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HANS NEILSON V. J. B. JENSEN ET AL.

FILED OCTOBER 20, 1898. No. 8337.

1. **Libel:** VERDICT FOR DEFENDANTS: EVIDENCE. Evidence examined, and *held* not to sustain the verdict of the jury.
2. ———: TRUTH OF PUBLICATION: EVIDENCE. In a suit for libel, where the defense is the truth of the matter published, the defendant, to exonerate himself, must establish the truth of each libelous charge made and published.
3. ———: ———: JUSTIFICATION. A publisher may not exempt himself from liability for libeling another simply by showing that the charge published was true, but must go further and show that the publication was made under such circumstances as justify the conclusion that he acted with good motives and for justifiable ends. (Constitution, art. 1, sec. 5.)

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

Thomas L. Redlon and *D. J. Burrows*, for plaintiff in error.

Albert W. Crites, contra.

RAGAN, C.

In the district court of Dawes county Hans Neilson sued Peter Jensen and others for libel. Jensen and others had judgment, and Neilson has filed a petition in error here for its review. Neilson, in his petition, alleged that the defendants, wickedly intending to injure him, maliciously published of and concerning him in the *Northwest News*—a newspaper published at Hay Springs, Nebraska—the following false, scandalous, and defamatory libel:

"The people of Hay Springs and vicinity seemed very much surprised when it was announced that the plow and harrow stolen from C. F. Burrows on the 15th day of April were found in the possession of Hans Neilson. The discovery, however, was not so much of a surprise

to his neighbors. Indeed, it might never have been made had it not been that some of his Danish neighbors, who have known his habits for the past ten years, had determined to show him up and bring to light a few facts for the benefit of the public. He was addicted to 'taking what didn't belong to him' when he lived in Crawford county, Iowa. On one occasion he stole a load of wood, but saved himself from exposure by paying the owner the sum of $20. Another time he stole a rail belonging to a railroad company and came near getting himself into trouble again, but managed to worm out of that scrape all right. After coming to Dawes county, Nebraska, he seemed to grow bolder, and increased his nefarious tricks considerably. The first year of his residence in this county a lot of fence wire was found on his place, down in a cañon away from the house. This circumstance was looked upon with great suspicion at the time, and he soon found that he could not work the expert thief business as well as he thought he could. The statement made and sworn to by Hans Neilson, which was published in the *Northwest News* on May 3, was absolutely false in every respect, and we do not believe that he would have been so foolish as to make such a statement had he not been persuaded to do so by T. S. Tripp, in order that the latter might earn his fee of $2 thereby. The plow and harrow stolen from C. F. Burrows on the 15th day of April were found on his place by one of his neighbors, who at once notified the owner. B. F. Carroll and H. Casselman came out to identify the implements, which was an easy matter. The plow was found under the straw stack, and the harrow was found out in the field, where it had been used. C. F. Burrows accordingly paid the reward which he had offered for the discovery of the stolen implements, and P. F. Carroll agreed to hush up the matter for a certain sum of money, which Neilson paid. It was proved beyond doubt that Hans Neilson was guilty of the theft, and we do not consider that it was fair and just to settle the matter in that

way. Hans Neilson swore in his statement that he was not in the village of Hay Springs on the 15th of April,—the day that the implements were stolen,—but C. F. Burrows states that he saw him in town about 4 or 5 o'clock P. M. We know for a fact that Hans Neilson is a man who will swear to anything. He said that he did not uphold stealing; but how is it that missing tools and articles have repeatedly been found in the possession of his family? Hans Neilson has been suspected for years of being a regular thief, and he has now been caught at it. His neighbors, therefore, are of the opinion that he ought to be dealt with according to law and not be allowed to continue his thieving practices, which have furnished a very bad example to his children, who are now almost as bad as himself. The above assertions are perfectly true and can be proved. Now, Mr. Neilson, if you have any more affidavits to make, it is time for you to make them. (Signed) PETER JENSEN," and the other persons made defendants.

As an answer to this petition Jensen and others interposed (1) a general denial, and (2) that all the statements made in the publication were true.

1. This judgment cannot stand. The evidence shows beyond all question that Jensen and others wrote out, circulated, signed this libel, and caused it to be published in the newspaper. If the verdict of the jury then is based upon its finding that the defendants did not publish this libel, it has no support whatever in the evidence.

2. It will be observed that in the libel the defendants charged Neilson (*a*) with having stolen a load of wood in the state of Iowa; (*b*) with having stolen some railroad iron in the state of Iowa; (*c*) with having stolen in Nebraska some fence wire; (*d*) with having committed perjury in a sworn statement made by him; (*e*) with having stolen a plow and harrow; (*f*) and generally, with being a thief and perjurer. If the verdict of the jury is based upon its finding that the defendants proved the truth of

each of these charges, then it is unsupported by the evidence. There is some evidence in the record which tends to show, and from which the jury might possibly have inferred, that Neilson stole the plow and harrow, but there was no evidence establishing the truth of the other charges. The evidence showing beyond dispute that the defendants published the libel, the burden was then upon them to show that each libelous charge made against Neilson was true.

3. There is one other thing which requires attention. While the defendants pleaded below that the charges published of and concerning Neilson were true, they neither pleaded nor proved that these charges were published with good motives and for justifiable ends. Of course, if the defendants did not publish or cause to be published the libel, that was a complete defense; but since the evidence shows that they did publish the libel, it would not have been a complete defense for them had they shown that the charges made were true. They would have had to go further and show that they were published with good motives and for justifiable ends. (Constitution, art. 1, sec. 5; *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64.) In a civil case at common law the truth of a charge published was a defense to one who was sued for libel; but our constitution has changed this rule, and a publisher may not exempt himself from liability for libeling another simply by showing that the charge published was true, but must go further and show that the publication was made under such circumstances as would justify the conclusion that he acted with good motives and for justifiable ends. The framers of the constitution may have been of opinion that the peace, good order, and well being of the state would be best subserved if every citizen devoted at least a part of his time to attending to his own business instead of constituting himself an agent for bruiting abroad the short-comings of his neighbor; but whatever may have been their motives, the provision on the subject

of libel is part of the supreme law of the land. What motive induced the publication of a libel is of course a question of fact; and whether these motives warrant the conclusion that a publication was justifiable is probably for determination by the jury or other triers of fact. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

FRANK D. MILLER ET AL. V. RICHARD HOGEBOOM.

FILED OCTOBER 20, 1898. NO. 8346.

1. **Justice of the Peace:** SEARCH-WARRANT. A justice of the peace is invested with jurisdiction to specially depute a proper person to execute a search-warrant. SULLIVAN, J., dissenting.
2. **Reward:** BY WHOM RECOVERABLE: OFFICERS. A ministerial officer who, in the performance of his duties as such, recovers and returns to its owner stolen property is not entitled to recover a reward offered by the owner for such recovery and return.
3. **Judgment Against Sureties on Appeal Bond.** Upon the rendition of a judgment against an appellant in the district court that court has not such jurisdiction of the person of the surety in the appeal undertaking that it may render the same judgment against him that it may against the appellant. *Selby v. McQuillan*, 45 Neb. 512, followed.

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

Horer & Nickerson, for plaintiffs in error:

An officer relying upon an offer of reward may be entitled to it when making an arrest under circumstances which do not require him to make the arrest as an official duty. (*Hayden v. Souger*, 56 Ind. 42; *Davis v. Munson*, 43 Vt. 676; *Kasling v. Morris*, 71 Tex. 584.)

John P. Breen, contra.

RAGAN, C.

In the county court of Sarpy county Richard Hogeboom sued Frank D. Miller. Hogeboom had judgment, and Miller appealed to the district court of said county, Upjohn and Catherine Miller becoming the sureties on his appeal bond. In the district court Hogeboom alleged in his petition that being the owner of a pocketbook containing some $395 in money and some papers of little value he lost the same; that the said pocketbook and contents were found by a man named James Sullivan, who resided at Hogeboom's house; that Sullivan concealed the fact of his having found said pocketbook and contents with the intention of stealing the same; that Sullivan then informed Frank D. Miller of the finding of said pocketbook and contents, and the latter, with the intent of stealing the same, induced Sullivan to transfer the pocketbook and its contents to him, Miller, knowing at the time that they belonged to the plaintiff; and that he had refused to deliver said pocketbook and the contents thereof to plaintiff on demand, but had converted the same to his own use. In answer to this petition Miller alleged that after Hogeboom lost his pocketbook he offered a reward of $200 in money to any one who would find and return him the pocketbook and its contents; that the offering of this reward coming to his knowledge, he found the pocketbook and its contents, retained $200 of the money therein in payment of the reward, and offered and returned the pocketbook and the remainder of its contents to the plaintiff. In reply to this answer Hogeboom denied the offer of reward and alleged that a justice of the peace of said county duly issued a search-warrant for said pocketbook and its contents, and the arrest of the said James Sullivan, and duly deputized and appointed and authorized Miller to serve such search-warrant; that he accepted the appointment, and while acting as such deputized officer arrested Sullivan and took possession of the pocketbook and its

contents by virtue of said search-warrant. At the close of the evidence the court instructed the jury to return a verdict in favor of Hogeboom and against Frank D. Miller for the $200 taken by him from the pocketbook and retained. This being done the court entered a judgment against Miller and Upjohn and Catherine Miller, the sureties on Frank D. Miller's appeal bond, for the amount of the verdict. The three parties have filed here a joint petition in error for a review of this judgment.

1. There was some evidence adduced on the trial which tended to show that Hogeboom offered a reward of $200 to any one who would find and return to him the lost pocketbook and its contents, and the evidence is undisputed that Frank D. Miller came into possession of the pocketbook and its contents by virtue of the search-warrant issued by the justice of the peace and which Miller was duly authorized by him to execute. If Frank D. Miller could lawfully claim the reward, if one was offered, then the judgment of the district court must be reversed, because there was a conflict in the evidence as to whether a reward had been offered, and that issue should have been submitted to the jury for its determination.

2. The record presents three questions, the first of which is, has a justice of the peace any authority to deputize one to serve a search-warrant? Section 1094 of the Code of Civil Procedure authorizes a justice of the peace to specially depute any discreet person of suitable age and not interested in the action to serve a summons or execution with or without an order to arrest the defendant or to attach property; but no express provision of statute exists conferring authority upon a justice of the peace to depute any person to execute a criminal process. At common law, however, a justice of the peace had no civil jurisdiction. (1 Blackstone, Commentaries 350.) And at common law a justice of the peace had authority to depute a person to serve a search-warrant. (4 Blackstone, Commentaries 291; *Rex*

v. Kendal, 1 Ld. Raym. [Eng.] 66.) It would seem that the very object of the legislature in enacting section 1094 of the Code of Civil Procedure was to confer upon a justice of the peace authority to deputize some private person to serve a civil process, because in the absence of such a statute the justice of the peace would not have had such authority. It seems also that no express provision of statute was necessary to authorize a justice of the peace to deputize a private person to execute a search-warrant, as the justice was by the common law invested with that authority. This seems to be the principle upon which the supreme courts of Connecticut and Wisconsin sustained the appointment of a private person by a justice of the peace to serve a search-warrant. (*Kelsey v. Parmelee*, 15 Conn. 260; *Meek v. Pierce*, 19 Wis. 318.) We conclude, therefore, that a justice of the peace may specially depute a proper person to execute a search-warrant.

3. A second question is whether one who recovers stolen property on a search-warrant which he has been specially deputed to execute is entitled to recover from the owner of the property a reward offered by him for its return. The doctrine of the courts seems to be that ministerial officers who recover and return to its owner stolen property are entitled to the reward offered therefor if the service performd by them was extra official; in other words, that a ministerial officer who, in the performance of his duties as such, recovers and returns to its owner stolen property is not entitled to recover a reward offered by the owner for such recovery and return. (*Means v. Hendershott*, 24 Ia. 78; *Warner v. Grace*, 14 Minn. 364; *Hatch v. Mann*, 15 Wend. [N. Y.] 45; *People v. Rainey*, 89 Ill. 34.) It cannot be doubted, we think, that when a justice of the peace appoints some certain person to execute a search-warrant, that that person is thereby invested with all the authority of a constable or sheriff in the premises. In the case at bar Miller accepted the appointment made by the justice, and he

came into possession of the stolen property by virtue of the criminal process, and therefore the services which he performed in recovering the stolen property were performed in his official capacity, and he was therefore not entitled to claim the reward offered by the owner of the property for its recovery and return. The court therefore did not err in directing the jury to return a verdict against Miller.

4. But what authority had the district court to render a judgment against Upjohn and Catherine Miller, the sureties on Miller's appeal bond? They were not parties to this suit. They did not appear in the action, and we think the district court was without jurisdiction over them. (*Selby v. McQuillan*, 45 Neb. 512.) But these parties have united with Frank D. Miller in the petition in error filed here; and since the petition in error, being joint, cannot be sustained as to Miller, it cannot be sustained as to the sureties or either of them. (*Small v. Sandall*, 45 Neb. 306; *Harold v. Moline, Milburn & Stoddard Co.*, 45 Neb. 618.)

JUDGMENT AFFIRMED.

SULLIVAN, J., dissenting.

No principle of public policy forbade the defendant to claim and receive the reward. He was not an officer, nor charged with any duty in relation to the enforcement of the criminal laws. His appointment by the justice to execute the search-warrant was unauthorized and void. A justice of the peace in this state possesses neither statutory nor common law authority to direct criminal process to private persons. The fact that Miller assumed to act under the writ, would not, in this case, estop him from asserting that he did not act in an official capacity, nor bring him within the reason of the rule which denies to public officers a reward for performing the duties imposed upon them by law. The judgment of the district court is erroneous and should be reversed.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. ANTHONY YOST.

FILED OCTOBER 20, 1898. NO. 8296.

Injury at Railway Crossing: CONTRIBUTORY NEGLIGENCE: EVIDENCE. The undisputed evidence in this case *held* to establish (1) that the defendant in error stepped upon a railway track without looking to see if a train or engine was approaching; (2) that his conduct under the circumstances afforded conclusive evidence that the act was negligence; (3) that such negligence was the proximate cause of the injury for which he sued.

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

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

George B. France and *Merton Mecker, contra.*

RAGAN, C.

Anthony Yost, in the district court of York county, sued the Chicago, Burlington & Quincy Railroad Company for damages for injuries sustained by him by being struck by one of its engines. The claim of Yost was that the proximate cause of the injury he had received was the negligence of the railroad company's employés. He had judgment, to review which the railroad company has filed here a petition in error.

A contention of the railroad company is that the proximate cause of Yost's injury was his own negligence. Alger is a station on the line of the railroad company in the state of Wyoming. At or near this station is a gravel-pit. About a mile west of the station is a water-tank. In September, 1894, the company was hauling gravel from this gravel-pit to points on its line west of Alger. At that time there was a switch engine at Alger which sometimes assisted the gravel-train up a grade west of the gravel-pit. This switch engine was accus-

tomed several times each day to go out to the water-tank for water, sometimes pushing the gravel-train and sometimes following it. With all these facts Yost, who was a section-hand in the employ of the railroad company, was familiar. About 9 o'clock on the morning of September 6, 1894, Henry Walker, the section-foreman, his brother, John Walker, William Yost, his brother-in-law, the defendant in error, and one Jacob Lapp were at work surfacing and ballasting the track between Alger and the water-tank. At the place where the men were at work the roadbed rested on a fill about five feet high. Ninety feet east of where the men were at work the railway track was crossed by a highway, and from the place where the men were at work toward the east for a distance of seven hundred feet the view of the railway track was wholly unobstructed. At this time, and while the men were so engaged, a gravel-train, consisting of something like twenty cars and pushed by an engine, came from Alger going west, toward where these men were at work, running at the rate of about eighteen miles an hour. Following this gravel-train and about one hundred fifty feet behind the same was a switch engine going to the tank for water. Just before the gravel-train reached the highway crossing the whistle on the engine was sounded, the four men at work on the track heard the signal, Henry Walker, the foreman, and Lapp stepped off the track on the north side thereof, and John Walker and Yost stepped off the track on the south side thereof. The gravel-train pushed by the engine passed the place where they were at work, and as Yost was about to step back on the track he was struck by the following switch engine and injured.

The argument is that Yost stepped, or attempted to step, back on this track without looking to the east to see if an engine or train was following, and that his failure to look was negligence and the proximate cause of his injury. If Yost neglected to look to the east before stepping upon the track, was such neglect negligence?

He was a man about twenty years of age, and had for more than a year been in the employ of railway companies as a section-hand. He had been working on this particular track at and about this place for about a week before he was injured. He knew that this switch engine passed and repassed several times each day between Alger and the water-tank; that it sometimes helped push the gravel-train and sometimes followed it. He had been warned by his brother-in-law, the section-foreman, not only to step off the track when this gravel-train approached, but to step off the fill so as to avoid danger from gravel or stone falling from the passing trains. He had been instructed by his foreman that after a train passed not to go back on the track without looking in the opposite direction from which the train was going to see if an engine or train was following. Under these circumstances we think that all reasonable and unprejudiced minds would concur in saying that if Yost stepped, or attempted to step, back on this track after the gravel train passed without looking on the track towards the east his conduct was negligence.

Did Yost look to the east before attempting to step back on the track after the gravel-train had passed? He testified:

Q. Now, when you were working there, what occasion did you have, if any, to leave the track? How did you come to get off the track? What made you do that?

A. My boss holloed out to let the train have the track.

Q. What train was that? What kind of a train?

A. It was a gravel-train.

Q. Now, when the boss said that what did you do?

A. Just stepped down off the track.

Q. How far, about, did you go from the track?

A. About five or six feet.

Q. Now, after you had stepped off the track and the train came along, or near by, what did you do then?

A. Well, after it was by, we got up on our work again.

Q. In the place where you were?

A. Yes, sir.

Q. Now when this gravel-train went by did you attempt to do that?

A. Yes, sir.

Q. Did you get on the track, or do you know?

A. No; I did not get quite on.

Q. Now after you attempted to get on the track what is the next thing you remember?

A. I got struck.

Q. In getting back on the track at this time you were hurt. I will ask if you went back in the manner you usually did?

A. Yes, sir.

Q. State in what manner you did at this time.

A. Well, I just got down about five or six feet away from the track. When this gravel-train was by, I just stepped up as I usually did, and looked both ways, and just as I got up here I got struck.

Q. Now you state that when you went back you looked along the track. Did you see any switch engines coming?

A. No, sir.

Q. Which way were you standing, and how were you approaching the track?

A. I was standing facing the north.

Q. What time of the day was it that this accident happened?

A. It was about half past nine o'clock in the morning.

Q. Was the sun shining?

A. Yes, sir.

Q. How far away was it,—that is, the gravel train—which had just passed when you got on the track?

A. Oh, about six feet.

Q. Did you go clear up on the track?

A. No, sir.

Q. About how close did you get to the south rail?

A. Oh, close enough so that the engine struck me.

Q. Were you still standing outside the rail?

A. Yes, sir.

Q. What do you mean by saying that you looked both ways before going back?

A. Well, I looked toward this train—the gravel-train —that had passed; and then when the train was past, to go by, I looked the other way and went up toward the track again.

Q. You got up there when the engine of the gravel-train was only about six feet away?

A. Yes, sir, started to go up.

Q. The fact of it was, you did not see the engine.

A. I did not see it.

Q. Necessarily you did not look?

A. I did look.

Yost further testified that at the time he was struck the wind was blowing and that it was dusty.

Now the undisputed evidence is that a man standing at the point where Yost was struck and looking east on the track could see a man on the track for a distance of seven hundred feet. The accident happened in the daytime. The weather was clear and the wind was blowing from the south, and whatever dust was made by the passing train was blown to the north side of the track, and Yost was on the south side. John Walker, Yost's brother-in-law and a witness in his behalf, testified that he stepped off the track at the same time Yost did, and on the same side of the track, but seems to have been standing immediately west of Yost when the engine pushing the gravel-train passed, and he testifies that he, Walker, was looking at this engine; that he was not looking back east, and that the fireman on the engine pushing the gravel-train motioned to him and that he turned around toward Yost to the east, and at the instant was knocked down by Yost being thrown against him. Here then is a positive demonstration of one of two things: Either Yost is mistaken in saying that he did look east before stepping up to this track, or if he looked east and did not see this switch engine it was because he

failed to use his sense of sight. The contention that he could not see because of the dust is absolutely worthless in the face of the statement of his brother-in-law, who was within a foot or so of him, that he was looking at the pushing engine and saw the motion of the fireman on it to him. If Walker could see a man's hand in the dust Yost could have seen a thirty-ton engine. We think the evidence in this record shows beyond all doubt that Yost stepped back, or attempted to step back, upon this track without looking to the east before so doing, and that in view of all the circumstances in the case his neglect to look was negligence; that this negligence was the proximate cause of his injury; and he cannot recover.

We are not deciding that always and under all circumstances a man is guilty of negligence who steps on a railway track without looking up and down the same to see if an engine or train is approaching. Generally, the going upon a railway track before looking along the line each way to see if an engine or train is approaching is evidence of negligence, but it is not always conclusive evidence of negligence. A person may have gone upon a railway track under such circumstances as would exonerate him from the charge of negligence. But in the case at bar the record discloses no excuse whatever for Yost's going on this track without looking to the east. This is not a case in which he was in a position of danger and in his confusion chose the more dangerous of two ways; nor is it a case in which he went from a place of safety into one of danger in an attempt to save life or property, as in *Omaha & R. V. R. Co. v. Krayenbuhl*, 48 Neb. 553, and *Missouri P. R. Co. v. Lyons*, 54 Neb. 633. Nor is this a case in which a section-man, while in the performance of his duties on the track, was hurt by an engine creeping upon him without giving any signal of its approach, as in *Union P. R. Co. v. Elliott*, 54 Neb. 299. Yost had just been warned off this track because of the danger of the approaching engine and train, and he left a place of safety and heedlessly and carelessly stepped

back on the track without exercising any care whatever for his safety by looking east on the track to see if there was a train or an engine following.

Yost's argument is that the railway company was guilty of negligence in permitting this switch engine to follow so close to the gravel-train. It may have been guilty of negligence in that respect, but if so, the answer is that such negligence was not the proximate cause of Yost's injury.

Another argument is that the switch engine did not sound a whistle or ring a bell or give other signal at the time it approached this highway crossing. It is undisputed that the gravel-train engine sounded its whistle; that all the section-men heard it and stepped off the track because of the signal. As to whether the other engine sounded a whistle at the time it approached the crossing it may be said there is a conflict in the evidence; but assuming that no signal was given by the switch engine at that time, that neglect did not cause Yost's injury. Yost alleged in his petition that he had been injured through the negligence of the railway company, without fault on his part and while in the exercise of ordinary care. The evidence does show that he was injured. We assume that it shows that the railway company was guilty of negligence, but the evidence does not sustain his contention that he himself was at the time in the exercise of ordinary care, but on the contrary it affirmatively shows that the proximate cause of his injury was his own neglect. The judgment of the district court is

REVERSED.

