount of the mortgage, is not thereby estopped from pleading the illegality of part of the mortgage contract. *Hallam v. Tellerea*..... 256

4. Where an executory written contract for the conveyance of realty requires the payment of a specified amount in cash at the date of such contract, and by virtue of an independent agreement a demand note of the vendee is accepted in lieu of the cash payment, the refusal of vendor and payee to accept the sum due on said note will not constitute a breach of the terms of said executory contract. *King v. Waterman*.. 324

5. The grantee in a deed, though he does not subscribe the same, is bound by a covenant to pay a mortgage not due for more than a year after the delivery of the deed. *Kendall v. Garneau*..... 403

6. A contract for the purchase of land made *bona fide* for a valuable consideration vests the equitable interest therein in the vendee from the time of the execution of the contract, though the money is not then paid. *Wehn v. Fall*..... 547

7. The mere docketing of a judgment against a vendor of real estate is not notice to the vendee in possession, and does not impose on him a duty to apply deferred installments of the purchase price in satisfaction of such judgment. *Id.*

8. A judgment of the district court, against a vendor of land who retains the legal title, attaches as a lien to such land, and, as against a vendee in possession with actual notice, may be enforced to the extent of the unpaid purchase price. *Id.*

Venue.

A life insurance company created under the laws of the state is situated, within the meaning of section 55 of the Code, in any county in the state in which it maintains an agent or servant engaged in transacting the business for which it exists, and may be sued therein. *Bankers Life Ins. Co. v. Robbins*..... 117

Verdict. See TRIAL, 6-11.

Voluntary Assignments.

1. An assignment of personal property for the benefit of creditors should be filed in the office of the county clerk of the county where the assignor resides within twenty-four hours after its execution, and is not void because not filed for record with the register of deeds within that period. *Maul v. Drexel*..... 447

Voluntary Assignments—*concluded.*

2. A deed of assignment which describes the property conveyed with sufficient particularity to enable the same to be readily identified is not rendered void by the failure to attach to such deed a copy of the schedule of property referred to therein as being on file in the office of the county judge, and containing a more specific description. *Id.*..... 446

3. Where property is assigned to the sheriff and his successors in office in trust for the benefit of the creditors of the assignor, on the expiration of the term of the then sheriff the execution of the trust devolves upon his successor in office, in case the assignee chosen by the creditors fails to qualify and enter upon the duties of assignee. *Id.*

4. An objection to the admission of a deed of assignment in evidence that it was not executed or acknowledged in the manner in which a conveyance is required to be executed and acknowledged is too general and not sufficiently specific to reach defects in the form of execution and acknowledgment of the instrument. *Id.*..... 447

5. Whether a deed of assignment is void for reasons which appear on its face is a question of law for the court, and not the jury, to determine. *Id.*

Waiver. See CRIMINAL LAW, 4, 10, 11.

Wills. See DEEDS, 6.

Witnesses. See INSTRUCTIONS, 1. JURY, 3.

1. A party is not required to make out his entire case, or any particular branch thereof, by a single witness. *Zobel v. Bauersachs* 20

Credibility.

2. On review the supreme court will not pass on the credibility of witnesses. *Bartlett v. Scott*..... 477

3. It is the function of the jury to determine the credibility of witnesses and the weight to be accorded to their testimony. *Kloke v. Martin*..... 554

Impeachment.

4. Preliminary to the impeachment of a witness because of inconsistent statements made at a previous time, the attention of the witness should be called to the time and place where such alleged statements had been made. *McVey v. State* 777

5. If it is sought to impeach a witness because she is a prostitute, inquiry should be made as to that fact, and not with reference to habits which are not characteristics peculiar to prostitutes alone. *Id.*

Interest in Suit.

6. The law does not raise against a witness the presumption

Witnesses—*concluded.*

of dishonesty because of his interest in the result of the suit in which he testifies. *Boice v. Palmer*..... 389

Transactions with Persons Deceased.

7. In a suit against a testatrix to set aside an alleged fraudulent conveyance by testator to her and to subject the property to payment of grantor's debts, it was *held* that she was incompetent, under section 329 of the Code, to testify to the transaction out of which the conveyance originated. *Adler & Sons Clothing Co. v. Hellman*..... 266

Privileged Communications.

8. In a suit against a testatrix to set aside an alleged fraudulent conveyance by testator to her and to subject the property to payment of grantor's debts, an attorney who was present as adviser of the parties was *held* competent to testify to the conversation between them. *Id.*

Words and Phrases.

1. "Insolvency." *Adler & Sons Clothing Co. v. Hellman*..... 267
2. "For at least six days prior." *Leavitt v. Bell*..... 58
3. "Residence." *State v. School District*..... 320

Work and Labor. See EVIDENCE, 38.

Rendition of rejected bill for services does not estop claimant from suing for a larger amount. *People's Nat. Bank v. Geisthardt* 232

Writs. See PROCESS. SUMMONS.