A. W. McCREADY v. THOMAS L. PHILLIPS.

FILED OCTOBER 20, 1898. No. 9725.

1. **Deceit:** SALES. Deceit, to ground a recovery, must relate to existing facts; but if one buy property on credit, with the intention at the time of not paying therefor, he is guilty of actionable fraud.

2. ———: ———: PROMISE TO PAY: FALSE REPRESENTATIONS. In such case the fraud does not consist in the unfulfilled promise to pay. That is only the false token whereby the fraud is accomplished. The gist of the fraud is in the expressed or implied false representation of the intention to pay.

3. ———: INSTRUCTIONS: EVIDENCE. Certain instructions and rulings on evidence examined, and *held* to be free from prejudicial error.

4. **Vendor and Vendee:** FRAUD OF VENDEE: DAMAGES. In an action for damages by a vendor of land for fraud practiced by the vendee, the evidence establishing that the fraud did not induce the plaintiff to part with his land for less than he was willing to take uninfluenced by the fraud, but consisted in inducing him to sell at an acceptable price, the vendee intending to evade payment, *held*, that the measure of damages is the price agreed upon less what the vendor may have received, and not the value of the land less such receipts.

5. **Deceit:** ACTION FOR DAMAGES: RATIFICATION OF CONTRACT. An action for damages for deceit inducing a contract ratifies the contract, and the defendant may set off against the damages awarded plaintiff any sums due defendant growing out of the transaction and accruing under the contract.

6. **Conflict of Laws:** FOREIGN NOTE: USURY. Notes made and payable in another state and stipulating for a higher rate of interest than is here lawful will be enforced according to their terms in the absence of a plea of usury.

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

A. G. Greenlee, for plaintiff in error.

Tibbets Bros., Morey & Ferris and *C. T. Jenkins, contra.*

IRVINE, C.

This case was before the court at a former term, and a judgment for the plaintiff was then reversed for error in the instructions and insufficiency of the evidence to sustain a recovery under the allegations of the petition. (*McCready v. Phillips*, 44 Neb. 790.) After the case had been remanded to the district court amended pleadings were filed. A trial was had on the issues so presented, and there was a verdict and judgment for the plaintiff for $6,000. The defendant again prosecutes proceedings in error.

The amended petition is framed on an entirely different theory than the original, and the case is now presented in an entirely different aspect. The original petition in one count charged a conversion of certain chattels; in another it sought recovery for false representations, inducing plaintiff to sell a farm to defendant. The amended petition is in a single count, and while it pleads all the facts contained in the original, it pleads additional matter, and all as stating a scheme of deception whereby plaintiff was defrauded. In brief, it charges that defendant sold plaintiff certain chattels and agreed to rent him a farm in Dakota; that by reason of the false representations alleged in the former petition plaintiff was induced to make absolute a conveyance of a farm in Seward county, Nebraska, which he had conveyed to defendant as security for the purchase price of the chattels; that defendant refused to rent to plaintiff the Dakota farm, and kept and converted to his own use the chattels, and that all of said acts were performed with the fraudulent design and intent on part of defendant of cheating plaintiff, and of not performing his contract. The answer denies all charges of fraud, pleads the contracts in some detail, and demands judgment on certain notes resulting from the transactions.

It is first argued that the verdict is not sustained by the evidence. While the argument on this topic is sub-

divided, it will be most convenient to treat it as a single assignment. It is not contended that there was no evidence tending to show false representations, but rather that such as might have been false were not material and worked no damage. We think the argument on this point disregards the theory on which the amended petition is drawn. For its proper consideration a statement of the facts is necessary. Phillips was the owner of a farm in Seward county containing 320 acres and valued by different witnesses at from $4,000 to $9,600. It was incumbered by mortgages amounting to almost $3,000. A judgment of about $500 had been rendered against Phillips and others in Lancaster county, and by means of a transcript had become a lien on the farm. The land was occupied by a tenant, Phillips and his family residing in Lincoln. On most points relating to the transactions in controversy the evidence is sharply conflicting. We shall state as facts the evidence tending to support plaintiff's claim, which the jury evidently found to be true. Phillips, late in 1886, was in Sioux City, Iowa, apparently selling rights under a patent. One day he met McCready at the post office and the two men fell into conversation. They had never met before and apparently had never heard of one another. As a result of this first conversation Phillips became imbued with the project of engaging in the live-stock business in Dakota, and within a day or two he went with McCready to a place near Madison, in the then territory of Dakota, and contracted to purchase the chattels above referred to, consisting of live stock, grain, and household goods. The purchase price was $3,000, for which Phillips gave six notes of $500 each, payable to the order of one A. L. Burt, for whom McCready claimed to be acting. To secure the notes Phillips executed a chattel mortgage upon the chattels. In the meantime Phillips had told McCready of his owning the farm, and at McCready's instance Phillips executed a deed conveying the farm to Mrs. McCready, as further security to Burt for the notes. This deed was

executed December 2. McCready at once started for Lincoln, arriving the evening of December 3. He saw Mrs. Phillips that night and by appointment met her the morning of the 4th, when she executed and acknowledged the deed. At 2 o'clock that afternoon it was filed for record in Seward county. Mrs. Phillips disposed of most of her household furniture, and with the remainder and her four children went to Dakota, where the family established itself in a two-room house on a farm occupied by McCready. Phillips denies that he ever obtained possession, except on behalf of McCready, of the chattels he had bought, but it is quite evident that, while McCready had some use of them, they were under Phillips' dominion until the events in February shortly to be narrated. About December 23, McCready having returned to Dakota, he represented to Phillips that an execution on the judgment had been levied on the Seward county farm and that it was about to be sold, and that foreclosure proceedings had been begun on the mortgages. These representations were false. Having so induced Phillips to believe that his farm was about to be lost, he persuaded Phillips to let his conveyance become absolute by a sale to McCready. There is a dispute as to the terms. McCready claims that the price was $4,500; that the incumbrances were computed, and that a balance of $878 being found due Phillips, this was credited on the chattel sale, a novation of which was then effected. Phillips claims that the price was $6,000; that some of the chattels were then relinquished, the remainder of the debt thereon canceled, and he was to have $878 in cash as he might need it. Certain it is that a stallion which Phillips had bought was then turned back, reducing the price of the chattels to $2,400; that Phillips executed notes to Mrs. McCready for $1,500, and that it was understood that Phillips was in some way credited $878. The notes to Burt were not delivered up, but no recovery has been sought on them, and there was at some time written thereon a memorandum indicating that they

were held only as collateral to the new notes. So matters went until February 23. Phillips then found that the farm he expected had been leased to another and he determined to return to Nebraska. McCready says he simply became discouraged. Discouragement is not surprising under all the circumstances, as he seems to have become involved in debt to McCready $502 additional in the interval. McCready and Phillips had another settlement, when it was agreed that certain things should be done permitting Phillips and his family to get away. The following day they all drove to Madison, where, shortly before the time for the train to leave, they entered a bank, McCready advanced to Phillips $100 to pay his traveling expenses, and Phillips again relapsed into his habit of signing documents presented by McCready. Among those then signed was a note for $602 and a power of attorney. The note represented money lent and the price of feed furnished by McCready. The power of attorney is a remarkable instrument. It is executed by both Phillips and wife and authorizes McCready to sell the chattels and from the proceeds pay the notes for $1,500, the note for $602, the expense of keeping the chattels, and a commission to McCready for selling them. Then McCready was to send "whatever is left" to Phillips at Omaha. It also contains a stipulation for a deficiency judgment against Phillips for anything within the above category which might not be realized, and closes as follows: "And whatever said A. W. McCready does with said chattels, we are to find no fault and consider it is the best that he could do under the scarcity of grain and hay and deep snows." The essence of the instrument was, out of abundant caution, repeated in the certificate of acknowledgment. The Phillipses then returned to Nebraska, and active dealings between the parties ceased. In March McCready says he sold the chattels for $1,190, for which he allows credit on the notes for $1,500. He now owns those notes as well as that for $602. February 23, 1887, a deed conveying the Seward county farm

to a stranger was placed on record. This deed bore date January 21. The title appeared of record in the stranger until November 14, 1891, when a deed reconveying it to Mrs. McCready was filed. This deed bore date January 26, 1887.

The recital of these facts demonstrates intense stupidity on one side or consummate villainy on the other. Perhaps the jury found that there was a concurrence of both traits. Inasmuch as the evidence shows that Phillips, before he met McCready, had been willing to accept even less than $6,000 for his farm, the representations as to the condition of the incumbrances could not have been in themselves material, or at least injurious, if he sold for that price; but we think the evidence amply warrants the inference that there was no *bona fide* sale; that at least as early as December 23 McCready had conceived a scheme to manipulate the conveyance and the deal in chattels in such a way as to obtain the farm without paying therefor and without losing the chattels. The false representations complained of in the original petition were not the gist of the fraud; they were merely made to induce Phillips to act hastily, without reflection and without counsel. They admirably served this purpose. The practical result of the affair was that, while in December Phillips owned a farm, incumbered, but leaving in him a valuable equity, in February, with no intervening cause except his dealings with McCready, the latter had his farm, and Phillips not only had nothing, but was largely in debt to McCready for taking his property away from him. Of course this might be the result of foolish bargains, untainted by fraud. But when we consider that the acquaintance began as does the acquaintance of a vendor of gold bricks with his victim; the promptness with which McCready placed the record title of Phillips' farm in his own wife; the whole course of the subsequent transactions; the fact—not before mentioned—that when the Phillipses left, McCready endeavored to induce them to go to St. Joseph or Milwau-

kee among strangers, and not to return to Nebraska; that the record title of the land was for years kept in a stranger while a deed of reconveyance to Mrs. McCready was withheld from record,—the inference is justifiable, if not necessary, that McCready was deliberately preying upon an unsophisticated stranger, that when he got the farm he had no intention of paying therefor, and that the deal in chattels, the notes, and the power of attorney were only for the purpose of giving legal semblance and apparent plausibility to the fraud contemplated. Such a fraud is actionable. Deceit to ground a recovery must relate to existing facts; but if a man buys property on credit with the intention at the time of not paying therefor, his promise to pay is but a false token whereby the fraud is effected. The real fraud is the expressed or implied false representation of his intention to pay. (*Ayres v. French*, 41 Conn. 142; *Dowd v. Tucker*, 41 Conn. 197; *Chicago, T. & M. C. R. Co. v. Titterington*, 84 Tex. 218; *Goodwin v. Horne*, 60 N. H. 485; *Wilson v. Eggleston*, 27 Mich. 257; *Gross v. McKee*, 53 Miss. 536.)

Complaint is made of certain instructions as submitting evidence of misrepresentations and conduct not in issue; but the argument is based on the theory that the gravamen of the action is the misrepresentations as to the condition of the incumbrances. We think the instructions applicable on the theory of the amended petition and of the evidence as we have stated it.

Rulings on the evidence are complained of. Certain of these related to evidence attacking the consideration of the note for $602. This evidence was material as tending to establish the purpose and intent of McCready. So far as it affected the note itself it was withdrawn from the jury by instructions.

Evidence was excluded of conversations, before the representations were made, between McCready and the attorney of the judgment creditor. The only purpose of this was to show that McCready's statements as to the levy of execution were not intentionally false. But in

this state a *scienter* in such cases is unnecessary. (*Johnson v. Gulick*, 46 Neb. 817; *Moore v. Scott*, 47 Neb. 346, and cases cited.) Moreover, the offer was only to show that the attorney had said that unless the judgment was paid within a time named he would cause the land to be sold. The representation charged and proved was that the land had already been levied upon and was about to be sold.

In the cross-examination of plaintiff defendant sought to show that he had previously offered the land for as little as $4,000. This was excluded. It is doubtful whether it was proper cross-examination, but if so, the error was without prejudice. Defendant proved the fact by other witnesses. Plaintiff was called in rebuttal and denied or explained the circumstance, and defendant had then a proper opportunity to cross-examine.

The verdict, we think, was largely excessive. The rule of damages proposed to the jury was the difference between the value of the land and what Phillips received. This was incorrect, under the facts of the case. The fraud did not consist in inducing Phillips to part with the land for less than he would otherwise have done, but in inducing him to part with it at an acceptable price without any intention of paying the consideration agreed upon. Phillips was willing at all times to sell for $6,000, if not for less, and $6,000 was what he thought he was getting. This should be the basis of the calculation. He received a credit of $878 on the chattels and the discharge of the mortgages. These were computed to amount to $2,983.53, and we can find nothing impeaching that calculation. Deducting the sum of these two credits from $6,000, we have $2,138.47 as plaintiff's damage. Interest at seven per cent to December 16, 1896, the date of the verdict, increases this amount to $3,632.13. The verdict should not have been for more. But there is another error. The court allowed the jury to consider the debt to McCready on the notes only in case it found for the defendant. This is not an action to rescind, but one for damages. It ratifies the contract.

Plaintiff is entitled to his damages on the basis of a contract performed. He cannot repudiate it in part and have his damages entire. Defendant is now entitled to recover on his notes. On the $1,500 notes $1,190 was paid by the sale of the chattels. The $602 note is wholly unpaid. They are all stipulated to bear interest at the rate of twelve per cent per annum. The law of Dakota, where they were made and payable, is not pleaded or proved, and the presumption of similarity in law would ground a presumption of usury. But usury is not pleaded by the plaintiff. Usury must be pleaded, and with certainty, to be available as a defense. (*New England Mortgage Security Co. v. Sandford*, 16 Neb. 689; *Anglo-American Land, Mortgage & Agency Co. v. Brohman*, 33 Neb. 409; *Rose v. Mumford*, 36 Neb. 148; *Rainbolt v. Strang*, 39 Neb. 339; *Bell v. Stowe*, 44 Neb. 210.) We are constrained, therefore, to disregard this feature and allow interest according to the terms of the notes. We credit the payment of $1,190 as of March 1, 1887, there being no evidence of the precise date and that being to take the defendant's testimony most strongly against him. So computed we find due on the notes at the date of verdict $2,273.36. Deducting this from $3,632.13, the maximum of plaintiff's damage, we have $1,358.77 as the highest amount the evidence will sustain.

If the plaintiff within forty days remit $4,641.23, as of the date of the judgment, the judgment will be affirmed for the residue; otherwise it must be reversed.

JUDGMENT ACCORDINGLY.

JOHN PISAR, JR., V. STATE OF NEBRASKA.

FILED OCTOBER 20, 1898. NO. 10273.

1. **Intoxicating Liquors:** APPLICATION FOR LICENSE: NOTICE. An application for a license to sell liquor cannot be acted upon until at least two weeks' notice has been given in the manner specified by statute. Action can only be taken after the expiration of two weeks, and consequently action on the fourteenth day after the first publication of notice is premature.

2. ———: ———: ———. Notice of the application, in compliance with the statute, is essential to confer jurisdiction on the board to which the application is addressed; and a license issued without such notice is void and may be collaterally attacked.

3. **Criminal Law:** ADMITTED FACTS: INSTRUCTIONS. In a criminal case, if the defendant on the trial stipulate that certain facts exist, the court may properly assume those facts as established and instruct the jury as to their legal effect.

4. ———: ———: MAXIM. If the defendant solemnly admit facts establishing his guilt, he is not entitled to have the jury pass on the issue of his actual intent to violate the law. *Ignorantia legis neminem excusat.*

ERROR to the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

Hazlett & Jack and *E. N. Kauffman*, for plaintiff in error.

C. J. Smyth, Attorney General, Ed P. Smith, Deputy Attorney General, Samuel Rinaker, and *E. O. Kretsinger*, for the state.

IRVINE, C.

John Pisar, Jr., was convicted of selling intoxicating liquors without a license, and asks a reversal of the judgment. The case was submitted to the jury on an agreed statement of facts without other evidence. It appeared from this statement that Pisar sold liquors as charged in the information, but that he did so under color of a license which had been issued to him; that except as to the publication of notice all the proceedings leading to the issuing of the license were sufficient and regular.

The notice was published in a weekly newspaper April 28 and May 5. The license was granted May 12,—the fourteenth day after the first publication. The state asserts that the notice had not been published a sufficient period to permit action on the application on the day when such action was taken. It is on this alone that the prosecution rests.

The statute provides (Compiled Statutes, ch. 50, sec. 2): "No action shall be taken upon said application until at least two weeks notice of the filing of the same has been given by publication," etc. Construing this provision with reference to a notice first published June 5, this court said: "Saturday, the fifth of June, the day of publication, must be excluded. The two weeks then would expire with Saturday, the nineteenth. If Sunday must be excluded—and it must, for the board could not legally be in session on that day to appoint a time for hearing—Monday, the twenty-first, would have been the first day on which the board could take any action whatever on the application." (*Pelton v. Drummond*, 21 Neb. 492.) Referring to a notice first published May 12, it was said: "The notice given in the newspaper had been given two weeks with the expiration of May 26. If no remonstrance had been filed, a license might have been granted on the 27th." (*Hollembaek v. Drake*, 37 Neb. 680.) Other expressions may be found in the reports of similar import. In *Pelton v. Drummond* action had been taken on the thirteenth day instead of the fourteenth, as is here the case, and in *Hollembaek v. Drake* the notice given was held sufficient, so that, in a strict sense, the cases cited are in a manner *obiter* as to the precise question now before us. Nevertheless, both cases required for their decision a construction of the same clause of the statute, and the language used by the court was not an incidental expression but the deliberate judgment of the court as to such construction. The statute says that no action shall be taken "until at least two weeks notice" has been given. This indicates that action must be after the ex-

piration of two weeks, and not merely at the end of two weeks, and so justifies the construction which has been placed upon it, and which will not now be changed.

It is said that, in the cases the state relies upon, the court was dealing with direct attacks on the license; that when a license has been granted the same considerations do not apply to a collateral attack. But the notice is jurisdictional. Without a compliance with the statute in that regard the council is without authority to act. (*Pelton v. Drummond, supra; Livingston v. Corey,* 33 Neb. 366; *Zielke v. State,* 42 Neb. 750.) The defect was not a mere irregularity in the proceedings, but one which rendered them void and the license no protection. It was no license because of want of authority in the council to grant it.

The foregoing questions were raised by exceptions to instructions. The instructions are also assailed as depriving the jury of its authority to pass on the question of guilt or innocence. The instructions specially assailed tell the jury that the only question before it is the sufficiency of the notice, and then that the notice is insufficient. This was of course practically equivalent to directing a verdict of guilty. An instruction in a criminal case is not erroneous for assuming facts as proved, provided the record clearly shows that the defendant admitted such fact or treated it as established. (*Hill v. State,* 42 Neb. 503; *McAleer v. State,* 46 Neb. 116.) In this case the necessity of proof was dispensed with by a solemn stipulation of all essential facts. The court did not err in treating those facts as established. The legal conclusion from such facts was for the court and not for the jury, and the defendant cannot complain because the court drew that conclusion and stated it clearly to the jury. If the legal conclusion from the facts defendant solemnly admitted was equivalent to a plea of guilty, there was nothing really for the jury to pass upon.

It is said that the issue of criminal intent was at least for the jury, and that the defendant had acted in good

faith, believing he had a license. But he is conclusively presumed to know the law, and if an actual unlawful intent is essential, that presumption supplies it. The case is one of hardship, and it is doubtful if any public purpose is subserved by a prosecution under such circumstances; but the hardship is no greater than is frequently caused by the application of the always harsh but necessary maxim, *ignorantia legis neminem excusat.*

AFFIRMED.

H. A. LA SELLE, APPELLEE, V. W. D. NICHOLLS ET AL., APPELLANTS.

FILED OCTOBER 20, 1898. No. 8356.

1. **Record for Review:** MODIFICATION OF DECREE. Confirmation of a judicial sale was resisted on the ground that the district court had, without notice to the appellant and at a term subsequent to that at which the decree was rendered, modified the decree by appointing a special master to make the sale, instead of the sheriff as the decree had provided. The record brought to this court did not contain the decree or the order complained of. *Held*, That no cognizance could be taken of the question in the absence of such records.
2. **Judicial Sales:** APPRAISEMENT: HARMLESS ERROR. An error in appraising land for judicial sale whereby a tax-lien was deducted twice is without prejudice to the defendants when the land sold for more than two-thirds of the appraised value, correcting the error.
3. ———: DESCRIPTION OF LAND: PRESUMPTIONS. In the absence of evidence it will not be inferred that land described as the "north one-third of lots five and six" constitutes separate tracts which should be sold separately.

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

L. W. Colby, for appellants.

Hazlett & Jack, contra.

IRVINE, C.

This is an appeal from an order confirming a judicial sale of real estate. The appellants assert that at a term subsequent to that at which the decree was rendered the same was modified by appointing a special master to sell the property, instead of the sheriff as designated in the decree, and this without notice to appellants. The question as to the validity of such a proceeding is not presented by the record. The decree is not a part of the record filed in this court, nor does any order appear of the nature complained of. The only indication that there was any such proceeding is in certain affidavits which seem to have been used in support of the objections to the sale, but these cannot be permitted to take the place of a transcript of the record assailed.

One of the objections to confirmation was that certain taxes appeared in both the city and county treasurer's certificate and were thus twice deducted in making the appraisement. As the land sold for more than two-thirds of the appraised value, making due allowance for this error, the appellants were not prejudiced.

It is also claimed that different portions of the land should have been separately appraised. As before stated, we have not the decree before us. From the order, notice of sale, appraisal, and return it appears that the land was described as the "north one-third of lots five and six, in block seventy-seven," etc. This description in itself indicates a single tract, and there is nothing to show that there were separate tracts.

The remaining objections are barely stated rather than discussed in the brief, and relate to questions repeatedly decided adversely to appellants' contention.

AFFIRMED.

C. M. HENDERSON & COMPANY, APPELLANTS, V. C. F. KEUTZER ET AL., APPELLEES.

FILED OCTOBER 20, 1898. No. 8341.

Estoppel: PLEADING. The facts from which an estoppel *in pais* arises, to be available as such, must be pleaded, at least where there is an opportunity to so plead.

APPEAL from the district court of Adams county. Heard below before BEALL, J. *Affirmed.*

Cavanagh & Thomas, M. A. Hartigan, and *Harwood, Ames & Pettis,* for appellants.

Capps & Stevens, contra.

IRVINE, C.

This was a creditor's bill whereby C. M. Henderson & Co. undertook to subject to the payment of a judgment against C. F. Keutzer and Henry Trier certain land the title to which was in Elizabeth Trier, the wife of Henry. There was a decree for the defendants and plaintiffs appeal.

The essential facts are that Keutzer, June 9, 1890, was indebted to the plaintiffs in the sum of $871.52, and being pressed for payment, sought an extension, offering two notes signed by himself and Henry Trier, due, respectively, July 9 and August 9. After investigation the plaintiffs granted the extension and accepted the notes. Before the first note matured Keutzer, who was engaged in a mercantile business, failed, and his stock was seized by mortgagees. The title to the land in controversy had for years been in Henry Trier, the surety on the notes. June 24 he conveyed it to a third person, and by means of several mesne conveyances it became vested, in July, in Elizabeth Trier. It is conceded that there was sufficient evidence to sustain the finding that the land was bought with money of Elizabeth and that the conveyances were not, in the usual sense, voluntary or fraudu-

lent, but were made in execution of the resulting trust. The appellants assert that the uncontradicted proof shows that Mrs. Trier had for years known that the title was in her husband and had suffered it to so remain; that the appellants, before accepting him as surety, made investigation, and finding the title in him accepted the notes, relying on his apparent ownership; that by so doing they lost the opportunity of proceeding against Keutzer until after other creditors had absorbed his assets. A reversal is sought on the sole ground that Mrs. Trier is by the foregoing facts estopped from asserting her right against the claim of plaintiffs.

An estoppel *in pais* is not available unless the facts from which the estoppel arises are pleaded, at least where there is an opportunity to so plead. (*Norwegian Plow Co. v. Haines*, 21 Neb. 689; *Schribar v. Platt*, 19 Neb. 625; *Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Neb. 746; *Erickson v. First Nat. Bank*, 44 Neb. 622; *Scroggin v. Johnson*, 45 Neb. 714.) The petition, after pleading the debt and its circumstances, the recovery of judgment and the transfers which it seeks to avoid, charges that the transfers were made without consideration and in pursuance of a conspiracy to defraud creditors of Keutzer and Trier. It also alleges that "at the time said notes and evidences of indebtedness were made and delivered they were accepted by plaintiffs solely and wholly upon the statement that defendant Trier was worth to exceed the sum of $5,000, which plaintiffs allege to be the fact at that time." This, it will be observed, is only an averment that plaintiffs relied on a true statement by some one not named as to Trier's wealth. The petition was clearly framed upon the theory that the land was Trier's and that the conveyances were fraudulent or voluntary, not on the theory now presented. Mrs. Trier's answer pleads her title and right in detail. To this it might properly have been replied that she was estopped to set up her right, and thereby the petition might be sustained; but the pleader, while evidently at-

tempting to do so, failed. To demonstrate this it is necessary to quote the whole of the reply. It is as follows:

"Comes now the plaintiff in the above entitled action, and for their reply to the separate answer of Henry Trier and Elizabeth Trier replying say:

"1. They deny each and every allegation in said answer contained inconsistent with the petition heretofore filed in said action.

"2. Further replying to the several matters the defendants set out in their answer, these plaintiffs allege that the said defendants Elizabeth Trier and Henry Trier are estopped, denied, and in law forbidden to now offer as a defense the facts set out in the said answer, for the following reasons: For that for all of the several years, from the time of the purchase of the said land up until the time of the said attempted conveyance, the title of the same was in the defendant Henry Trier, with the full knowledge and consent of Elizabeth Trier, his wife, now defendant in the said answer, and with the knowledge that the said Henry Trier was receiving and had received, was directing and had directed, upon the strength of such credit so secured, by reason of his holding the title to the lands and the reason of the value of the said lands.

"3. The plaintiff herein again alleges each and every fact as fully as if the same were herein set out at large, contained in their petition, and again asks for judgment as in said petition prayed."

The attempt to plead the estoppel is in the second paragraph. After the averment that the title was for several years in Trier with the knowledge and consent of his wife this paragraph becomes unintelligible. Whatever the pleader may have intended to charge he certainly did not charge that Henry's title to the land was used as a basis for obtaining credit, or that plaintiffs had relied thereon in extending credit, or that plaintiffs had altered their position to their disadvantage. The matter now relied on was, therefore, not in issue, nor was it pleaded and admitted.

AFFIRMED.

GLOBE OIL COMPANY V. G. W. POWELL.

FILED NOVEMBER 3, 1898. No. 8387.

1. **Assignments of Error:** INSTRUCTIONS. If of the giving of more than one instruction there is an assignment of error in gross in the motion for a new trial, and one of the instructions is determined proper, no further examination of the assignment need be made.
2. ———: RULINGS ON EVIDENCE: RECORD. An assignment of error in the petition was of the admission of the evidence of a witness as set forth on a designated page of the bill of exceptions, and an examination developed the fact that no objections were interposed to any interrogatories or any evidence shown on the stated page of the record. *Held*, To present no matter for consideration or decision.
3. **Instructions:** REVIEW. An instruction which ignores a proposition material to the conclusion which it announces may, under certain findings, be reached for one of the parties, is erroneous.

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

John D. Carson, for plaintiff in error.

F. B. Donisthorpe, contra.

HARRISON, C. J.

On December 15, 1891, the defendant, then in business in Shickley, gave to a traveling salesman for the plaintiff the following order:

"Dated Dec. 15th, 1891. Sold by J. O. C.
"The Globe Oil Co., 1891.
"Ship to G. W. Powell, on or about June 1st, at Shickley; county, Fillmore; state, Nebraska; P. O. address, ———. Terms, 4 months. F. o. b. Beatrice. No special agreement will be recognized that is not embodied in this contract.
"½ bbls. King Cylinder at 40; 1 bbls. Castor Machine (heavy) at 33; 1 bbls. Mach. Lard Oil at 36; ½ bbls. Vel-

vet Engine at 27; ½ Amber Engine at 24; ½ Red Castor at 34; 4 packages at 50.

"Above is correct. Quality of oil guarantied.

"G. W. Powell, Purchaser."

The plaintiff instituted this action to recover an amount asserted to be its due on account of the oils sold and delivered to defendant as shown in said order. The defendant answered the petition, which was in the ordinary form of declaration on an account, and admitted the order, but alleged that it was conditional; that, if he was unable to procure a suitable place within which to store the oils ordered, he was not to receive them; that he had not been able to get the room for storage and had, before shipment of the goods included therein, canceled or countermanded the order. It was further alleged in the answer: "Plaintiff claims to have delivered certain oil as per the terms of said contract, whereas the fact is that whatever oil was shipped to defendant never reached its destination, but certain barrels and half barrels reached Shickley, Nebraska, nearly empty of oil, the oil having escaped,—the said barrels and half barrels being in such shape and condition as not to be able to contain oil,—and the defendant refused to accept of the same." The reply was a general denial, and from a verdict and judgment for defendant the plaintiff has prosecuted error to this court.

It is argued that the trial court erred in refusing to give in charge to the jury certain instructions prepared and requested for the plaintiff and numbered 2, 3, and 4. The assignment in the motion for a new trial in relation to the instructions to which we have just referred was in gross. Of the instructions in question the one numbered 4 was erroneous, and this being determined disposes of the entire assignment as unavailing. (*Hiatt v. Kinkaid*, 40 Neb. 178; *Graham v. Frazier*, 49 Neb. 90; *Denise v. City of Omaha*, 49 Neb. 750.)

It is argued that the court erred in the admission in evidence of the testimony of a witness—Oscar Johnson

—as set forth on pages 10, 11, and 12 of the bill of exceptions. In the petition in error there appears the following assignment: "The court erred in admitting the evidence of Oscar Johnson. See page 10, bill of exceptions;" and there is no other or further mention of the testimony of the witness designated in argument and in the assignment. To the questions asked of the witness as shown on page 10 of the bill of exceptions there were no objections; and of the admission of the other portions of the testimony of this witness, there were no assignments of errors in the petition; hence they are not presented for examination, from which it follows that this branch of the argument must fail.

It is insisted that the trial court erred in giving to the jury instruction numbered 3, given on its own motion, which was as follows: "The order provides that the oil shall be delivered free on board cars at Beatrice, Nebraska, and if you do not find either that it was so placed on board cars at Beatrice, in ordinarily good condition, or else that it arrived at its destination in ordinarily good condition, then defendant would have the right to refuse to accept the oil in question." It may be well to notice the facts as they appear in evidence relative to the shipment of the oils ordered by defendant. A knowledge of them may render somewhat clearer the applicability or lack of it of the foregoing instruction. A car load of oils, inclusive of what had been ordered by the defendant, was shipped to Omaha,—the witness who testified in regard to the matter said "for distribution." It must be concluded, since the testimony was of a car load "for distribution," and no consignment of any designated portion to defendant, or any other party, that there was no separation, and the car load was the company's property. The oils ordered by defendant were shipped from Council Bluffs to Shickley, consigned to defendant at the latter place; and it will be remembered they were to be according to the order for them, "f. o. b. Beatrice," which seems to have been interpreted by the

trial court as meaning delivered on board cars at the place mentioned. (See instruction quoted herein.) This court has considered the import of a contract to sell "prices f. o. b." at a designated point, and whether it fixes the place of delivery or not, and did not reach a conclusion which is applicable, as an inflexible rule, in all similar cases. (See *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321.) But if it be conceded that the instruction in this case was correct in its statement of the place of delivery, Beatrice, then the title to the goods passed to the defendant at said point, and the instruction was erroneous in its further assertion that unless the jury should find that the condition was good when delivered, or ordinarily so, at time of arrival at Shickley, then the defendant might refuse to receive them. The matters of condition of which there were complaints were of the barrels in which the oils were shipped, and of leakages. The instruction ignored in its latter portion the proposition that these matters might have been produced by negligence and carelessness of the carrier after the title to the goods had passed to the consignee. If so, it was without fault of the vendor, and would furnish no sufficient reason for a refusal to receive as between the vendor and vendee. For the error in the instruction the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

EMMA H. HOLMES, APPELLEE, V. MARY J. CROOKS ET AL., APPELLANTS.

FILED NOVEMBER 3, 1898. No. 8373.

1. **Sheriff**: SALE AFTER EXPIRATION OF TERM OF OFFICE. A sheriff to whom an order of sale has been issued, and who has commenced the execution of the same during his term of office, may complete the service after the expiration of such time.

2. **Judicial Sale: NOTICE: PROOF OF PUBLICATION.** A purported affidavit of proof of publication of notice of sale of land under an order of sale is not sufficiently authenticated if it lacks the signature of an officer to the jurat.

APPEAL from the district court of Lancaster county. Heard below before HOLMES, J. *Reversed.*

John S. Kirkpatrick, for appellants.

Field & Brown and *Cobb & Harvey, contra.*

HARRISON, C. J.

In this, an appeal from an order of the district court of Lancaster county, by which there was confirmed a sale of real estate made under a decree of foreclosure of a mortgage, it is complained that there were fatal defects in the proceedings; of such as are urged at the present time but two were of the grounds of the objections to the confirmation presented to the district court, and none others will be considered.

One objection was that the sale took place after the term of office of the sheriff who made it had expired. The sheriff received the order of sale December 26, 1895, and he caused an appraisement of the premises to be sold to be made of date January 6, 1896. These acts were prior to the expiration of the sheriff's term of office. It is of the provisions of our statutes that "sheriffs and their deputies may execute any process which may be in their hands at the expiration of their office." (Compiled Statutes, ch. 18, art. 1, sec. 123.) That an order of sale comes within the term "process" see *Philips v. Spotts*, 14 Neb. 139. An officer who commenced the service of the process during his term of office may complete its execution after the expiration of his term. (1 Freeman, Executions sec. 62; *Fowble v. Rayberg*, 4 O. 45.)

A second objection was that no proper or sufficient proof of publication of a notice of the sale was made. In the return to the order of sale there appears a statement of the publication of the notice, and such statement is ac-

companied by a reference to the affidavit or proof of the publication as a part of the return. The document alluded to is in the ordinary form of what is termed an affidavit of publication of notice of sale, and purports to be signed by the publisher of a newspaper as the affiant. The jurat is in substance regular and there is an impression of a notarial seal immediately below the form and to the left of the words "Notary Public," which words appear just below a line directly underneath the right-hand end of the jurat, but the signature of the notary public is nowhere present,—is wholly lacking. Notice is necessary and publication in a newspaper is prescribed. (Code of Civil Procedure, sec. 497.) "Publications required by law to be made in a newspaper, may be proved by affidavit of any person having knowledge of the fact, specifying the time when and the paper in which the publication was made, but such affidavit must, for the purposes now contemplated, be made within six months after the last day of publication." (Code of Civil Procedure, sec. 403.) The statement of the officer in his return did not prove the publication of the notice. (*Miller v. Lefever*, 10 Neb. 77.) In section 6 of chapter 61, Compiled Statutes, certain powers and duties of notaries public are enumerated, inclusive of that of administering oaths and affirmations; and it is further provided: "And over his signature and official seal certify the performance of such duties, so exercised and performed under the provisions of this act, which certificate shall be received in all courts of this state as presumptive evidence of the fact therein certified to." "An affidavit may be made in and out of this state, before any person authorized to take depositions, and may be authenticated in the same way." (Code of Civil Procedure, sec. 371.) Authentication is by the certificate, signature of the officer in all cases, and official seal, if the officer has one. (Code of Civil Procedure, sec. 384.) In the opinion in the case of *Bantley v. Finney*, 43 Neb. 794, written by RAGAN, C., wherein there was under consideration an affidavit to

which the jurat was blank or had not the signature and seal of the officer, it was, impliedly at least, held that it was not proved or authenticated, the main point of adjudication being that the fact of its being sworn to might be proved by extrinsic testimony. That the impression of the seal appeared to the jurat in question in the case at bar was not alone sufficient. Further proof that the oath was before the officer to whom the seal belonged was requisite. The jurat without the signature of the officer was incomplete and no authentication of the document on which it appeared. (Ency. Pl. & Pr. 317, 318, and cases cited.) There was not sufficient proof of the publication of the notice of the sale. The order of confirmation must be reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

SECURITY ABSTRACT OF TITLE COMPANY ET AL. V. JOHN H. LONGACRE, ADMINISTRATOR.

FILED NOVEMBER 3, 1898. No. 8389.

1. **Judicial Sales:** TITLE: EFFECT OF OPENING DECREE. Setting aside a decree under the provisions of section 82, Code of Civil Procedure, upon the application of a non-resident upon whom service was had of the pendency of the cause by publication, and not otherwise, does not affect the title to the property, the subject of an order or judgment sought to be opened, which by it, or in consequence of it, while in force, shall have passed to a purchaser in good faith; nor can such title be litigated in the action after the decree is set aside, except possibly when the *bona fides* of the purchase is the subject of attack. (Code of Civil Procedure, sec. 82; *Citizens State Bank of Council Bluffs v. Haymes*, 56 Neb. 394.)

2. ———: ———: ———: CONTRACTS. The mere setting aside of such a decree in the manner and for the reasons provided in said section of the Code does not comply or fulfill the terms of an agreement to secure the deed issued after confirmation, and in completion of a sale ordered by the judgment to be vacated, and the property and its title to be settled and fixed in a party to the agreement.

3. **Abstracts of Title:** LIABILITY OF ABSTRACTER. An abstracter of title is liable to a person for whom he or it has prepared and furnished an abstract of title to property for the damages suffered by such person in consequence of an omission to notice in the abstract an incumbrance against, or matter which affects, the title.

4. ———: ———. A party procured an abstract of title to real estate of which he contemplated the purchase, and, in reliance on the completeness and accuracy of the abstract, made the purchase and, as a part of the consideration, assumed and agreed to pay the debt secured by a mortgage on the premises. He lost all that he apparently purchased,—the title, the property, and its possession,—by a sale, without his knowledge, of the property under the order of a judgment in a suit whose attachment writ had been levied thereon, and of which suit all notice or mention of the pendency had been omitted from the abstract. After this occurred the mortgage on the property was foreclosed, and he was a party to the foreclosure action. He having died prior to the sale, his administrator allowed a sale of the property under the decree therein at a sum less than the amount of the mortgage debt. Such facts *held* to furnish no matter of defense for the abstracter in an action by the administrator for the damages claimed to have accrued by reason of the defect in the abstract.

5. **Rulings on Evidence:** ASSIGNMENTS OF ERROR. To obtain a review of the admission of evidence the ruling must be assigned in the petition in error.

6. **Abstracts of Title:** DAMAGES. A peremptory instruction to the jury herein examined, and *held* not erroneous.

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

I. R. Andrews, H. C. Brome, and *Brome, Burnett & Jones,* for plaintiffs in error.

Frick & Dolezal and *W. J. Courtright, contra.*

HARRISON, C. J.

The Security Abstract of Title Company, plaintiff in error, was during the year 1890 in the business which is indicated by its name,—that of furnishing abstracts of title to real estate,—and its place of business was, as stated in the pleadings, in Douglas county. It had given

the bond required by law. The other parties impleaded with it, now co-plaintiffs in error, were the sureties on the bond. Isaac Longacre, a prospective purchaser of a portion of a lot in an addition to the city of Omaha, applied to the company for, and was by it furnished an abstract of title to the property which he purposed purchasing. From the abstract there was omitted any notice, statement, or information of the pendency of an action against the owner in which attachment process had been procured to issue and which had been levied upon said property. The action proceeded to judgment, and under an order for such purpose, the attached property was sold, and in the due course of the further progress of the matter the sale was confirmed, a deed ordered, prepared, executed, and delivered to the purchaser, who took possession of the property. Soon after, the abstract of title was prepared for Isaac Longacre, he, as it is alleged in the petition, relying on the abstract for a knowledge of the true condition of the title, purchased the property and took possession thereof, and had no notice of the pendency of the suit, the attachment, and sale, until after the person who bought at the sale had received a deed from the officer charged with its making, and had taken possession of the property and ousted Isaac Longacre, whose possession was by tenant. Isaac Longacre died subsequent to the occurrences hereinbefore noted. The exact date of his death is not a material fact herein, and the defendant in error was duly appointed administrator of his estate, and instituted this action against the company and its bondsmen to recover the damages which it was asserted had ensued from its negligent performance of the preparation of the abstract of title to the property ordered by Isaac Longacre. Issues were joined, and a trial thereof resulted favorably to the claim of the administrator, and of the judgment in his favor the plaintiffs in error ask a reversal in error proceedings.

When Isaac Longacre discovered that the property

he had been induced to buy in reliance upon the information imparted by the abstract of title, and by or through a cause which was then existent but all mention of which had been omitted from the abstract, was lost to him, he notified the company, complained of its want of care, and threatened suit to recover his damages unless the property was procured for him and with the title as shown in the abstract. It was of the defenses pleaded for the plaintiffs in error that it was agreed that if the company would cause what was styled in the plea the "pretended judgment" in the action wherein the property had been taken and sold under writ of attachment to be vacated, and the sale set aside, Isaac Longacre would be satisfied and make no further claim against the company. For the administrator it is contended that this agreement contained the further element that the company should give him renewed possession of the property. The party defendant in the suit and attachment was William S. Mills, who was a non-resident, and service in the action was made by publication. The purchaser of the property at the sale under attachment was Andrew Kiewit. William S. Mills, at the instance and request of the abstract company and through counsel employed by it, made application as it is provided in section 82 of the Code may be done by a defendant against whom a judgment or decree has been rendered on service by publication, and such proceedings and determinations were had during the course of the hearing of said application that the judgment was vacated and the applicant let in to defend. The action was subsequently dismissed, but this did not fulfill the agreement of the company, as set up in its defense herein, with Isaac Longacre. It neither restored him his property nor title thereto. These still remained with Kiewit, the purchaser at the attachment sale. It is of the provisions of said section 82: "But the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a pur-

chaser in good faith, shall not be affected by any proceedings under this section." The disposition of the title acquired by purchase at a sale under a judgment or decree may not be litigated in the action after the judgment or decree is set aside, under the provisions of section 82 of the Code of Civil Procedure, on application of a non-resident defendant on whom service was made by publication, unless, possibly, under allegations which attack the *bona fides* of the purchase. (*Citizens State Bank of Council Bluffs v. Haymes*, 56 Neb. 394.) From all this it must be concluded that if the agreement be conceded or considered as established as alleged in the answer, there was no compliance with its requirements by the company.

Another argument for the plaintiffs in error is that if there could be a recovery, the measure of damages should have been the amount of the incumbrance, the judgment in the suit, to enforce which the sale occurred, the suit being the one of which the omission of mention in the abstract furnished the basis for the action at bar. This is not tenable. The sale had been made and confirmed and deed ordered before the pendency of any action or existence of attachment or judgment became known to Isaac Longacre, and he could not have paid the judgment if he had so wished, for it was then satisfied by the sale. The proceedings had caused and perfected a title which destroyed any claim of his to the property or its title.

It appeared that William S. Mills, while owner of the property, executed and delivered to the Lombard Investment Company a mortgage thereon to secure the payment of his indebtedness to it in the sum of $1,100, and that Isaac Longacre bought the real estate subject to the lien thereby created and assumed the payment thereof. This indebtedness was not paid at its maturity and an action for foreclosure of the mortgage was instituted and prosecuted to completion, and the sale of the premises was made under the decree for a sum less than the mortgage debt. To these proceedings Isaac Longacre was a party defendant, duly served, but made no

appearance nor active defense. It is insisted for plaintiffs in error that inasmuch as Isaac Longacre did not take any active part in and against the foreclosure, did not stay the sale, and allowed the property to be sold for less than the mortgage debt, he showed a willingness and preference to abandon all further claim to it; and that he suffered it to be sold for a sum below the amount of the mortgage evidenced that he did not consider it worth such sum; and the fact that it sold for less than the amount of the mortgage lien disclosed that it was worth less than such amount; and Isaac Longacre's acquiescence in the sale or failure to attempt to save the property showed that it was not of greater value than it sold for under the order of sale, and all these things being true, establish that he suffered no damage by the act of the abstracter. Of this argument we fail to see, and cannot acknowledge, the force. Prior to the commencement of the foreclosure, all the real or apparent right and title of Isaac Longacre in the property had been divested or destroyed by the sale under the judgment and order of attachment, and by reason thereof the possession had been taken from him and his right of action against the company had accrued. That he might possibly have been in a sale under the decree of foreclosure a successful bidder and have obtained a title to the property shorn of the right or title of the purchaser at the sale to satisfy the attachment, who was a party defendant in the suit to foreclose, furnished no defense for the abstract company; and that he was personally bound for the payment of the mortgage debt to be enforced in the foreclosure makes the contention of the plaintiffs in error no stronger, rather the reverse. If Isaac Longacre, or his administrator, for he died before foreclosure sale, had purchased the property thereat, he would have acquired in an independent transaction the title to property which the deceased thought he had but did not get in perfection or as he intended, through the fault or neglect of the company, and any benefit which

he derived in the matter could not inure to the company or destroy or discharge in whole or in part his cause of action against it.

An argument is presented relative to the admissibility of evidence of which it must be said that there was no assignment of error in the petition, which fact leads to its not being considered. (*Smith v. Mason*, 44 Neb. 610.)

The arguments herein were made mainly under an assignment that the trial court erred in instructing the jury as it did to return a verdict for the defendant in error. No points have been presented which in any degree impeach the correctness of such action, and it follows that it must be approved and the judgment must be

AFFIRMED.

IRVINE, C., not sitting.

BATES-SMITH INVESTMENT COMPANY V. OSCAR A. SCOTT.

FILED NOVEMBER 3, 1898. NO. 8352.

1. **Review**: PARTIES: JOINT JUDGMENT. All parties to a joint judgment must be joined in error proceedings therefrom, and a nonjoinder is a fatal defect in the proceedings; but if the objection is delayed until the final submission of the cause on its merits, the defect is waived.

2. ———: ———: ———: JURISDICTION. Where a judgment in terms is inclusive of and against two parties, in an action in which a several judgment might have been proper, and of one party so embraced by the judgment the court had no jurisdiction, such judgment may be affirmed as to the one defendant of whom there was jurisdiction.

3. **Cross-Examination**: REVIEW. Exclusion of testimony as improper during cross-examination, examined and adjudged not erroneous.

4. **Instructions**: REPETITIONS. It is not error to refuse an instruction, the subject-matter of which is fully covered by one given.

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

Wright & Thomas, for plaintiff in error.

Ed P. Smith and *Smith & Sheean, contra.*

HARRISON, C. J.

This action was commenced by defendant in error before a justice of the peace of Douglas county to recover of the plaintiff in error and Charles E. Bates the sum of $50, asserted to be his due from them by reason of services by him rendered to them under and by virtue of a contract. In the justice's court the defendant in error was accorded a judgment against the company as follows:

"It is therefore considered by me that the said plaintiff recover from the defendant Bates-Smith Investment Company the sum of ($30) thirty dollars and costs of this suit herein expended, taxed at $3.60."

It will be noticed that there is no reference in the foregoing judgment to Charles E. Bates, his rights, or the disposition of the action to the extent it was against him. An appeal for the company was perfected to the district court, where, in the petition filed and the instructions of the court to the jury during the trial, the action was conducted and treated as against the investment company and Bates. There was no answer for Bates and no appearance by or for him. The verdict was as follows:

"OSCAR A. SCOTT, Plaintiff,
v.
THE BATES-SMITH INVESTMENT COMPANY, Defendant.

"We, the jury duly impaneled and sworn to try the issues joined between the said parties, do find for the said plaintiff, and assess his damages at the sum of $52.64 (fifty-two and 64-100 dollars)."

The judgment was against the company and Charles E. Bates and each of them. The company presents the case in this court for review.

It is argued for defendant in error that inasmuch as the judgment was against both Charles E. Bates and the investment company, and Charles E. Bates has not been made a party to the error proceedings, there is a defect of parties which calls for a dismissal of the petition in error. It is true that it is the rule that in order to secure a review of a joint judgment in error proceedings to this court, all persons interested must be made parties. (*Polk v. Covell*, 43 Neb. 884; *Andres v. Kridler*, 42 Neb. 784; *Consaul v. Sheldon*, 35 Neb. 247; *Curtin v. Atkinson*, 36 Neb. 110.) But it has also been held that such defect is waived if the objection is not made before the submission of the cause on its merits. In the case at bar no motion has been made for the dismissal of the proceedings on the ground of defect of parties. The first mention of it appears in the brief for defendant in error on the merits, and is too late to be of any avail. The defect of parties, if any, must be treated as waived.

It is contended for the plaintiff in error that as there was no judgment in justice court against Charles E. Bates, the appeal of the cause to the district court, which was for the investment company, did not remove the action to the appellate court to the extent it was against Bates and involved his rights and liabilities. The court, at the inception of the action, seems to have considered the claim a separable one, and in accordance with this view rendered judgment against the investment company alone. It is true the justice ignored the other party to the suit in its adjudication, but to this there was no objection on the part of any person. The appeal for the company was perfected, and there is no tenable course of reasoning from which it can be concluded that Charles E. Bates was a party to the action during its pendency and trial in the district court. The district court had no jurisdiction of him, and the judgment, to the extent it was against him, was a nullity. But he is not here complaining. The error proceedings are for the company which had appealed the action and submitted itself to the jurisdiction of the court.

It is contended for the company that a judgment is an entirety, and if against two or more, and either erroneous or void as to one party, and for such reason subject to be vacated or reversed, the action must be in regard to it as an entirety; that it cannot be good as to one and bad as to another or others, and will not be so held. (1 Black, Judgments sec. 211, and cases cited in notes 146, 147; 11 Ency. Pl. & Pr. 858, note 1.) The doctrine of entirety of judgment is one of the common law and has been pushed to the extreme; but by many courts the rule has been announced that such a judgment may be voidable or void as against one defendant, but binding on another or others in a collateral attack. (1 Black, Judgments sec. 211, note 148; 11 Ency. Pl. & Pr. 859, note 2.) The weight of authority seems to favor the doctrine that in appeal or error proceedings such judgment must be as an entirety affirmed or reversed as to all parties, and cannot be severed. (1 Black, Judgments sec. 211, note 151; Ency. Pl. & Pr. 859, note 4.) In this state it has been said: "If a suit be brought against three parties jointly and severally liable, two of whom only are served, it is not error to enter judgment against those served and omit therefrom the other." The action was upon a note. There was service of summons on two, and no service on the other. Judgment was rendered against the two, and nothing stated therein relative to the one who was not served. It was also said in the opinion of this court, to which it was presented by petition in error: "The judgment was rightly entered against the defendants served. It was not error not to make it in form against the defendant who was not served. Judgment affirmed." (*Bennett v. Townsend*, 1 Neb. 460.) The matter is the subject of statutory provision in this state, as follows: "Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants. It may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to

which it may be entitled. In an action against several defendants, the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper." (Code of Civil Procedure, sec. 429.) That a judgment against two defendants, of one of whom the court was without jurisdiction, is void as to the latter, but of force against the other where its validity is questioned in another action, see *Mercer v. James*, 6 Neb. 406, and *Council Bluffs Savings Bank v. Griswold*, 50 Neb. 753; and that this court will, in an action similar to the one at bar, wherein there are two defendants, one served with process and the other not, and judgment against them by the trial court, in error proceedings to this court, reverse the judgment as to the one not served and affirm as to the other, see *Forbes v. Bringe*, 32 Neb. 757. To the same effect are *Kleiber v. People's R. Co.*, 17 S. W. Rep. [Mo.] 946; *Gray v. Stuart*, 33 Gratt. [Va.] 351; *Ricketson v. Richardson*, 26 Cal. 149; *Belkin v. Hill*, 53 Mo. 492; *Wood v. Olney*, 7 Nev. 109; *Saffold v. Navarro*, 15 Tex. 76; *Neenan v. City of St. Joseph*, 28 S. W. Rep. [Mo.] 963; *Latta v. Visel*, 37 Neb. 612; *Herbert v. Wortendyke*, 49 Neb. 182. It will doubtless be remembered that the party as to whom the judgment was void is not a complainant here. That it was rendered against such defendant cannot injure or prejudice the other defendant, who is alone in the prosecution of error, and it may be affirmed as to him. (*Neenan v. City of St. Joseph, supra; State v. Tate*, 109 Mo. 269, 18 S. W. Rep. 1088, and cases cited and reviewed; *Bensieck v. Cook*, 110 Mo. 183, 19 S. W. Rep. 642; 1 Black, Judgments sec. 211.)

It is of the assignments of error that the court excluded certain testimony sought to be elicited from a witness,—one J. S. Bryant—during his cross-examination. The objection interposed was that it was improper cross-examination. The objection was well taken; hence it was not error to sustain it and exclude the testimony at that time.

It is further argued that the trial court committed error in the refusal to give to the jury an instruction tendered and requested for the plaintiff in error. It suffices to say that the relevant and material subject-matter of this instruction was covered by one given by the court on its motion, and it was not error to refuse to repeat it.

Charles E. Bates has not complained of his inclusion in terms in the judgment, and no action need be taken as to him or his rights. It follows from what has been said herein that the judgment as to plaintiff in error will be

AFFIRMED.

W. W. HARE, APPELLANT, V. DAVID C. HOOPER, APPELLEE.

FILED NOVEMBER 3, 1898. No. 8407.

1. **Usury**: PRINCIPAL AND AGENT. If an agent, for the purpose of making loans of money, exacts, directly or indirectly, for its use interest in excess of the legal rate, the transaction will be usurious.
2. ———: EVIDENCE. The evidence herein *held* to sustain a finding that the contract evidenced by the instruments in suit was tainted with usury.

APPEAL from the district court of Deuel county. Heard below before NEVILLE, J. *Affirmed.*

Hoagland & Hoagland, for appellant.

James H. Hooper and *Wilcox & Halligan, contra.*

HARRISON, C. J.

The plaintiff instituted this action in the district court of Deuel county to effect the foreclosure of a real estate mortgage, and from a decree in which was recognized and allowed the force and sufficiency of the plea and

proof of usury in the contract from which originated the indebtedness, the payment of which the mortgage in suit was given to secure, has appealed to this court.

The sole contention is that the evidence was insufficient to support the finding of the usurious nature of the said contract. The only portion of the plea of the appellee which could be determined to be of force, if any, was of a payment of the sum of $9, to a person who, it was alleged, figured in the transaction of a loan of money by appellant to appellee, evidenced by a promissory note, and its security by the mortgage sought to be foreclosed, as agent for the appellant, and who, it was further pleaded, exacted, or received, such amount of $9 as a bonus or commission for his services in the matter. The evidence disclosed that the appellee wrote appellant and solicited a loan, and was in a letter in answer to his application referred by appellant to one Van Marter, a resident of Deuel county, to whom it was stated was submitted for approval or disapproval applications to appellant for loans. Appellee saw Van Marter and the loan was procured, the party last named acting for the lender. The interest provided for in the note which was taken was at ten per cent per annum, the highest legal rate, and the appellee paid for recording the mortgage, for an abstract, for draughting the papers, a notary's fees and a bonus or commission of $9. A draft or check was forwarded by appellant to Van Marter for the full amount of the loan, $300, payable to the borrower, and from it the amounts of the fees and commission were taken and the balance paid to appellee. The exact methods pursued in the transaction need not be set out here at length. Suffice it to say that they were effective of the purposes for which they were employed.

A thorough examination of all the evidence convinces us that there was sufficient to sustain the finding of the trial court that Van Marter acted in the matter for the lender, and his acts constituted the contract usurious within the doctrine of this court on the subject. "It is

a settled rule of this court that if an agent, intrusted with the business of loaning money, exacts for its use, either directly or indirectly, interest in excess of the legal rate, the transaction will be adjudged usurious." (*Courtnay v. Price*, 12 Neb. 188; *Cheney v. Eberhardt*, 8 Neb. 423; *Olmsted v. New England Mortgage Security Co.*, 11 Neb. 487; *Anderson v. Vallery*, 39 Neb. 626; *New England Mortgage Security Co. v. Hendrickson*, 13 Neb. 157.) It follows that the decree of the district court must be

AFFIRMED.

AMERICAN FIRE INSURANCE COMPANY OF PHILADELPHIA v. HARVEY LANDFARE ET AL.

FILED NOVEMBER 3, 1898. No. 8369.

1. **Petition:** CONSTRUCTION. A petition, when assailed for the first time after judgment, will be sustained if the averments therein constitute a cause of action, even though informally or indefinitely stated.

2. **Insurance:** OWNERSHIP OF PROPERTY: EVIDENCE. Policy of fire insurance is *prima facie* an admission by the insurer of the title or ownership of the insured to the property covered by the policy.

3. **Deeds:** ACCEPTANCE: EVIDENCE. The introduction in evidence of a recorded deed by the grantee mentioned therein in support of his claim of title to the property is sufficient to establish his acceptance of such deed.

4. **Evidence:** NEWSPAPERS: KNOWLEDGE OF CONTENTS: PRESUMPTIONS. One is not bound to know at his peril all that is contained in a newspaper to which he is a subscriber. He is chargeable with knowledge of all matters contained in such publication which he has seen or read, as well as all matters of advertisements published in such newspaper in obedience to some statute or legal order, and which the law has made conclusive of his rights whether he ever knew it or not.

5. ———: ———: ———: ———. Proof of the publication in a newspaper as an item of news of the giving of a mortgage upon certain real estate is alone insufficient to establish that a particular subscriber had actual knowledge of the existence of such mortgage.

6. **Evidence Upon Issue Withdrawn from Jury:** REVIEW. Error can-

not be predicated upon the admission of evidence to establish a particular issue, where such issue is subsequently withdrawn from the consideration of the jury by the court in its instructions.

7. **Instructions:** ESTOPPEL. A party cannot complain of the giving of an instruction in harmony with one which he requested.

8. ———: ———. One who tenders an instruction which is given, which assumes the existence of evidence to establish an issuable fact in the case, cannot afterwards be heard to assert that there was no evidence received tending to prove such fact.

9. ———: EXCEPTIONS. A general exception to instructions is insufficient. Where a charge consists of several paragraphs, there must be an exception to each instruction claimed to be erroneous.

10. ———: ASSIGNMENTS OF ERROR. An assignment in a motion for a new trial that a group of instructions is erroneous, is insufficient if one of them is without error and was properly given.

11. **Insurance:** PARTIES: JUDGMENT: HARMLESS ERROR. Error in entering a judgment for a stated sum upon an insurance policy in favor of two joint plaintiffs, the insured and the owner of a mortgage on the insured premises, where the latter alone was entitled to recover the full amount of the loss, is harmless, since it is immaterial to the defendant whether it pays the sum to one or both, and the payment of the judgment would be a complete bar to any subsequent action brought by either plaintiff upon the same policy.

12. **Special Findings.** It is within the discretion of the trial court to submit or withhold questions for special findings of the jury; and its ruling in that regard will not be molested unless an abuse of discretion clearly appears.

13. **Costs:** REVIEW OF TAXATION. A motion in the lower court to retax costs is unnecessary to review a judgment awarding an attorney's fee in an action on an insurance policy.

14. ———: INSURANCE: ATTORNEY'S FEE. On rendering judgment on a policy of insurance on real property, a reasonable attorney's fee may be allowed plaintiff and taxed as costs without regard to the date the risk was written.

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

The facts are stated in the opinion.

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

The introduction in evidence of the newspaper article

for the purpose of fixing upon insurer knowledge of liens on the insured property, in absence of testimony that insurer's agents saw the article, was prejudicial error. (*King v. Paterson & H. R. R. Co.*, 29 N. J. L. 92; *Brundred v. Del Hoyo*, 20 N. J. L. 328; *Fosgate v. Herkimer Mfg. & Hydraulic Co.*, 9 Barb. [N. Y.] 287; *Goetz v. Bank of Kansas City*, 119 U. S. 551; *Watkins v. Peck*, 13 N. H. 373.)

Landfare had no insurable interest in the premises. (*Freeman v. Fulton Fire Ins. Co.*, 38 Barb. [N. Y.] 247; *Gilbert v. North American Ins. Co.*, 23 Wend. [N. Y.] 43; *Fonda v. Sage*, 46 Barb. [N. Y.] 123; *Jackson v. Phipp*, 12 Johns. [N. Y.] 418; *Maynard v. Maynard*, 10 Mass. 458; *Samson v. Thornton*, 44 Mass. 281; *Herbert v. Herbert*, Breese [Ill.] 360; *Kingsbury v. Burnside*, 58 Ill. 310.)

The commencement of foreclosure proceedings vitiated the policy. (*Meadows v. Hawkeye Ins. Co.*, 62 Ia. 387; *Brunswick Savings Institution v. Commercial Union Ins. Co.*, 68 Me. 313; *Bishop v. Clay Fire & Marine Ins. Co.*, 45 Conn. 430; *Titus v. Glenns Falls Ins. Co.*, 81 N. Y. 417; *McIntire v. Norwich Fire Ins. Co.*, 102 Mass. 230.)

Change of possession of insured property invalidated the policy. (*Wenzel v. Commercial Ins. Co.*, 67 Cal. 438; *Carey v. German-American Ins. Co.*, 54 N. W. Rep. [Wis.] 18; *Burr v. German Ins. Co.*, 54 N. W. Rep. [Wis.] 22.)

Plaintiffs were not entitled to a joint judgment. (*Brent v. Tinebaugh*, 12 B. Mon. [Ky.] 87; *Bell v. Allen*, 53 Ala. 125; *Gerry v. Gerry*, 11 Gray [Mass.] 381; *Doremus v. Selden*, 19 Johns. [N. Y.] 213; *Lockhart v. Power*, 2 Watts [Pa.] 371; *Ulmer v. Cunningham*, 2 Me. 117; *Governor v. Webb*, 12 Ga. 189; *City of Chicago v. Speer*, 66 Ill. 154; *Murphy v. Orr*, 32 Ill. 489; *Davey v. Dakota County*, 19 Neb. 721; *Boldt v. Budwig*, 19 Neb. 741; *Palmer v. Davis*, 28 N. Y. 242; *Peabody v. Washington County Mutual Ins. Co.*, 20 Barb. [N. Y.] 339; *Rowe v. Bacigalluppi*, 21 Cal. 633; *Phenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb. 847; *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 458; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 146.)

Insurer did not waive provisions of the policy. (*Ryan*

v. Springfield Fire & Marine Ins. Co., 46 Wis. 671; *Putnam Tool Co. v. Fitchburg Fire Ins. Co.*, 145 Mass. 269; *Weed v. London & Lancashire Fire Ins. Co.*, 116 N. Y. 106; *Phœnix Ins. Co. v. Lawrence*, 4 Met. [Ky.] 9; *Richards v. Wetmore*, 66 Cal. 365; *Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 432; *McCormick v. Orient Ins. Co.*, 86 Cal. 262; *Murphy v. People's Equitable Mutual Fire Ins. Co.*, 89 Mass. 239; *Orient Ins. Co. v. Williamson*, 98 Ga. 464; *Shaffer v. Milwaukee Mechanics Ins. Co.*, 46 N. E. Rep. [Ind.] 557.)

References as to error in instructions: *Dwelling-House Ins. Co. v. Brewster*, 43 Neb. 528; *Kelsey v. McLaughlin*, 10 Neb. 6; *Dinsmore v. Stimbert*, 12 Neb. 433; *School District v. Holmes*, 16 Neb. 486; *Insurance Co. of North America v. Bachler*, 44 Neb. 560; *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620.

Hall & McCulloch, contra.

NORVAL, J.

On November 26, 1888, the American Fire Insurance Company of Philadelphia, through its Omaha agents, Murphy & Lovett, issued its policy of insurance whereby, in consideration of the sum of $52.50 paid as premiums, it insured Harvey Landfare against loss or damage by fire for the period of one year from that time in the sum of $1,750, on his two-story building, used mainly for the storage of cutters, carts, and carriages, located in block 15, in Albright's Choice, an addition to South Omaha. The policy contained this clause: "Loss, if any, first payable to John Wendell as his interest may appear." On May 3, 1889, the insured building was destroyed by fire, and March 5, following, this action was instituted on the policy by Landfare and Wendell, who jointly obtained a verdict and judgment for the face of the policy, with interest thereon, and an attorney's fee of $200. The defendant has brought the record of the proceedings to this court, alleging numerous errors.

It is argued in the brief of the company that Landfare had no insurable interest in the property covered by the policy; that there is no averment in the petition of any ownership in him; and that there was no proof adduced of his insurable interest upon the trial. The petition avers the execution and delivery of the policy in suit by defendant, whereby "it agreed and did insure the said Harvey Landfare to the amount of $1,750, for the term of one year from that date, on his two-story, slate-roof building, known as the 'Factory Building,'" etc. This was a sufficient allegation that the insured premises were owned by the insured when the policy was taken out, especially as no objection was made to the petition until after verdict. A petition, when assailed for the first time after judgment, will be sustained if the facts averred therein constitute a cause of action, although informally and indefinitely stated. (*Powers v. Powers*, 20 Neb. 529.)

To the objection that there is no proof that Landfare had any interest or title to the property insured, a sufficient answer is that the policy itself, the issuance whereof is admitted in the answer, is sufficient *prima facie* to show the ownership or title of Landfare to the property. (*Western Horse & Cattle Co. v. Scheidle*, 18 Neb. 495; *Farmers & Merchants Ins. Co. v. Peterson*, 47 Neb. 747.) But Landfare's insurable interest was established by proofs aside from the *prima facie* case made out by the policy. The defendant concedes in its briefs that the Omaha Carriage & Sleigh Company formerly owned and occupied the insured premises. It appears that on August 23, 1888, said company, through its president and secretary, executed a deed to the property to the plaintiff Landfare, subject to certain mortgages, which deed was placed upon record September 1, 1888, and before the policy was issued. Who caused the instrument to be recorded is not shown, and it is argued that a recorded deed is *prima facie* evidence alone of a delivery, and not of the acceptance thereof by the grantee. Whether the rule is thus correctly stated we need not now determine,

since Landfare introduced in evidence on the trial the deed, or rather the record thereof, which was sufficient proof of his acceptance of the conveyance.

Complaint is made of the admission as evidence of the following article in the Omaha *Evening World* of August 25, 1888:

"Last night's *World* contained a statement that the Omaha Carriage & Sleigh Company had placed mortgages on its property. The following mortgages were given yesterday:

First chattel mortgage, Churchill Parker.....	$10,641
Second chattel mortgage, Star Cutter Co.....	6,554
Third chattel mortgage, N. B. Van Slyck.....	1,000
Fourth chattel mortgage, Douglas County Bank,	1,569
Fifth real estate mortgage, Star Cutter Co.....	6,795
Sixth real estate mortgage, Mansfield Buggy Co.,	2,348
Total.....	$28,907"

The insured premises were formerly owned by the Omaha Carriage & Sleigh Company, and it had executed a mortgage thereon in favor of the Star Cutter Company, and the same was a lien upon the property at the time the policy in suit was issued. It was claimed by the insurance company that it had no knowledge of the existence of said real estate mortgage, and that the lien of the mortgage rendered the policy void. The newspaper article was read in evidence for the purpose of showing that the agents of the company issuing the policy had actual knowledge that the insured property was incumbered by mortgage to the Star Cutter Company. The article was not one which the law required to be inserted in a newspaper, and the publication thereof was not alone sufficient to establish that the agents who issued the policy, or any officer of the insurance company, possessed knowledge of the lien of the mortgage to the Star Cutter Company. The precise principle was decided in *State Bank of Lushton v. Kelley*, 47 Neb. 678. In that case the question involved was whether the bank had knowl-

edge of the existence of a chattel mortgage held by the defendant. RAGAN, C., speaking for the court, observed: "The only evidence in the record which tends to show, if that does, that the bank officers had any knowledge or notice of the mortgage held by the Kelley Company is this: The bank was a subscriber for a 'bulletin' issued by some one in York county, which bulletin gave the names of parties making mortgages filed in York county and a description of the mortgaged property. It was shown that a bulletin which came to the bank soon after July 23, 1891, recited that John and Peter Peters had executed a chattel mortgage to the Kelley Company on a threshing machine, such as the one in controversy, and that this mortgage had been filed in the clerk's office of York county, but there is no evidence in the record that any officer or agent of the bank ever read this bulletin. If the jury had specially found that the officers of the bank had actual knowledge or notice of the mortgage of the Kelley Company, the evidence would not have supported the finding, and the court therefore erred in giving the instruction." In the case at bar it was shown that Murphy & Lovett, the agents who issued the policy, were at the time subscribers of the Omaha *Evening World*, but there is no evidence in the record that they ever saw or knew of the article in question. Its publication was not alone sufficient to impart notice to such agents, or to the company, of the lien of the mortgage to the Star Cutter Company. We quote with approval the following language of the supreme court of New Jersey in *King v. Paterson & H. R. R. Co.*, 29 N. J. L. 92: "And we cannot lawfully hold that any person is bound to know at the peril of his legal rights all that is in all the newspapers published in his vicinity, or in any one of them when he may be surrounded by dozens of different ones, unless it may be some notice or advertisement that is published in obedience to some positive law or legal order, and which the law has made conclusive of his rights whether he ever knows it or not." While the newspaper article

introduced in evidence in this case was insufficient, standing alone, to establish knowledge on the part of the defendant of the existence of the mortgage on the insured premises in favor of the Star Cutter Company, yet, had proof of the publication been followed by evidence tending to show that the article was read by the agents issuing the policy, or some officer of the company, it would have been sufficient for the purpose of fixing actual knowledge of the mortgage lien upon the insurance company. Proof of the publication was one link in the chain to fasten notice or knowledge upon the company, but the other link was never supplied by the proof. The article in question was not incompetent evidence, but was merely insufficient of itself to prove the point in the case it was offered to establish, namely, that the insurance company had actual knowledge of the incumbrance on the property. The defendant could not have been prejudiced by admission in evidence of this newspaper article or in receiving testimony relating to the publicity of the failure of the Omaha Carriage & Sleigh Company, for whether the defendant had knowledge of the existence of any liens upon the insured premises at the time the policy was written was a matter which was not submitted by the court to the jury in its instructions. The court, in the third paragraph of its instructions, told the jury that the undisputed evidence showed there were mortgages existing against the insured premises at the date of the policy which were not disclosed by plaintiffs, and directed the jury "that such concealment rendered the policy void, and the plaintiffs are not entitled to recover unless the defendant, after the policy was written, and prior to the fire, became aware of their existence and waived objections thereto." It is too plain to admit of discussion that this portion of the charge of the court eliminated from the case, and took from the consideration of the jury, all question whether the company had notice or knowledge of any mortgages on the premises when the policy was issued, and therefore cured any

error that may have been committed in the admission of evidence to establish such withdrawn issue.

It is argued that the policy became invalid because of the breaches of the conditions thereof. The policy contained a clause to the effect that it should be null and void if the insured should conceal any fact material to the risk, whether in the written application or otherwise. Evidence was adduced tending to show that the existence of certain incumbrances against the property was concealed from the company, and that such incumbrances affected materially the risk. The court submitted to the jury the question whether the incumbrances were material to the risk, which was error, since that was a question of law for the court. (*Insurance Co. of North America v. Bachler*, 44 Neb. 560.) But the giving of such instruction was not reversible error, because the insurance company requested, and the trial court gave, an instruction embodying the same proposition. (*Jonasen v. Kennedy*, 39 Neb. 314; *Richards v. Borowsky*, 39 Neb. 774; *City of Omaha v. Richards*, 49 Neb. 244.) Upon this branch of the case the court, at the request of the defendant, gave this instruction to the jury:

"6. It is in evidence without dispute that when the policy was issued papers had been filed and were of record in Douglas county purporting to create and claiming liens upon the property, including the building insured,—one being the mortgage for the sum of sixty-three hundred dollars ($6300) and over, executed, on or about the 23d day of August, A. D. 1888, by the Omaha Carriage & Sleigh Company, as the owner of the property, to the Star Cutter Company; also a claim of mechanic's lien filed by the Chicago Lumber Company against said Carriage & Sleigh Company on or about December 5, 1887, for the sum of twenty-five hundred ($2500) dollars; also a claim of mechanic's lien filed by Howard & Bradford against said carriage and sleigh company on or about December 8, 1888, for $115 and over. Evidence has been given tending to show that

these facts were material to the risk. If you find they were and that the existence of any such material fact was concealed from the insurance company agents until after the policy was issued, this was a violation of the conditions thereof, rendering the policy void; and unless you find that the authorized agents of the insurance company subsequently obtained knowledge thereof and with such knowledge waived the conditions, you must find for the defendant."

The foregoing instruction assumes that there was evidence before the jury from which they could find that the authorized agents of the defendant, after the issuance of the policy, obtained knowledge of the incumbrance and with such knowledge waived the condition of the policy now invoked. If such evidence was adduced, and, in view of the instruction, we must presume that there was, then the jury were justified in finding that there had been a waiver by the defendant of the particular clause in the policy relied upon to defeat a recovery.

It is insisted that the policy was invalidated by reason of the title to the insured premises having become involved in litigation by and through the commencement of a suit several months after the issuance of the policy by the Chicago Lumber Company against the Omaha Carriage & Sleigh Company to foreclose a mechanic's lien. The quoting of the eighth instruction given at the request of the defendant is a complete answer to this assignment of error and argument based thereon by counsel for the insurance company. The instruction reads:

"8. It appears by uncontradicted evidence that subsequently to the issue of the policy, on December 22, 1888, suit was commenced to foreclose the mechanic's lien claimed by the Chicago Lumber Company; that in the same suit Howard & Bradford also asked a foreclosure of the mechanic's lien claimed by them against the property, and that afterwards, on February 23, 1889, several parties intervened in said action, asking for a foreclosure of the mortgage given upon August 23, 1888, by the

Omaha Carriage & Sleigh Company to the Star Cutter Company, and that a decree was afterwards rendered in said action foreclosing the mechanic's lien above mentioned and the Star Cutter Company's mortgage. You are instructed that the proceedings therein involved the title to the insured premises in litigation; that this, by the terms of the policy, rendered it void, and that unless you find that some agent or agents of the company obtained knowledge thereof and with such knowledge waived this condition of the policy, you must find for the defendant."

It cannot escape notice that the court, at the request of the defendant, directed a verdict should be returned in its favor, unless the jury should find that some agent of the company, with knowledge of the litigation involving the property, waived the terms and stipulations of the policy. We must assume that there was ample evidence before the jury to establish a waiver, and if there was, the policy was not invalidated by reason of the foreclosure proceedings.

Another breach of the policy is relied upon by the defendant below. The property was sold about two weeks prior to the fire by the sheriff of Douglas county to the Merchants National Bank of New York in a suit brought by such bank against the Omaha Carriage & Sleigh Company. This sale, it is urged, was a violation of at least three conditions of the policy, stated in the brief as follows: "(1) Proceedings working change in the title to the insured premises by legal process; (2) because by and under these proceedings the title to the insured premises became involved in litigation; (3) because the property had been levied upon and had been taken into custody of the sheriff under his writ of attachment,—the provisions of the policy referred to being as follows: If the property thereby covered shall be levied upon or taken into possession or custody under any proceeding at law or in equity." The trial judge instructed the jury upon this point, at the request of the insurance company, in the following language:

"9. It appears by uncontradicted evidence that upon September 8, 1888, the Merchants National Bank of Syracuse, New York, commenced a suit against the Omaha Carriage & Sleigh Company to attach the insured premises; that this attachment was sustained, and that an order of sale was issued directing the sheriff to sell said insured premises, and upon April 10, 1889, the insured premises were exposed for sale and bid in upon such sale by the plaintiff, the Merchants National Bank of Syracuse, New York. You are instructed that the proceedings in said action involved the title to the insured premises in litigation and was a violation of the terms of the policy, which made it void. And unless you find that some agent or agents of the insurance company had knowledge of such proceedings and with such knowledge waived said condition of the policy, you must find for the defendant."

The jury undoubtedly found that the defendant, with the knowledge of the facts, waived the condition of the policy, and we decline to weigh the evidence to ascertain if it sustains such finding, since the instruction quoted, given at the request of the insurance company, submitted to the jury the question of waiver of the terms of the policy.

The policy contained a stipulation to the effect that it should be void if any change should occur in the possession of the property. It is insisted that this provision of the policy has been violated. At the time the insurance was written the sheriff had possession of the property under and by virtue of a certain writ of attachment, and so retained possession until January, 1889, when, under a replevin writ served upon him by the coroner for the personal property, the sheriff delivered possession of the chattels and building to the coroner. The chattels were subsequently sold under a chattel mortgage to B. B. Wood, who took possession thereof and of the insured premises, and so retained possession until the time of the fire. There is contained in the bill of exceptions am-

ple evidence to show that Murphy & Lovett, the agents who wrote the policy, had actual knowledge of the changes in possession of the premises, and with such knowledge did not cancel the policy, but waived the conditions thereof.

Complaint is made of the giving of paragraphs Nos. 1, 3, 4, 5, 7, and 8 of the court's charge to the jury. The instructions cannot be considered for two reasons: The exception to the instructions taken by the defendant in the trial court was too general, being in the language following: "Now comes the defendant, and excepts to the giving by the court to the jury on its own motion of the following instructions, to-wit: Instruction No. one (1); instruction No. two (2); instruction No. three (3); instruction No. four (4); instruction No. five and one-half; instruction No. six (6); instruction No. seven (7); instruction No. eight (8)." The exception is not sufficiently specific, and is insufficient. (*McReady v. Rogers*, 1 Neb. 124; *Hedrick v. Strauss*, 42 Neb. 486; *Brooks v. Dutcher*, 22 Neb. 644; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473; *Redman v. Voss*, 46 Neb. 512; *Blue Valley Lumber Co. v. Smith*, 48 Neb. 293; *Union P. R. Co. v. Montgomery*, 49 Neb. 429.) Again, the instructions were grouped in a single assignment in the motion for a new trial. So that, as the attention of the trial court was not properly called to the instructions in the motion for a new trial, they cannot be reviewed here. (*Hiatt v. Kinkaid*, 40 Neb. 188; *Rea v. Bishop*, 41 Neb. 202; *Hedrick v. Strauss*, 42 Neb. 485; *Diers v. Mallon*, 46 Neb. 132; *Kauffmann v. Cooper*, 46 Neb. 644; *McCormal v. Redden*, 46 Neb. 777; *Union P. R. Co. v. Montgomery*, 49 Neb. 429.)

The point is made that plaintiffs were not entitled to a joint verdict and judgment. It is a familiar doctrine that two persons are not entitled to recover jointly upon a demand due one of them alone. The amount of the policy was $1,750, and the loss thereunder was, by its terms, payable to John Wendell as his interest should appear. He held a mortgage on the insured premises

for the sum of $5,000, besides interest. The proofs disclose that this mortgage remains unpaid, and that there was due thereon at the trial the sum of $5,907.76. While both plaintiffs were entitled to join in bringing the action, as both were interested in a recovery and were entitled to have their several interests adjudicated in the same action, under the evidence adduced there could not properly be a joint recovery. The entire amount of the loss was, by the terms of the policy, due and payable to John Wendell, the mortgagee, and the verdict and judgment should have been in his favor alone. But the judgment should not be reversed for this error. As the defendant was not in the least prejudiced by the return of a joint verdict in favor of both plaintiffs, no recovery could afterwards be had by either of the plaintiffs upon the same cause of action. The error was not prejudicial to rights of the insurance company. (*Culbertson Irrigating & Water Power Co. v. Wildman*, 45 Neb. 663; *Houck v. Linn*, 48 Neb. 227; *Louisville, N. A. & C. R. Co. v. Lange*, 41 N. E. Rep. [Ind.] 609.)

Error is assigned because the court below declined to submit to the jury certain requests for special findings submitted by the defendant. Interrogatories for special findings may be submitted to the jury or refused in the discretion of the trial court, and where there has been no abuse of discretion in that regard, the ruling will not be molested. (*Floaten v. Ferrell*, 24 Neb. 353; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356; *Hedrick v. Strauss*, 42 Neb. 485; *Reed v. McRill*, 41 Neb. 206.) The defendant was not prejudiced by the refusal to give to the jury the requests for special findings.

It is finally insisted that the court erred in rendering judgment against the defendant for $200 attorney's fees, since the policy was issued prior to the enactment of the statute authorizing the taxation of an attorney's fee in actions upon fire insurance policies. It is argued by counsel for plaintiff that this point cannot be considered, for the reason the defendant filed no motion in the court

below to retax the costs in this case. This latter doctrine was repudiated in *Hartford Fire Ins. Co. v. Corey*, 53 Neb. 209, 73 N. W. Rep. 674, where it was said: "In actions like the present one, the statute makes it the duty of the court, and not the clerk, to determine the amount of attorney's fees which shall be paid by the insurer to the insured. The clerk is the mere arm of the court, and could not, of his own accord, allow an attorney's fee in the case. It required judicial action. The court below has spoken. It awarded an attorney's fee to plaintiffs, and determined the amount thereof, and, to review its decision upon the question, no motion to retax was necessary." The fact that this policy in suit was issued before the act was adopted allowing attorney's fees in actions like the present is immaterial. The statute in question authorizing the recovery of such fees applies to all policies whether written before or subsequent to the time the act became operative. This was expressly held in *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828. There is no reversible error in the record, and the judgment is

AFFIRMED.

IRVINE, C., not sitting.

CLARENCE CHEZEM V. STATE OF NEBRASKA.

FILED NOVEMBER 3, 1898. No. 10221.

1. **Larceny**: INFORMATION. An averment in an information that the accused, from the person of the prosecuting witness, unlawfully and feloniously, did steal, take, and carry away certain property belonging to such witness sufficiently charges that the taking was against the will of the owner.

2. ———: CORPUS DELICTI: EVIDENCE. To sustain a conviction for a crime the *corpus delicti* must be proven beyond a reasonable doubt. Rule applied.

3. ———: ———: ———. Evidence examined, and *held* to sustain a conviction of the crime of larceny from the person.

4. **Criminal Law:** CONFESSIONS OF ACCUSED. When the offense charged in an information has been fully established by competent evidence, the free and voluntary statement and confessions of the accused may be proven for the purpose of connecting him with the crime.

5. **Credibility of Witnesses.** It is not error to instruct a jury that they must alone determine the credibility of witnesses, and that in doing so it is proper to consider the interest, if any, of a witness in the result of the suit, and his demeanor upon the stand.

6. ———: JURY. A jury is not bound to accept as true everything testified to by a witness, though unimpeached.

7. **Evidence:** INSTRUCTIONS. It is not error to refuse an instruction which has the effect to withdraw from the consideration of the jury competent material evidence in the case.

8. ———: ———: REVIEW. Error cannot be predicated upon the refusal of an instruction which is not applicable to the evidence.

9. **Failure to Request Instructions.** A party cannot usually be heard to complain of the failure of the court to instruct upon a particular feature of the case where he has not requested a proper instruction upon the subject.

ERROR to the district court for Adams county. Tried below before BEALL, J. *Affirmed.*

John C. Stevens, for plaintiff in error.

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

NORVAL, J.

Clarence Chezem was prosecuted in the district court of Adams county, under section 113*a* of the Criminal Code, for the crime of larceny from the person of one Asa R. Oliphant. Upon the trial a verdict of guilty was returned, whereupon the accused filed a motion in arrest of judgment on the ground that the information under which the conviction was had did not state facts sufficient to constitute a crime, which motion was overruled, as was likewise his motion for a new trial, and the defendant was sentenced to imprisonment in the penitentiary for the term of one year, and to pay the costs of the prosecution.

It is urged that the information fails to charge a crime. The information alleges that "Clarence Chezem, late of the county aforesaid, on the 10th day of January, A. D. 1898, in the county of Adams, and state of Nebraska aforesaid, then and there being, from the person of one Asa R. Oliphant, unlawfully and feloniously, did steal, take, and carry away one purse of the value of twenty-five cents and fifteen dollars, lawful money of the United States, of the value of fifteen dollars, the property of the said Asa R. Oliphant, without putting him, the said Asa R. Oliphant, in fear by the use of threats, force, or violence." The sole criticism made against the information is that it contains no averment which negatives the innocence of the accused. In other words, had Chezem taken the property from the person of Oliphant with the consent of the latter, it would be wholly consistent with the charge set out in the information. To this proposition we do not yield assent. The information avers that the pocketbook and money were unlawfully and feloniously taken from the person of the prosecuting witness. This is not an allegation of a conclusion merely, but of an ultimate fact, and clearly negatives any inference that consent to the taking of the property was obtained. Oliphant could not have given permission to the removal of the pocketbook and money from his person, if the taking was unlawful and felonious. To constitute the crime of larceny from the person, defined in section 113*a* of the Criminal Code, it is indispensable that the property be taken from the person of another without his consent, and the information in the case at bar so charges.

The next argument is that the *corpus delicti* was not proven. In other words, the body of the offense was not established by the evidence. If such be the case, manifestly the judgment must be reversed, since to sustain a conviction for a crime the *corpus delicti* must be established beyond a reasonable doubt. (*Dreesen v. State*, 38 Neb. 375.) A careful reading of the evidence preserved in the bill of exceptions shows that the contention of

counsel that the crime charged was not shown to have been committed is entirely without foundation. The evidence adduced on the trial completely established that during the night of January 10, 1898, in the city of Hastings, Adams county, there was stolen from the person of Asa R. Oliphant, and against his will, without putting him to fear by threats, force, or violence, the pocketbook and money of the prosecuting witness. It is also disclosed beyond a reasonable doubt that on said date Chezem and Oliphant visited the saloons together in the city of Hastings, and that the latter displayed his money in the presence of the former; that the two together, about 11 o'clock at night on January 10, went to Scott's livery stable in said city, where the defendant made a bed by spreading some robes on the floor, on which Oliphant laid down in the presence of Chezem and went to sleep. At that time the prosecuting witness had in his pocket about $16 in money, of which fact the defendant was aware. When Oliphant awoke he ascertained that his money was missing and that the accused had gone. The money was not given to Chezem, nor did he have permission to take the same. After the arrest of the accused he went with Whitmier, a policeman, and pointed out the pocketbook. Witnesses testified that Chezem admitted to them that he took the money. The *corpus delicti* was not only satisfactorily proven, but that the defendant committed the crime was established on the trial beyond a reasonable doubt.

Complaint is made of allowing Whitmier, a witness for the state, to testify to certain alleged expressions and statements made by the accused after his arrest and while he was in jail. The record discloses that the statements and expressions imputed to the defendant were freely and voluntarily made by him without any threats, promises, or inducements whatever being held out. The offense charged in the information had been fully proven by competent evidence, and proof of the confessions so made by the prisoner was competent as tending to con-

nect him with the offense. (*Heldt v. State*, 20 Neb. 492; *Furst v. State*, 31 Neb. 403; *May v. State*, 38 Neb. 211; *Weinecke v. State*, 34 Neb. 14; *Bubster v. State*, 33 Neb. 663; *Basye v. State*, 45 Neb. 261.)

It is urged that the following instruction is erroneous and should not have been given to the jury: "The court instructs you that you are the sole judges of the credibility of the witnesses, and that you need not believe anything to be a fact simply because a witness testifies to it positively, if from all the evidence and circumstances arising in the case, the demeanor of the witness upon the stand, the manner of his testifying, his apparent candor and fairness, his interest, if any, in said action, you believe that he has knowingly testified falsely." The foregoing is a correct exposition of the law, and a charge to the jury couched in substantially the same language was approved in *Murphey v. Virgin*, 47 Neb. 692. Unquestionably jurors are to determine for themselves the credit to be given witnesses, and the weight to be accorded their testimony. The demeanor of a witness while testifying, his interest, apparent intelligence, candor, and fairness, or want thereof, are all proper matters for consideration, and the triers of fact are not required to accept as true all sworn testimony, though not directly impeached or contradicted. The instruction assailed does not purport to apply to the defendant alone, who testified in his own behalf, as his counsel assume, but was alike applicable to all the witnesses in the case whether examined on behalf of the prosecution or defense. The court by this instruction in no manner criticised, or cast reflections upon, the testimony of the accused, but properly allowed the jurors to decide for themselves the weight his testimony should receive. The instruction was fair, and free from error.

The action of the trial court is criticised for its refusal to give the following instruction tendered by the accused: "You are further instructed that before a confession of guilt is proper for you to consider, you must find

that the confession of guilt was made voluntarily and without any promise of leniency or threat, and if you find that defendant confessed to taking this money from Oliphant in consideration of a promise from Lepinski that if he would confess that he took the money from Oliphant he would not be prosecuted, you will find the defendant not guilty." It would have been rank error to have given this instruction in its entirety as requested. The fact that the defendant may have made a confession of guilt under a promise of immunity would not alone entitle him to an acquittal, as the court was asked to charge the jury, since there is ample evidence in the record, aside from the confessions of the prisoner, to justify a conviction, which the instruction sought to have the jury ignore and disregard.

The following request tendered by the defendant the court declined to give to the jury, which refusal is assigned as error: "You are further instructed in this case that you cannot convict the defendant in this case on his confession or admission alone, and if you find there is no other evidence in this case that the defendant committed the crime charged in the information, you will find him not guilty." The fault with this instruction is it was not framed with reference to the evidence adduced on the trial. There was evidence other than the confessions testified to by witnesses that the defendant committed the crime charged; hence it would have been improper to have instructed the jury as outlined in said instruction.

It is finally insisted that the judgment should be reversed because the jury were not instructed that they might find the defendant guilty of petit larceny. There are two ready answers to this suggestion: First, no request covering this point was submitted by the defendant, and in the next place the evidence would not have warranted a verdict of petit larceny. The defendant was either guilty of the crime stated in the information or he was wholly innocent. The jury, after a fair and im-

partial trial, concluded he was guilty, and the verdict meets with our approval. The judgment is

AFFIRMED.

SARAH C. WEBSTER, APPELLEE, V. CITY OF LINCOLN ET AL., APPELLANTS.

FILED NOVEMBER 3, 1898. No. 8382.

Adverse Possession: STREETS. One who has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city under a claim of right, for ten years or more, thereby acquires an absolute title to the property.

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

Abbott, Selleck & Lane, for appellants.

Joseph R. Webster, contra.

NORVAL, J.

Sarah C. Webster instituted the action in the court below to enjoin the city of Lincoln and its officers from destroying fences and trees which the defendants claim were within the streets of the city, and to quiet the title to the two strips of land about eleven feet in width at east side of Fourteenth street and north side of Q street, in said city, at the intersection of said streets. From a decree in favor of plaintiff the defendants have prosecuted an appeal.

The record shows that plaintiff has ever since October, 1877, been the owner of what is known as lot 36 in S. W. Little's subdivision of the west half of the southwest quarter of section 24, in township 10 north, range 6 east, situate at the northeast corner of Fourteenth and Q streets, in the city of Lincoln. The strips of land in controversy lie within the platted limits of said streets, and

for more than ten years prior to the bringing of this suit plaintiff has continuously maintained a fence around said lot 36 and the strips of land in dispute, and during all of said times has been in the actual, visible, exclusive, and uninterrupted possession of all of said real estate under a claim of ownership and title. She therefore has the absolute title to the property, including the portions claimed to be within the limits of the streets. In this state it is no longer an open question that the doctrine of adverse possession applies to municipal corporations and individuals alike. (*Shock v. Falls City*, 31 Neb. 599; *Meyer v. City of Lincoln*, 33 Neb. 566; *Lewis v. Baker*, 39 Neb. 636; *Lewis v. City of Lincoln*, 55 Neb. 1.) The case at bar is not distinguishable from these just mentioned.

It is insisted that the ordinances of the city of Lincoln grant permission to property owners to place a fence about a portion of the street for the protection of the lawns and trees—in fact, to do precisely what the plaintiff claims to have done in this instance. There is no force to this argument, since plaintiff had fenced the real estate and had been in possession thereof more than one year before the passage of the ordinance in question. Its passage did not take away vested rights, nor change plaintiff's status. The decree is

AFFIRMED.

WILLIAM SMITH, APPELLEE, V. FANNIE B. MYERS, APPELLANT, ET AL.

FILED NOVEMBER 3, 1898. No. 8348.

1. **Conflicting Evidence:** REVIEW. A finding of fact on conflicting evidence will not be disturbed on appeal.
2. **Vendor and Vendee:** FALSE REPRESENTATIONS: EVIDENCE. Evidence *held* sufficient to establish that plaintiff was induced to make an exchange of lands by false representations.
3. ———: RIGHTS OF OCCUPANT: NOTICE. Where a grantor remains

in possession of real estate after the execution of the deed therefor, one purchasing is charged with notice of the right, title, or interest of such occupant in the property.

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

J. N. Rickards and *Daniel F. Osgood,* for appellant.

Thomas Ryan, contra.

NORVAL, J.

This suit was instituted in the court below by William Smith to cancel and annul a deed executed and delivered by plaintiff and wife to the defendant G. M. Dement to lot 4, block 13, in Newman's subdivision, University Place, in Lancaster county, on the ground that the conveyance was obtained by fraudulent representations. From a decree setting aside the deed and canceling the record thereof the defendant Fanny B. Myers has prosecuted an appeal.

It is insisted with apparent candor that there is not a particle of testimony to support the finding of the lower court as against Mrs. Myers. Her co-defendants have not appealed, which is a confession on their part of the justness of the decree, and a perusal of the evidence adduced on the hearing leads our minds to the same conclusion. The record discloses that the defendants reside at Crab Orchard, this state, and plaintiff, upon the tract above described. Prior to May 27, 1895, there had been some negotiations between plaintiff and the agent of Dement for the exchange of lands. On that date Dement and N. C. Myers visited plaintiff at his home at University Place, and while there a trade was effected for the exchange of plaintiff's property for certain real estate belonging to Dement situated in the state of Missouri which plaintiff had never seen. In the deed executed by plaintiff and wife the name of no grantee was inserted. Subsequently the name of the defendant Fannie B. My-

ers, the wife of N. C. Myers, was inserted as grantee, and who now claims to be an innocent purchaser of the property. Plaintiff has hitherto remained in possession of said lot 4. The proofs tend to establish that on the day the trade was made, and prior to the consummation thereof, Dement, in the presence of N. C. Myers, gave plaintiff a written memorandum or statement of the condition of the Missouri land proposed to be exchanged, in the language following: "N. W. ¼ sec. 8, T. 32, R. 1. This 160 acres is nearly all smooth, about 72 acres in cultivation—the rest in pasture. A small house and barn, quite a good-sized apple orchard, and seedling peach trees, a lot of them, and are all full. This land is 2 miles north and ½ mile west from Centerville, and if times were not so close we would consider this very cheap at $17.50 per acre and believe you would have no trouble in selling it at $12.50 to $15 now. About 15 acres good timber and some small timber." The evidence also tends to show that at the time of the delivery of said memorandum Dement also orally made to plaintiff substantially the same representations as therein contained, and, in addition thereto, that the land was good for farming purposes, located six miles from the railroad station, and occupied by a tenant, and that there was on the premises a three-roomed house and a good barn. Some time after the trade was completed plaintiff visited the land obtained from Dement, and plaintiff describes its condition in his testimony as follows:

Q. What, if anything, did you do afterward with reference to examining the Missouri land?

A. I waited a few weeks, and thought it would be cold weather to be moving my family in the cold, and thought I would go down and see if I could get the parties off so I could take possession. When I got down there I was surprised. You would have to hang a sheep up by the tail to get the grass off that. I could find there nothing.

Q. How about the soil?

A. There was no soil at all—just a mass of rocks.

Q. Who went with you, if any one, to look at the land?

A. Mr. Cross.

Q. Did you go over the entire tract?

A. Yes, we went over the tract.

Q. Was there any orchard on the land?

A. Nothing whatever.

Q. Had you ever been up on the land?

A. Never.

Q. Was there then, or had there been, any building on it?

A. There was some appearance as if there had been, but there was nothing like a building. There was no roof on it.

Q. Were there any fruit trees?

A. No fruit trees.

Q. Orchard?

A. Nothing whatever.

Q. Was the land fit for cultivation? Could it be cultivated?

A. No, sir; you could not cultivate any of it.

Q. How did you find it with reference to the seventy-two acres reported to be in cultivation?

A. Well, there was not anything.

The foregoing excerpt from the testimony of plaintiff is corroborated by the depositions of E. H. Sutterfield and S. F. Cross, two disinterested persons who reside in Reynolds county, Missouri, where the land is located. It is further disclosed from said depositions that the land is situate twenty-one miles from the nearest railroad station. Although both Dement and N. C. Myers deny that they made any representations as to the quality and condition of the Reynolds county land, there was ample evidence before the trial court to justify a finding not only that the representations regarding the land imputed to them were made as alleged, but that said representations, in almost every essential particular, were false and untrue. In this case we can but apply the familiar rule that a finding based on conflicting evidence will not be

disturbed on appeal. If the evidence of the plaintiff and his witnesses are worthy of belief, Dement swindled plaintiff out of his property.

It is argued in the briefs that there is no averment in the petition, nor is there any evidence to show that plaintiff relied upon the representations and statements of Dement. This assertion is wholly without foundation. In the petition it is alleged "that plaintiff at that time stated to said defendants that he knew nothing of said land in Missouri, had never been in that part of said state, and that he must rely wholly on the statements of these defendants, and that in reliance thereon he would make the said trade. And plaintiff says that in reliance thereon, and with no knowledge whatever as to the said land except as represented to him by the said defendants, he, with his said wife, Elizabeth Smith, did, on or about the said 28th day of May, 1895, make a deed to said lot 4, block 13," etc. This is a sufficient pleading that the plaintiff was induced to make the exchange by the representations of Dement, and the averment is supported by the evidence of plaintiff himself.

It is insisted that there is no evidence to sustain the finding of the trial court as against the defendant Fanny B. Myers. It is true she made no representations or statements to the plaintiff whatever, but she is chargeable with notice of the fraudulent transaction, since she was not an innocent purchaser of the land without notice. This is so for two reasons: She claims title solely under a deed from Smith to her, the instrument having been executed and delivered to Dement with the name of no person inserted therein as grantee, and Mrs. Myers' name was subsequently written therein as grantee without the knowledge or authority of the plaintiff. This alone was sufficient to put Mrs. Myers upon inquiry. Again, plaintiff has at all times been in possession of said lot 4, which was notice of the rights plaintiff had in the property. (*Uhl v. May*, 5 Neb. 157; *Jones v. Johnson Harvester Co.*, 8 Neb. 446; *McHugh v. Smiley*, 17 Neb. 626; *Conlee v.*

McDowell, 15 Neb. 184; *Pleasants v. Blodgett*, 32 Neb. 427; *Lipp v. South Omaha Land Syndicate*, 24 Neb. 692; *Hansen v. Berthelsen*, 19 Neb. 433.) It is suggested that the rule stated cannot be invoked against Mrs. Myers, since plaintiff accepted a lease from Dement for the University Place property and occupied the same as the latter's tenant. The lease was part of the transaction resulting in exchange of the property and was made at the same time. On the same day the lease was assigned to Mrs. Myers her husband represented her in that transaction as well as in the transfer of the property to her, and the evidence tends to show that Mr. Myers was present when the fraudulent representations were made by Dement to Smith. Notice to an agent is notice to the principal. The decree annulling and setting aside the deed is supported by the evidence.

Plaintiff complains because the trial court did not award him as damages a sum equal to the expenditures incurred by him by reason of the fraudulent representations of the defendant. We think the decree was right. Plaintiff sought and obtained a rescission of the contract of sale on the ground of fraud, and he was not also entitled to damages sustained by reason of the fraud. Plaintiff had a right to rescind the trade or affirm the contract, and his damages resulting from the transaction, but not both. We are aware of no case where one who has rescinded a contract on the ground of fraud has been allowed damages. The decree is

AFFIRMED.

COLUMBUS STATE BANK, APPELLANT, V. GEORGE J. DOLE ET AL., APPELLEES.

FILED NOVEMBER 3, 1898. No. 8383.

Chattel Mortgages: PARTNERSHIP. A chattel mortgage given to secure a partnership debt is valid, though executed by one partner alone in his individual name, when the other member of the firm either authorized the same or subsequently acquiesced in the act.

APPEAL from the district court of Boone county. Heard below before THOMPSON, J. *Affirmed.*

Whitmoyer & Gondring and *Pratt & Walkup*, for appellant.

Moudy & Rose and *N. C. Pratt, contra.*

NORVAL, J.

This was an action by the Columbus State Bank to foreclose a chattel mortgage on a stock of merchandise executed on April 24, 1895, by G. J. Dole in the name of G. J. Dole & Son to one S. J. Green to secure the sum of $1,500 payable on demand. The mortgage was placed on record on the day of its execution, and was assigned to plaintiff. A decree was entered by the court below to foreclose the mortgage, awarding plaintiff a lien on the property junior to a lien created by a certain chattel mortgage held by the defendant Stephen T. Battles. The bank appeals.

The only controversy is over the finding of the trial court relating to the priority of the liens. The record discloses that George J. Dole and George A. Dole, in the firm name of G. J. Dole & Co., were the owners of a grain elevator at St. Edward, this state, and for several years used the same in their business of buying and selling grain. The firm became indebted to plaintiff for money borrowed, and gave the bank a note therefor signed by S. J. Green as surety. The chattel mortgage owned by the bank was given, after the debt was incurred, to indemnify Green. The grain venture of G. J. Dole & Son proved unprofitable, and in the fall of 1894 George A. Dole left St. Edward for the purpose of seeking employment elsewhere, giving George J. Dole authority to dispose of the elevator in any manner most advantageous to the firm. Several months afterwards George J. Dole traded the elevator to Elihu T. Long for the stock of goods in controversy. The latter was to re-

ceive, besides the elevator, the sum of $1,000, and was to retain possession of the goods until the sum should be realized from the sales. On April 23, 1895, a new contract was made between George J. Dole and Long, whereby the former was to, and did on said day, execute a mortgage on the merchandise in favor of Stephen T. Battles, aggregating the sum of $1,131.15, to secure two notes of that date payable to the latter, one for $917, being the balance due Long, and the other for $214.15, representing a pre-existing debt owing by said G. J. Dole & Son to Battles. This instrument was immediately recorded, and the mortgagee at once took possession of the chattels under the terms of his mortgage, and the following day the mortgage to Green was given. There was introduced on the trial evidence tending to show that George J. Dole represented to Battles, at and prior to the execution of the mortgage to the latter, that he was the sole owner of the goods in dispute, and the mortgage on its face recites that Dole was the owner of the property therein mentioned and described. It is clear that the firm of G. J. Dole & Son, prior to the giving of these mortgages, had been dissolved by mutual consent of the parties, and that George A. Dole relinquished to George J. Dole, his father, all his interests in the firm assets. But whether the merchandise in dispute belonged to George J. Dole individually or to the firm of G. J. Dole & Son, is of no practical importance in the determination of this case, since if the goods were owned by the firm, then the mortgage to Battles was given to secure a firm indebtedness, and such mortgage having been executed and recorded one day prior to the making of the mortgage to Green, the lien of the former is superior to that of the latter. A chattel mortgage given to secure a partnership debt is valid, though executed by one partner alone in his individual name, where the other partner authorized the same, or acquiesced in the act. (*Clay v. Greenwood*, 35 Neb. 736.) The decree is sustained by sufficient evidence, and it is accordingly

AFFIRMED.

MILLIE MCCURDY V. W. H. RYAN, SHERIFF.

FILED NOVEMBER 3, 1898. No. 8351.

1. **Evidence:** ADMISSION OF PARTY. On the trial of a cause an admission by one of the parties, of the existence of a judgment which it was incumbent on his adversary to prove, *held* to imply that such judgment was valid.
2. **Fraudulent Conveyances:** EVIDENCE. Evidence examined, and *held* insufficient to sustain a finding that the sale through which plaintiff claims title to the property in dispute was fraudulent as to her vendor's creditors.

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

Jay & Welty, for plaintiff in error.

J. J. McCarthy, contra.

SULLIVAN, J.

This was an action of replevin brought by Millie McCurdy against W. H. Ryan to recover the possession of a horse. The finding and judgment of the district court were against the plaintiff, and by this proceeding in error she presents the record to this court for review. The defendant, who was the sheriff of Dakota county, acting under the authority of an execution issued by a justice of the peace in favor of Kuntz & McCarthy and against S. M. McCurdy, levied upon, and took from the possession of the plaintiff, the property in question. At the trial the defendant asserted that the horse was purchased by the plaintiff to enable S. M. McCurdy to hinder, delay, and defraud his creditors, and that it was, therefore, subject to seizure and sale for the satisfaction of the execution. The proceedings before the justice in the case of Kuntz & McCarthy against S. M. McCurdy were given in evidence to establish the sheriff's special interest in the property. From the record it appears that the judgment in that case was rendered by default, and that the officer's

return of service indorsed upon the summons was as follows:

"Received this writ April 21, 1893. As commanded, I, on the 24th day of April, 1893, summoned the within named S. M. McCurdy by ——— at his usual place of residence a certified copy of this summons, and of the indorsements thereon. Dated this 26th day of April, 1893. W. H. RYAN, *Sheriff*."

It is contended that this return was insufficient to vest the justice with jurisdiction of the defendant McCurdy, and that the judgment, which was the basis of the execution, was and is absolutely void. The question need not be determined, for the validity of the judgment stands admitted. Counsel for the plaintiff conceded at the trial that there was a judgment; and the proceedings before the justice show that such judgment was in favor of Kuntz & McCarthy and against S. M. McCurdy for the sum of $25.75. An admission of the existence of a judgment cannot be construed as meaning a record which purports to be, but is not, a judgment. Without passing on the legal effect of the evidence of service of the summons, we therefore hold, on the record before us, that the validity of the judgment and execution offered in support of defendant's special interest were fully established. We think, however, there was no sufficient evidence on which to base a finding that the sale through which plaintiff derived title was fraudulent as to creditors of S. M. McCurdy. There is no dispute about the facts. The plaintiff and S. M. McCurdy are brother and sister. In July, 1892, they were living together on a farm in Dakota county. For some reason, which does not appear, either directly or inferentially, McCurdy determined to abandon the farm and remove to Pennslyvania. Before taking this step he sold and delivered to his sister the horse in controversy, seven other horses, a binder, a plow, a seeder, a wagon, a mowing machine, and a growing crop of flax for the agreed sum of $963. Of this amount $30 was paid in cash. An indebtedness of $19.25 due from McCurdy

was released. The payment of two notes representing the purchase price of the binder, and payable to Warder, Bushnell & Glassner Company, was assumed, and, for the balance, the plaintiff executed her promissory note. She afterward paid the binder notes, amounting with accrued interest to $119.15; and upon the other note she made two payments aggregating $98.14. McCurdy, shortly after the sale of the property to his sister, removed to Pennsylvania, where he remained for about nine months. In March, 1893, he returned to Dakota county and leased of the plaintiff the farm on which she lived and a portion of the property which he had sold to her in the previous July. He then commenced to work the land and was engaged in that business, and in possession of the horse which is the subject of this action, when the defendant levied the execution under which he claims. When the levy was made McCurdy disclaimed present ownership, but said that he expected to buy the horse in the fall if he succeeded in raising a good crop. It does not appear that McCurdy owed anything except the binder notes assumed by the plaintiff and the indebtedness to Kuntz & McCarthy, which is the basis of the judgment in their favor. Of this latter indebtedness the plaintiff had no knowledge at the time she purchased the property of her brother. The motive for the sale in question, it is quite clear, was McCurdy's determination to quit farming and remove to Pennsylvania. At the trial there was no attempt by counsel for either party to obtain an explanation of the reasons that influenced him to this line of conduct. That his action was inspired by a desire to hinder, delay, or defraud Kuntz & McCarthy in the collection of a claim amounting to less than $25 is beyond belief. The evidence does not justify a suspicion that such was his purpose. The finding of the court does not rest upon any warrantable deduction from the established facts and must be set aside. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

EMANUEL SPIECH, APPELLEE, V. IDA TIERNEY ET AL., APPELLEES, IMPLEADED WITH JOHNSON COUNTY, APPELLANT.

FILED NOVEMBER 3, 1898. NO. 8374.

1. **Estates:** TENANT FOR LIFE: TAXES. As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate.

2. **Lien of Taxes.** The revenue law of 1871 declared real estate taxes to be a perpetual lien on land against which they were levied. By subsequent legislation this lien has been preserved and continued in force.

3. **Taxes:** COLLECTION. It was made the duty of the county treasurer by section 50 of the act of 1871 to collect delinquent real estate taxes by seizure and sale of the owner's chattels, if any could be found.

4. ———: LIEN ON REALTY: COLLECTION: NEGLECT OF COLLECTOR. But the failure of the treasurer to discharge such duty by distraining the personalty of the life tenant did not divest the lien of the taxes from the reversioner's interest in the land.

5. ———: ———: ———: ———. Since 1877 the county treasurer has possessed no authority to sell personal property for taxes assessed against real estate prior to that time.

6. ———: IRREGULARITIES OF ASSESSOR. The failure of an assessor to attach his oath to, and return the same with, the assessment roll are mere irregularities which do not affect the validity of the tax.

7. **Officers:** PERFORMANCE OF DUTIES: PRESUMPTIONS. In the absence of evidence to the contrary, it will be presumed that a public officer proceeded regularly and performed his official duties within the law and in obedience to its mandate.

8. **Taxation:** EQUALIZATION: VALUATION: INCREASE. Where a board of equalization, without authority, increases the valuation of real estate as fixed by the assessor, the taxes apportioned against such real estate will be valid only to the extent that they are based on the original assessment.

9. ———: DESCRIPTION OF REALTY. Where part of a city lot is condemned by a railroad company for its right of way, the remainder is sufficiently described, for purposes of taxation, as a fractional lot.

10. ———: ———. A tax is void for uncertainty which is assessed and levied against an entire city lot under the description, "part of lot 5, in block 41."

11. ——: ——: VALIDITY OF ASSESSMENT. A tax based on an assessment *en masse* of contiguous lots which are so situated as to be incapable of separate valuation is not void, and affords no just ground of complaint to the owner whose personalty was liable for the tax at the time the same was levied.

12. ——: ——. Where land owned by one person is assessed with the land of another, under one aggregate valuation, so that neither owner can determine the amount for which his property is liable, the entire tax is void.

APPEAL from the district court of Johnson county. Heard below before BUSH, J. *Reversed.*

J. W. Dewcese, F. E. Bishop, and *J. Hall Hitchcock,* for appellant.

Fred'k Shepherd, Hugh Lamaster, and *M. B. C. True, contra.*

SULLIVAN, J.

In 1872 Mary A. Tierney, being the fee owner of lots 5, 6, and 7, in block 41, of the city of Tecumseh, in Johnson county, died intestate, leaving her surviving, Kyron Tierney, her husband, and six minor children. As tenant by the curtesy Kyron occupied and enjoined the use of the lots from 1871 to 1894, but did not pay the taxes levied against the same except for the years 1877 to 1881. In 1893 William Cummings purchased at execution sale the interest of George Tierney in the premises, and thereby became the owner of an undivided one-sixth of the same. He then, after the death of Kyron Tierney, brought this action to partition the property and made the county of Johnson a party defendant. There is no dispute between the plaintiff and the heirs regarding their respective interests. The entire controversy in the case arises out of the claim of Johnson county for taxes. The district court appointed Corydon Rood, Esq., referee to ascertain the liens and incumbrances existing against the lots, and from his report it appears, in addition to the facts already stated, that the taxes from 1871 to

1877 might have been collected by the seizure and sale of Kyron Tierney's personal property. The district court was of the opinion that the taxes for these years had ceased to be a lien on the premises, and disallowed the claim of Johnson county therefor. The correctness of this holding is the first question presented for decision by the appeal. Section 50 of the revenue act in force during the period in question is as follows: "On the first day of May of the year after which taxes shall have been assessed, all unpaid state, county, school, precinct, city, and village, except city taxes in cities of first class, shall become delinquent, and shall draw thereafter one per cent per month interest, which interest shall be collected the same as the tax so due, and it shall be the duty of the county treasurer, or any other person charged with the collection of delinquent taxes, to proceed as soon after the first day of May as practicable to make such delinquent tax out of the personal property of such delinquent, if any such property can be found; and this provision shall apply as well to the taxes assessed on real estate and remaining unpaid, as to delinquent taxes assessed on personal property, and the remedy to be pursued shall be the same as provided in sections forty-nine and fifty-two of this act; and the treasurer shall be entitled to five per cent additional compensation for making such collection, to be paid by such delinquent, and also the fees now prescribed by law." (General Statutes 1873, p. 916, ch. 66, sec. 50; Session Laws 1871, p. 81, sec. 1.) Other sections of the act made taxes upon real property a perpetual lien thereon "against all persons and bodies corporate," and required every person subject to taxation to attend at the treasurer's office and pay his taxes without demand.

The proposition for which appellees contend is that the failure of the treasurer to collect the taxes by distress and sale of Kyron Tierney's personalty divested the lien from their reversionary interest in the land. We do not think it did. As between the heirs and the tenant for

life, it was undoubtedly the duty of the latter to pay all taxes assessed against the land during the continuance of his estate. (*Disher v. Disher*, 45 Neb. 100; *Prettyman v. Walston*, 34 Ill. 175; *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. Rep. 813; 1 Washburn, Real Property secs. 96, 97.) This was a duty due from Kyron Tierney to the owners of the fee, and one which they might by an appropriate action enforce at any time. The taxes were not a lien only upon the particular estate of the life tenant. They were a lien on the land itself and were payable at the treasurer's office without demand. While section 50 of the act of 1871 remained in force it prescribed the remedy for enforcing payment of all land taxes. No other remedy could be then pursued. The land could not be sold until the personalty of the delinquent owner had been first exhausted. But when section 50 was repealed, in 1877, the right and the duty of the treasurer to seize chattels for the satisfaction of taxes assessed against real estate no longer existed. (*State v. Cain*, 18 Neb. 631; *County of Lancaster v. Rush*, 35 Neb. 119.) The remedy was modified by the repealing act, but the right remained—the lien of real estate taxes was fully preserved and by subsequent legislation has been continued in force. The duty of collecting taxes at the time named in the statute was not imposed on the treasurer of Johnson county for the benefit of these reversioners, but rather to enable the state and municipal or political corporations to which the taxes belong to promptly secure the revenues necessary to meet their current expenses. The treasurer was a public agent, and his duty in this respect was to his principal. The appellees can ground no equity upon his failure to discharge an obligation laid upon him by law for the benefit of the public. The statute made the taxes a perpetual lien, which no mere inaction on the part of the treasurer could release or divest. In *Adams v. Osgood*, 42 Neb. 450, it is said: "Whatever may be the rule elsewhere, we think, under our statutes, that the only way by which a valid tax existing against real estate here can

be discharged is by the payment of such tax, unless such real estate be sold for taxes and the holder of the tax lien fails to bring suit to foreclose the same for five years after the expiration of the time to redeem." The recent case of *Johnson v. Finley*, 54 Neb. 733, 74 N. W. Rep. 1080, is to the same effect. It was there said: "Taxes upon real estate are made a perpetual lien thereon, and the property cannot be relieved from this burden except by a payment of the taxes, or, in case it has been sold, the neglect of the purchaser to bring an action to foreclose his lien until after the statute of limitations has run." Our conclusion upon this branch of the case is that the failure of the treasurer to make the taxes, for the years in question, out of the personal property of Kyron Tierney, did not discharge such taxes nor release the land from the lien thereon.

The referee found that the assessor's oath was not attached to the assessment roll for the year 1874, and, in view of this finding, it is claimed that the tax for that year is without any legal basis and absolutely void. Conceding that the appellant is in the attitude of a plaintiff seeking to foreclose a lien, and that it was required to furnish affirmative proof of every fact essential to its cause of action, we do not think it has failed to prove a valid tax for the year in question. It was not necessary to show that the assessor took the oath which the statute made it his duty to take. He was a public officer, and it will be presumed, in the absence of evidence to the contrary, that he proceeded regularly and performed his official duties within the law and in strict obedience to its mandate. The fact that the oath was not annexed to the assessment book is of slight consequence and altogether insufficient to overthrow the presumption that the oath was taken. Upon this question *Twinting v. Finlay*, 55 Neb. 152, 75 N. W. Rep. 548, is decisive. In that case NORVAL, J., delivering the opinion said: "It is not alleged in the answer, nor was it proven on the trial, that the assessor did not make oath to his return at the

time he deposited the same with county clerk. The mere failure to attach the assessor's oath to the assessment roll did not invalidate the tax based on such assessment. The omission was an irregularity merely." To the same effect and precisely in point is the earlier case of *McClure v. Warner*, 16 Neb. 447.

In the year 1876 the valuation fixed by the assessor upon the lots in question was $700. The county commissioners, sitting as a board of equalization, increased this valuation to $1,300, without notice to any of the parties. This action of the board was unauthorized and utterly null. It was an attempt to deprive the appellees of their property without due process of law. In the administration of the revenue laws there is no more justice in taking property by increasing its valuation as fixed by the assessor, without notice to the owner and an opportunity to be heard, than there would be in seizing the same property for the satisfaction of a judgment rendered without service of process. In the case of *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30, this question was considered by the court and the conclusion reached that the board of equalization was without authority to increase the valuation of property returned by the assessor, without notice to the person whose rights and interests would be affected thereby. As to the correctness of that decision we entertain no doubt. It rests upon a fundamental principle of justice which is imbedded in the constitution of every state. It does not follow, however, from this conclusion that the entire tax levied against the lots for the year 1876 was and is void. The board being without jurisdiction, its action was ineffective and barren of legal results. In contemplation of law the valuation fixed by the assessor remained unchanged. The resolution of the commissioners, making the tax levy, operated on that valuation and charged the land with a valid tax on the basis of the original assessment.

In 1881 the Republican Valley Railroad Company con-

demned for its right of way the south eighty feet of lots 6 and 7 and obtained a deed therefor from Kyron Tierney and Maria Tierney, his wife. This deed and the condemnation proceedings were recorded in the office of the county clerk of Johnson county, and the lots were, for 1882 and subsequent years, listed and taxed as fractional lots. It is contended that the description, "part of lots 6 and 7," is too indefinite, and that the tax is void because it cannot be determined with certainty which part of the lots were assessed and taxed. After the condemnation proceedings the south eighty feet was not subject to assessment and taxation, except as a part of the railroad company's right of way. This strip, within the meaning of the revenue law, ceased to be a part of lots 6 and 7. The remaining portion only was to be entered on the assessment roll and valued for taxation. The law required the heirs, or their guardian if they were minors, to list the property, and directed that it be assessed in the name of the owners. The contrary not appearing, we will presume that these provisions of the statute were complied with, and if they were, it would seem that the public records afforded, at all times, pretty conclusive evidence of the identity of the land against which the efforts of the taxing authorities were directed. In *Kershaw v. Jansen*, 49 Neb. 467, the description by which the lots were taxed was that contained in a plat which had been previously vacated. The court held the description sufficient, saying in the course of the opinion "that all property is legally liable to taxation, and that where, for purpose of taxation, a description is used so certain in its terms that it must, as to the taxpayer, have apprised him of the proceedings and of the land assessed, he cannot avoid his share of the public burden merely because there is nothing of record which ascertains the property described." In *Woodside v. Wilson*, 32 Pa. St. 52, it was held: "The designation will be sufficient, if it afford the means of identification, and do not positively mislead the owner." In *Chiniquy v. People*, 78 Ill. 570, the court

held that property described as the east end of blocks 99 and 100 was a good description for the purpose of taxation, and construed it as meaning the east half of the blocks. Other cases sustaining the validity of taxes levied against property somewhat vaguely described are *Hannah v. Collins*, 94 Ind. 201; *Bryant v. Estabrook*, 16 Neb. 217; *Roads v. Estabrook*, 35 Neb. 297. The owners of the property were not misled, or in any way prejudiced, because the description under which the lots were assessed and taxed for several years lacked completeness and precision, and the taxes are not, for that reason, invalid. The assessment and taxation of lot 5 for 1882 and 1883 was under this description: "Part of lot 5." This designation, considered by itself or in connection with the evidence contained in the record before us, furnishes no means by which we can determine, or even conjecture, what portion of the property is charged with the taxes. It was not a fractional lot. It was all owned by the heirs of Mary A. Tierney. It was all subject to taxation, yet only a part of it was taxed. We cannot say what part, and therefore hold that the taxes are void. (*Massie v. Long*, 2 O. 287; *Mathews v. Thompson*, 3 O. 272; *Ronkendorff v. Taylor*, 4 Pet. [U. S.] 349; *Burchard v. Hubbard*, 11 O. 316; *Raymond v. Longworth*, 14 How. [U. S.] 76; *People v. Flint*, 39 Cal. 670; *Atwell v. Zeluff*, 26 Mich. 118; *Sims v. Warren*, 67 Miss. 278.)

In 1871 and 1876 the three lots were assessed as an entirety, and taxes apportioned against the property on the gross valuation thereof. It is argued on behalf of the appellees that this method of taxation was unauthorized and that the taxes for those years cannot be enforced. We think otherwise. The lots were contiguous. They may have been so occupied, used, and improved that a valuation and sale in distinct parcels would not have been practicable. They were owned by the same parties, and the taxes were not merely a charge against the land. The entire personal estate of the owners, within the county, was liable for their payment. Under these cir-

cumstances we cannot see any just ground for complaint because the lots were not separately valued and a tax based on such valuation apportioned against each. In *Mix v. People*, 116 Ill. 265, it was held under a statute requiring a separate valuation that the presumption would be indulged in favor of the proceedings of the assessor; that the lots were so situated that their valuation could not be separately determined, as if one building had covered part of both lots. In *Dodge v. Emmons*, 34 Kan. 732, the supreme court of Kansas, considering the question now before us, say: "The mere fact that there are two descriptions does not determine that there were more than a single piece or parcel of land within the meaning of the tax laws. That is to be determined rather from the situation, use, and occupation of the land; and so it has been held that 'where two or more tracts of land adjoin each other, and are used and occupied as one tract, they may all be taxed together and sold together as one tract.' A section of land lying in the same taxing district, which is owned by a single individual, and which is used, occupied, and treated as a single tract, although containing many legal subdivisions, may be listed and taxed as a single tract; and so may any compact portion of the same situated and treated in like manner." (See, also, *Wright v. Cradlebaugh*, 3 Nev. 345, and *People v. Morse*, 43 Cal. 541.)

In the years 1872, 1873, and 1874 lot 7 was assessed, *en masse*, with lots 8, 9, and 10, in block 41, and, of course, no separate tax was, or could be, apportioned against it. In 1875 lots 5, 6, 7, 8, 9, and 10, in block 41, were valued at one lump sum and a single tax apportioned to all. Lots 8, 9, and 10 were not owned by the appellees. It is perfectly clear that the taxes against lot 7 for the years 1872, 1873, 1874, and 1875 were and are void, and that the taxes against lots 5 and 6 for the last named year are also void. Where land owned by one person is assessed with the land of another, under one aggregate valuation, so that neither can determine the amount of the tax for which his property is liable, the uniform hold-

ing of the courts is that the entire tax is void. (25 Am. & Eng. Ency. Law 223; *Orton v. Nooman*, 25 Wis. 672; *Howe v. People*, 86 Ill. 288; *Challiss v. Hckelnkaemper*, 14 Kan. 474; *Fisk v. Corey*, 141 Pa. St. 334.) It follows that Johnson county is entitled to a lien upon the premises for all the taxes claimed by it except (1) the taxes charged against the three lots for the year 1875; (2) the taxes charged against lot 7 for the years 1872, 1873, and 1874; (3) six-thirteenths of the taxes charged against all the lots for 1876; and (4) the taxes charged against lot 5 for the years 1882 and 1883. The judgment is reversed and the cause remanded with direction to the district court to enter a decree in conformity with the views herein expressed.

REVERSED AND REMANDED.

RICHARDSON DRUG COMPANY ET AL. V. ELI PLUMMER ET AL.

FILED NOVEMBER 3, 1898. No. 8426.

Conditional Sale of Merchandise: FUTURE PURCHASES. The instrument in suit construed, and *held* to be a contract for the conditional sale of a stock of merchandise, and that a stipulation therein contained against depleting the stock while any portion of the purchase-money remained unpaid did not authorize the vendee to purchase new goods on the credit of the vendors.

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

John P. Maule, for plaintiffs in error.

A. G. Greenlee, contra.

SULLIVAN, J.

This was an action in the district court of Lancaster county brought by the defendants in error against the

Richardson Drug Company, the Lincoln Paint & Color Company, Alice M. Teasdall, and Thomas L. Teasdall. The petition charges that the plaintiffs sold and delivered to the plaintiffs in error goods, wares, and merchandise of the value of $215.98, and that the same were received by them and for their benefit. The cause of action against the Teasdalls is stated as follows: "These plaintiffs allege for a cause of action against the said defendants Alice M. Teasdall and Thomas L. Teasdall that the said goods were sold to the other defendants by the said Alice M. Teasdall and Thomas L. Teasdall as agents, and that the said Alice M. Teasdall and Thomas L. Teasdall, for a valuable consideration, agreed orally with these plaintiffs, and in writing with the other defendants, their principals, to pay for the said goods and merchandise, and are liable to these plaintiffs for the payment of the same." The writing mentioned in the foregoing excerpt is, by averment, made a part of the petition and is here set out:

"This agreement, made and entered into by and between the Richardson Drug Company and the Lincoln Paint & Color Company, of the first part, and Thomas L. Teasdall and Alice M. Teasdall, his wife, of the second part, witnesseth, that said parties of the second part are to forthwith become the agents of the parties of the first part, and as such shall at once take possession of all the stock of drugs, chemicals, paints, oils, merchandise, and all fixtures belonging to said stock at No. 1843 O street, Lincoln, Nebraska, and shall as such agents sell such goods at retail in the ordinary course of business and pay to the parties of the first part the sum of $100 in cash for each month for the first two months, and the sum of $150 thereafter till said parties of the second part shall have paid to the said parties of the first part the total sum of two thousand dollars ($2,000) net, the monthly payments to be commenced promptly on March 15, 1892, and to be made on the 15th day of each and every month thereafter till the whole sum of two thousand dollars

shall have been paid, and said parties of the second part shall receive no compensation for their services as such agents save the net profits of said business over and in excess of the said amounts to be paid to said parties of the first part, and said parties of the second part agree and guaranty that all said profits shall be made, and all payments agreed made, without in any degree depleting said stock of goods. Said $2,000 shall be applied as follows: Sixteen hundred dollars ($1600) to the Richardson Drug Company and four hundred dollars ($400) to the Lincoln Paint & Color Company, and said monthly payments shall be made to the Richardson Drug Company and by them divided as follows: 80 per cent to be retained by said Richardson Drug Company, and 20 per cent to be turned over as paid to the Lincoln Paint & Color Company, and when the total amount of the said $2,000 shall be paid, said parties of the first part shall transfer to said parties of the second part all their right, title, and interest in and to said stock of drugs and fixtures, but until said sum of $2,000 shall have been fully paid, the title to all said property shall be and remain in said parties of the first part. When said amount of $2,000 shall have been fully paid, said parties of the first part shall release and deliver to said parties of the second part all claims and evidences of indebtedness which they now hold against them.

"Witness our hands at Lincoln, Nebraska, this 27th day of January, 1892.

"ALICE M. TEASDALL.
"THOMAS L. TEASDALL.
"RICHARDSON DRUG COMPANY,
"AMOS FIELD, *Treasurer.*
"LINCOLN PAINT & COLOR CO.,
"M. WEIL, *Treasurer.*"

The answer, after denying generally the allegations of the petition not expressly admitted, proceeds as follows: "The defendants allege the truth to be that they were the owners of, and in possession of, a stock of drugs, and were

running a drug store on O street, in the city of Lincoln, Nebraska, and the defendants Teasdalls desired to purchase said stock and were unable to pay for the same, and it was finally agreed that the said companies would make to the said Teasdalls a conditional sale of said property, and for the purpose of carrying out the agreement of the parties the contract mentioned in the petition was made, and immediately on its execution the property was delivered to the defendants Teasdalls. They had no authority to purchase goods upon the credit of these defendants, and did not purchase on their credit, and the only authority they had was that contained in said contract. The plaintiffs knew all about the conditions and terms of said contract, and knew that the Teasdalls were in possession of said store by virtue thereof, and they extended the credit mentioned in their petition with this knowledge and to the Teasdalls alone." The reply is a denial of the new matter contained in the answer. Upon these pleadings the plaintiffs moved the court for judgment in their favor. The motion was sustained and judgment rendered against the plaintiffs in error for the amount claimed in the petition. As to Alice M. and Thomas L. Teasdall the cause was dismissed.

The Richardson Drug Company and the Lincoln Paint & Color Company, by this proceeding in error, challenge the correctness of the judgment against them. The judgment is manifestly erroneous and must be reversed. The contract was clearly one of conditional sale. It did not contemplate that the Teasdalls should possess an agency to purchase goods and pledge the credit of the plaintiffs in error for their payment. To hold that it did would practically nullify the stipulation against depleting the stock. Such a construction would ignore the evident intention of the parties. It would be a palpable absurdity to suppose they intended that the security of the vendors should be kept good by merchandise purchased on their credit and charged to their account. Whether the plaintiffs in error are liable by reason of having clothed the

Teasdalls with apparent authority on which the defendants in error relied in selling the goods in question does not arise on the record before us and is not decided. In view of the allegation of the answer that the Teasdalls' authority was known to the plaintiffs; that it was limited by the contract and that the credit was extended to them alone, it is perfectly plain that there was, in the pleading, no basis for the judgment pronounced against the plaintiffs in error.

REVERSED AND REMANDED.

JOHN G. WOLLAM ET AL. V. BRANDT & SHIPMAN.

FILED NOVEMBER 3, 1898. No. 8326.

1. **Judgment:** VENDOR AND VENDEE: COVENANT OF WARRANTY. One who purchases land charged with the lien of a judgment, which is specifically excepted from the covenants of warranty contained in the deed through which he claims title, cannot insist that his grantor's chattels shall be exhausted before such land is sold for the satisfaction of an execution issued on the judgment.
2. ———: EVIDENCE: REVIEW. Where a judgment or final order results from the trial of an issue of fact, this court will not, in an error proceeding, in the absence of a motion for a new trial, examine the evidence and pass upon its sufficiency to justify the conclusion reached.
3. **Review:** JOINT ASSIGNMENT OF ERROR. A joint assignment of errors in a petition in error, made by two or more parties to an action, will be overruled unless it can be sustained as to all who join therein.

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

F. B. Donisthorpe, for plaintiffs in error.

John D. Carson, contra.

SULLIVAN, J.

To secure the reversal of an order of the district court of Fillmore county confirming an execution sale of real estate John G. Wollam and Robert E. Hastings prosecute error to this court.

Of the numerous errors assigned in the petition filed here only two are discussed in the brief of the counsel for the complaining parties. These are (1) that the judgment was not a lien on the land sold, and (2) that there was, subject to seizure and sale in said county, sufficient personal property of the execution defendant to satisfy the writ. Wollam has no interest in the controversy. The judgment was against him and he was, at the time it was rendered, the owner of the land, but he has since conveyed it to Hastings, excepting the judgment from the covenants of warranty contained in the deed. The right of a debtor to have his chattels applied in satisfaction of an execution against him is a personal one and has no application in this case. One who purchases land charged with the lien of a judgment, which is specially excepted from the covenants of warranty, cannot insist that such land shall be exempt from execution sale until his grantor's chattels have been first exhausted.

On the hearing of the motion for confirmation it was claimed that the land in controversy was the homestead of Wollam at the time he conveyed it to Hastings; that its value above incumbrances did not exceed $2,000; that it was not bought subject to the judgment, and that the same was not a lien thereon. These questions were submitted to the court upon conflicting evidence and were resolved against the plaintiffs in error. There being no motion for a new trial, we cannot in this proceeding review the evidence upon which the district court based its decision. Where a judgment or final order results from the trial of an issue of fact, this court, in an error proceeding, will not, in the absence of a motion for a new trial, examine the evidence and pass upon its sufficiency

to justify the conclusion reached. (*Carlow v. Aultman*, 28 Neb. 672; *Gaughran v. Crosby*, 33 Neb. 33; *Losure v. Miller*, 45 Neb. 465; *Withnell v. City of Omaha*, 37 Neb. 621; *Jones v. Hayes*, 36 Neb. 526.)

There is another reason why the order of confirmation cannot be reversed. Wollam and Hastings have filed with the record a joint petition in error. Wollam, having no interest in the litigation, has no right to be heard, and is, of course, entitled to no relief. The petition, under the holdings of this court, is indivisible, and there being no ground for sustaining it as to Wollam it must be denied as to both. (*Gordon v. Little*, 41 Neb. 250; *Small v. Sandall*, 45 Neb. 306; *Harold v. Moline, Milburn & Stoddard Co.*, 45 Neb. 618.) The order is

AFFIRMED.

PAMELIA SMITH V. M. I. BOND ET AL.

FILED NOVEMBER 3, 1898. No. 8378.

1. **Married Woman:** LIABILITY AS SURETY. In an action against a married woman on a note executed by her as surety for another, coverture is a complete defense, unless it be shown that such note was made with the intention on her part of binding her separate estate for its payment.
2. ———: ———: SEPARATE ESTATE: EVIDENCE. Evidence examined, and *held* sufficient to sustain the finding of the trial court that the note in suit was not made with reference to, nor upon the credit of, defendant's individual property.

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

Thomas Ryan, for plaintiff in error.

B. F. Johnson, contra.

SULLIVAN, J.

This was an action on a promissory note executed by M. Isabel Bond as principal and Mrs. H. C. Smith as

surety, to the plaintiff, Mrs. Pamelia Smith. The defendant Bond made no appearance in the case. H. C. Smith answered, pleading coverture. When the cause came on for trial a jury was waived, and the court, having heard the evidence, found generally in favor of the answering defendant, and specially that "prior to the signing of the note sued upon in this action, the plaintiff stated to the defendant H. C. Smith that she loaned the money, the consideration for which this note was given, to the defendant M. Isabel Bond upon the responsibility of the defendant H. C. Smith." A motion for a new trial was overruled and judgment rendered against the plaintiff on the general finding. By petition in error the record is presented to this court for review.

It was established beyond controversy at the trial that the note in suit was given for money loaned by the plaintiff to M. Isabel Bond, and that H. C. Smith was a married woman at the time she signed it. The transaction in question having no relation to the separate estate or business of the defendant Smith, she is not liable on the note unless she signed it intending thereby to bind her individual property for its payment. (*Grand Island Banking Co. v. Wright*, 53 Neb. 574, 74 N. W. Rep. 82; *Stenger Benevolent Ass'n v. Stenger*, 54 Neb. 427, 74 N. W. Rep. 846; *State Nat. Bank of Lincoln v. Smith*, 55 Neb. 54, 75 N. W. Rep. 51.) The only controverted question in the case then was whether Mrs. Smith, at the time she signed the note, intended to make it a charge upon her separate estate. The trial court found that she had no such intention, and the finding is sustained by direct and positive evidence. The fact embodied in the special finding affords, of course, a strong inference of an intention on the part of the surety that her property should be liable for the debt in case the principal made default, but it is not conclusive. The statement of the plaintiff, that she would make the loan on the responsibility of Mrs. Smith, was not made at the time the note was executed, but at some time prior thereto while the negotiations were pend-

ing. The plaintiff was not present when the note was signed, and there is no evidence bearing on the intention of Mrs. Smith at that particular time except her own evidence, which is to the effect that she signed to accommodate M. Isabel Bond and because—to quote her language—"it is customary to have a name on a note." She testified that she did not expect, or intend, to pay the debt in case Bond failed to pay it, and that she had no intention of making the note a charge upon her individual property. The judgment is not without sufficient support in the evidence and it is

AFFIRMED.

RUDOLPH NICOLAUS V. CARL SYNDER.

FILED NOVEMBER 3, 1898. No. 8362.

Action by Minor for Wages: EVIDENCE. The evidence adduced by plaintiff to establish his rights to maintain an action for wages earned by him during his minority examined, and *held* insufficient for that purpose.

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

Norval Bros., *G. W. Lowley*, and *D. C. McKillip*, for plaintiff in error.

Edw. C. Biggs and *J. J. Thomas, contra.*

RYAN, C.

Rudolph Nicolaus, after he had attained his majority, sued Carl Synder before a justice of the peace of Seward county for a balance of $55.95, as wages for services rendered between March 1 and August 17 of the year 1890. We are not advised what judgment was rendered by the justice of the peace, for the record before us deals alone with the trial in the district court of said county, wherein there was a verdict and judgment in favor of Synder, the

defendant. From the averments and admissions contained in the pleadings we are able to state confidently that at the time he rendered the services, for the value of which he brought this suit, plaintiff was a minor; that he rendered the services; and that they were of the value claimed. The affirmative defense of payment pleaded by defendant was that plaintiff, when he rendered the services, was a minor, who resided with his mother, Mrs. Mox Byling, and Mox Byling, his step-father, who then had the control and management of plaintiff, and that plaintiff was unable to enter into the contract relation. In the reply it was alleged that plaintiff, before he rendered services for the defendant, had been emancipated by his mother, and that, therefore, the alleged payment was not effective to deprive him of his right of recovery. We do not think it necessary to enter into a detailed discussion of the issues thus presented, for there was no evidence from which an emancipation might properly be inferred. There was evidence from which it is claimed the jury might have concluded that plaintiff was specially authorized by his mother to collect wages for these particular services, and perhaps some others named, but there was no general emancipation, as will be illustrated by the testimony which hereinafter we shall quote. The question presented by the proofs on this point was narrowed down to the claim that there was special leave given plaintiff, who was then in his eighteenth year, to hire himself to the defendant and from him to collect his wages. The step-father is not shown to have done otherwise than to acquiesce in this arrangement, and whether the evidence warranted a finding of the existence of such authority was a question of fact to be determined by the jury, provided there was evidence from which different persons might draw different conclusions, and to this proposition we shall now direct our attention. On this point the testimony of plaintiff was as follows:

Q. State what the facts were about your working for Synder; under what right you had to go to work.

A. I was there for my own self and hired out.

Q. You may state what your mother said about your working out.

A. She didn't say nothing at all. * * *

Q. Who made the bargain; anybody else make it?

A. No, just me and Carl Synder.

Q. You may state whether you got the consent of anybody to make that.

A. Yes, sir; my mother gave me consent.

Q. Who was to collect the wages and have them?

A. Carl Synder says he will pay the money to me.

Q. Who was to have the wages after collected?

A. Myself.

Q. They belonged to you?

A. Yes, sir.

This testimony was followed by statements that defendant gave plaintiff as part of his wages $10 at one time, $5 at another, $2.50 at another, and $2.50 at still another time.

On his cross-examination the witness testified as follows:

Q. Didn't your mother tell you to go there and herd cattle?

A. That is what I don't know. * * *

Q. I will ask you where you lived?

A. Now?

Q. Where you made your home while you was a minor?

A. While I was at home I was over at Tamora with my mother; when I was working out I lived where I was working.

Q. At the time of this agreement with Synder where did you live—with your mother and step-father?

A. I was staying over there a couple of days. I wasn't at home all of the time.

Q. You claim that as your home, don't you?

A. Yes, sir.

On re-examination this witness was asked what the $10 of his wages he had received from Synder by plain-

tiff paid to his mother, was for, to which he answered: "I gave it to my mother. I gave it to her, that is all I know."

With reference to the proposition under consideration the testimony of Mrs. Byling was as follows:

Q. You may state if you know about your son working for Carl Synder in 1890.

A. Yes, sir; I know.

Q. You may state what you had to do, if anything, about his working for Synder at that time.

A. I know nothing. He came over and hired himself to make wages for himself.

Q. Did you give him permission?

A. No. He came home afterwards and was to go to work for Mr. Synder herding cattle.

Q. What did you tell him?

A. I say nothing more than all right, you go to work.

Q. What did you say about his collecting his wages; who should collect them?

A. I say he can do what he like. He can keep the money.

Q. That was before he had worked or while he was at work there. When did you tell him that he could keep the money?

A. He came home and say he could hire there, and I say that he could keep the money himself.

Q. Did you tell him any different, that he could not keep the money after that?

A. No.

On cross-examination Mrs. Byling was asked and answered as follows:

Q. You may state when it was that you told Rudolph that he could have the money that he had earned at Mr. Synder's.

A. I cannot remember when I told him that he could have the money; from that time I said that is your money. I don't want any money now from him only just when I need it awful bad.

Q. You didn't get any from him?

A. No.

Q. Was this conversation with Rudolph that you have just testified to before or after he started to work for Mr. Synder?

A. Not before he started to work by Mr. Synder; I know nothing about that.

Q. Then it was after he began working for Mr. Synder, after he had done the work, that you told him he could have the wages, was it?

A. I cannot remember when it was that I told him he can have the wages.

Q. Well, you remember of telling him that he could have this wages?

A. I don't remember.

Q. Don't remember of telling him that?

A. No.

Q. Then you are not positive that you told him?

A. No. I told him nothing.

While plaintiff at the time of bringing this action had attained his majority, it is evident that his right to collect for his own use the wages he earned while a minor is no greater than it would have been if suit had been brought in his behalf before he reached the age of twenty-one years. Let us now suppose that while he was still a minor a suit had been brought for these wages in his behalf, would the above evidence sustain a recovery against the employer, to whom no knowledge of any special authority had been brought home? The fact that the minor in his eighteenth year made the bargain would not necessarily be of controlling weight against the employer, for a youth of that age is not to be presumed incapable of arranging for the rendition of services, but the implication of the law is that such an arrangement is for the benefit of the parent with whom he makes his home, and under whose management he is. According to the testimony of both mother and son the hiring to Synder was approved by the mother in advance. The son

was authorized to receive the pay, and one-half of what he received he testified he turned over to his mother, but for what reason he could not explain. One-half of what was paid to him, aside from the above $10 plaintiff testified he laid out in purchasing clothing for himself. Even in regard to the money he was told he could collect the mother testified that she told her son she did not want any money from him only just when she needed it "awful bad." Under these circumstances we think a suit could not have been maintained against Synder in behalf of the minor on the showing made in this case. For the reason that plaintiff failed upon the testimony adduced by himself to show that he was entitled to maintain an action against Synder for wages earned during minority the judgment of the district court is

AFFIRMED.

FRED REUMPING V. JOHN C. WHARTON ET AL.

FILED NOVEMBER 3, 1898. NO. 8411.

1. **Negligence of Attorney:** ACTION FOR DAMAGES: EVIDENCE. In an action against attorneys at law for damages because of their alleged failure to obtain, upon appeal, the modification of a decree in like manner with others of the parties who did appeal, a failure of the evidence to show like conditions *held* to justify the supreme court's refusal to disapprove of an instruction of the district court to find for the defendants in such action for damages.
2. ———: OPINION: MISTAKE: DAMAGES. The expression of an opinion as to the probabilities of realizing a certain sum upon the sale of real property is not such an expression of opinion as renders liable an attorney at law because of a mistake in such estimate.

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

C. J. Smyth, I. J. Dunn, and *Mahoney & Smyth,* for plaintiff in error.

J. H. McCulloch, contra.

RYAN, C.

Plaintiff sued the defendants in the district court of Douglas county for damages alleged to have been sustained by reason of their negligence. In accordance with a peremptory instruction there was a verdict in favor of the said defendants, and by proceedings in error plaintiff seeks the reversal of the judgment thereon rendered. In the petition it was averred that the defendants, during all the transactions described in the petition, were attorneys at law engaged in the practice of their profession in Omaha; that for labor done and materials furnished plaintiff was entitled to a mechanic's lien on two certain described lots in Omaha, and for the preservation and enforcement of said lien had taken the steps prescribed by law; that after taking such steps plaintiff employed the defendants to do all things necessary to foreclose said lien in said district court, and to do all things that might be necessary to enforce the collection of the amount thereof, whether such things were required to be done in the said district court or in the supreme court of the state; that said defendants accepted said employment and procured a decree of foreclosure of said lien, which decree was duly entered of record in the case of the Bohn Sash & Door Company against Case & Kennedy and others, and that in said decree there were a great many other mechanics' liens, together with some mortgage foreclosures, which were divided into classes according to the order in which they were to be paid out of the fund to be created by the sale of the two lots affected by said decree. In round numbers the first class covered the costs of the foreclosure proceedings, $1,000. The second class was composed of a claim of P. H. Mahoney & Co. for $198; the third class was made up of the amount due J. Jeffries & Sons on a mortgage, which amount was $19,770. The fourth class embraced numerous claims in the aggregate amounting to $10,000, in which class was the claim of plaintiff for $2,515 and

that of George A. Hoagland for $3,152. In the tenth class it was averred were the claims of the Bohn Sash & Door Company and Edward Tighe, the first for $5,312 and the last for $845, a total of $6,157. It was alleged in the petition that the Bohn Sash & Door Company appealed from the aforesaid decree to the supreme court and made all other parties to the suit appellees and caused them to be served with notice of the appeal, and that defendants, as attorneys for plaintiff, were served with notice of the appeal and knew the same had been taken. The negligence imputed to the defendants was thus described in the petition: "Plaintiff further states that the said Wharton & Baird negligently failed to appear in the supreme court in behalf of this plaintiff, as they were required by the terms of their contract to do, and failed and refused to carefully preserve and enforce the interest of this plaintiff in said suit in the supreme court, and failed to urge that plaintiff's claim was entitled to priority over the said $19,770 of the mortgage of said John Jeffries & Sons, and failed and neglected, in violation of their duty to this plaintiff and of their duty as attorneys at law, to present to said supreme court the right of this plaintiff in said suit, and failed and neglected to discharge their duties owing by them to this plaintiff and resting upon them by reason of their employment in said case as attorneys to watch and guard the interests of this plaintiff and conduct his suit with reasonable care and skill; and that by reason of said failure, neglect, and want of skill upon the part of said Wharton & Baird this plaintiff's claim was not placed ahead of the claim of the said John Jeffries & Sons for $19,770.90, as aforesaid, and was not placed in the second class with the claims of the Bohn Sash & Door Company, Edward Tighe, P. H. Mahoney & Company, and George A. Hoagland." It was further charged in the petition that the defendants became the attorneys of the firm of J. Jeffries & Sons, whose interests were adverse to those of plaintiff, but this averment is of no impor-

tance in this case, for the gravamen of plaintiff's action was negligence, and not bad faith, as to which there was no proof whatever. It was further averred in the petition that the lots against which the decree was entered sold for $30,010, which was insufficient to pay all of the claims of the first, second, and third classes, for which reason plaintiff received nothing on his claim in the fourth class, but that, if plaintiff's claim had been placed in the second class, it would have been paid in full. The prayer was for judgment for an amount equal to the claim of plaintiff as established by the aforesaid decree.

The opinion in the case above referred to as having been appealed to this court was reported in *Bohn Sash & Door Co. v. Case*, 42 Neb. 281. A reference to the figures above given discloses that under the decree in the district court there were established, first, a claim for costs $1,000; second, a claim in favor of P. H. Mahoney & Co. for $198; and, third, a mortgage lien in favor of J. Jeffries & Co. for $19,770,—in all the aggregate of $20,568. Upon the readjustment of priorities in the supreme court the claims of the Bohn Sash & Door Company and Edward Tighe, aggregating $6,157 in amount, were advanced from the tenth class to the second class, thus being preferred to the claim of plaintiff herein. In the fourth class, in which was plaintiff's claim, was that of George A. Hoagland for $3,152, which was likewise advanced to the second class. To the claims recognized as prior to plaintiff's by the district court there were thus added the above two sums of $6,157 and $3,152 in the supreme court,—in the aggregate $9,309. This amount added to that which in the district court had been established as paramount to the claim of plaintiff, $19,770, made a total sum of $29,079 to which the claim of plaintiff was subject and inferior. The insistence of plaintiff now is that the sale of the property for $30,010 failed to provide means for the payment of claims in the fourth class, and that if his claim had been advanced to second class as it should have been, he would have been

paid in full. To establish his right to thus have his claim advanced to the second class counsel for Mr. Reumping offered in evidence the record and bill of exceptions filed in the supreme court in the case entitled *Bohn Sash & Door Co. v. Case, supra*, and read certain parts thereof, including the testimony of Mr. Reumping himself. In neither this testimony, nor elsewhere, did plaintiff, or any one else, testify when plaintiff's claim for a mechanic's lien was filed in the office of the register of deeds of Douglas county. Very probably and very naturally his counsel assumed that this fact would be disclosed by the indorsement upon the claim itself. A copy of this, or at least what purports to be a copy thereof, was offered and attached to the bill of exceptions as "Exhibit R," but on this there is found no memorandum showing when, if ever, it was so filed. Judging from this condition of the proofs, as we are bound to do, there was no evidence from which the jury could properly have found that the district court erred in placing this claim in the fourth class. On the original hearing and on the motion for a rehearing in the case of *Bohn Sash & Door Co. v. Case, supra*, we were very clear that the advancement of the claims which we advanced to the second class was proper, and in this case we have found no evidence which would have justified a jury in assuming that this court would or should modify its views expressed in the original action. The testimony of Mr. Reumping rather tended to show a misapprehension of conditions of fact than of law on the part of Messrs. Wharton & Baird. In effect, plaintiff testified that upon the entry of the decree in the district court these gentlemen said to him it would be of no advantage to him for an appeal to be taken in his behalf, because the property would sell for sufficient to pay plaintiff's claim though it stood in the fourth class. This conjecture was not one which involved the exercise of legal knowledge; indeed, it is quite likely that in the ratio in which attorneys at law qualify themselves to judge of the value of real property they may disqualify

themselves for the proper performance of their professional duties. Even if plaintiff in this case relied upon the knowledge of the value of real property possessed by his counsel, any mistaken estimate in that respect would not subject such counsel to liability for damages.

As a matter of fact the testimony shows that plaintiff was satisfied with being placed in the fourth class, and that both himself and his counsel expected that in that class he would be paid in full. There was no wish expressed by him that the decree of the district court should be disturbed; indeed, he was satisfied with that decree. His dissatisfaction is because of the fact that certain parties who appealed were successful, and because he assumes that if he too had appealed it would have been with a like result. As we have already stated, there was no evidence before the jury for the justification of the assumption that plaintiff's claim would have been advanced to the second class, whereby he would have secured priority over the rights of J. Jeffries & Sons. As there is no error upon the face of the record the judgment of the district court is

AFFIRMED.

LOUIS POSKA ET AL. V. EDGAR G. STEARNS.

FILED NOVEMBER 3, 1898. No. 8412.

Sales: COMMERCIAL AGENCIES: FALSE STATEMENTS: RESCISSION. Where a proposed buyer of goods, upon the request of a commercial agency, made a statement of his own financial condition, and the agency thereupon reported to the proposed seller its own conclusions as to such financial condition, including what purported to be one fact stated by the proposed buyer, a sale made on the faith of the report as a whole, and not particularly on the faith of the one statement made by the proposed buyer, cannot be rescinded merely because the said statement was false.

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

Sawyer, Snell & Frost, for plaintiffs in error.

George E. Hibner and *Davis, Hibner & Whitmore, contra.*

RYAN, C.

In this case the certified transcript of the record shows that there was filed originally a petition in which the plaintiff was described as "Edgar G. Stearns, doing business under name and style of E. G. Stearns & Co.," and the affidavit and bond in replevin described the plaintiff in the same way; hence we cannot assume, as we are asked to do because of recitations in the bill of exceptions of amendments permitted to be made during the trial, that the original plaintiff was other than as above described. As the clerk of the district court has solemnly attested with his seal of office the condition of the petition when filed, we must accept that condition as established beyond question.

It is urged that there was error in refusing to sustain objections orally made to certain depositions when the same were about to be read to the jury. The ground of these objections was that in taking them postponements from day to day had occurred, and that there was no justification shown for these delays. It is possible, as suggested, that the officer who takes depositions in a foreign state may unreasonably keep in attendance a party or his attorney desiring to cross-examine a witness, but the remedy for this, if any there is, is not upon objections to the deposition when about to be read to the jury. It is provided by section 390, Code of Civil Procedure: "No exception other than for incompetency or irrelevancy shall be regarded unless made and filed before the commencement of the trial." The objections as made were properly overruled.

This action was one of replevin in the district court of Lancaster county and was for the recovery of goods sold by plaintiff, a merchant doing business in Chicago, Illi-

nois, to L. Berkson, a retail merchant doing business in Lincoln, Nebraska. The defendants other than L. Berkson were made such because of their claims of liens upon the goods under L. Berkson. The goods had been delivered to L. Berkson at Lincoln when this action was begun, and the recovery of the right possession of them was predicated upon the claim that the sale had been induced by certain false and fraudulent representations of L. Berkson relied upon by plaintiff. These representations were communicated to plaintiff by the R. G. Dun & Co. mercantile agency in this language:

"L. Berkson, D. G. & Notions.

"LINCOLN, NEB., July 8, 1893.

"Think his stock would invoice fully $12,000; insured for $10,000 and says $1,200 would pay his entire indebtedness. Is doing a fair business, which is managed economically and with some profit. Has been here a good many years and no complaints are heard of him in any way. His stock is largely of cheaper variety and would suffer heavy shrinkage on forced sale. Is generally conceded a net worth of 4 to $5,000, this estimate allowing liberally for shrinkage in stock. Prospects thought fair."

The R. G. Dun & Co. mercantile agency, at the date of above memorandum, was represented at Lincoln by Frank Blish. When the order was sent into Chicago for the goods wished by L. Berkson, plaintiff applied to R. G. Dun & Co. for a special report upon the financial standing of said Berkson, and Blish was requested to make it to said agency. He went to Berkson and, as he himself admitted, obtained from Berkson only a part of the data upon which his report was founded. An examination of the report itself discloses that there was no pretense therein that Berkson had made the statements therein embodied, except that he estimated that $1,200 would pay his entire indebtedness. Even this was contradicted in Berkson's testimony and by that of his nephew. For the purposes of this case, however, it may

be conceded that Blish was correct in his version of what Berkson said to him. When this written statement above copied was offered in evidence objections were interposed and overruled, to which ruling the defendants excepted. In the further progress of the trial there was evidence that Berkson, at the date of said statement, was owing more than five times the amount stated as his entire indebtedness. Russel M. Foltz, who described himself in his deposition as the credit-man and office manager of E. G. Stearns & Co., testified that E. G. Stearns & Co., in extending credit to L. Berkson, relied solely on the report of R. G. Dun & Co.; that he looked over that report, and from that decided that L. Berkson was entitled to have the merchandise he had ordered shipped to him. This reliance was, therefore, upon all the statements of the report and not specially upon that portion containing what purported to be the statement of Mr. Berkson himself. In the admission of this statement in evidence we think there was error, for, according to the testimony adduced by plaintiff, he might have been entirely influenced by that portion of the report which contained the views of Mr. Blish, for which there is no pretense that Mr. Berkson was responsible.

A case much resembling that at bar in its facts was reported in *Wachsmuth v. Martini*, 39 N. E. Rep. [Ill.] 129, and sustains the view we take of the law as applied to this case. (See, also, *Runge v. Brown*, 23 Neb. 817, *Upton v. Levy*, 39 Neb. 331, *Kilpatrick Koch Dry Goods Co. v. McPheely*, 37 Neb. 800, and *Lorenzen v. Kansas City Investment Co.*, 44 Neb. 99.) The instructions of the court given, and the rulings on those of defendants requested, were in harmony with the theory upon which the report of R. G. Dun & Co. was admitted in evidence. For the error indicated the judgment of the district court is reversed and the cause is remanded for further proceedings not inconsistent with the views above expressed.

REVERSED AND REMANDED.

FANNIE HINDS ET AL. V. EMMA HINDS.

FILED NOVEMBER 3, 1898. No. 9836.

Descent and Distribution: PERSONALTY. Under the provisions of section 30 and section 176, chapter 23, Compiled Statutes, the personal property of a childless intestate, after the payment of his debts, descends to his widow, to the exclusion of his brothers and sisters who survive him and the children of other brothers and sisters whom he had survived.

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

Walton & Mummert and *Osborn & Aye*, for plaintiffs in error.

F. S. Howell, contra.

RYAN, C.

The facts, as well as the theory, upon which the defendant in error based her prayer for relief, are disclosed by the findings and judgment of the district court of Washington county, and these, condensed, are as follows: May 9, 1896, Alfred W. Hinds died intestate in said county, leaving surviving him his wife, the defendant in error, but no child. His nearest relations by consanguinity were brothers and sisters. In a remoter degree there were nieces and nephews, the daughters and sons of deceased brothers and sisters of Alfred W. Hinds. At the time the judgment under review was rendered there was in the hands of the administrator of the estate of Alfred W. Hinds personal property of the value of $20,000, subject to distribution; all the debts of said estate having been paid or provided against. Under these conditions found by the court to exist it was adjudged that the widow was entitled to all the personal property of the intestate.

The surviving relatives of Alfred W. Hinds above in-

dicated, as plaintiffs in error in this court, contend that one-half the personal property of the intestate in the hands of the administrator of his estate should be distributed among them; and this contention is based upon their construction of such portions of our statute as are applicable to the facts above stated, which are portions of section 30 and of section 176, chapter 23, Compiled Statutes. It is provided in section 30 aforesaid that when any person shall die seized of any lands, etc., they shall descend, subject to his debts, in equal shares to his children, etc. In section 176 above referred to there are various provisions for the distribution of the personal property of persons dying intestate in this state. These provisions close with the following: "Sixth. The residue, if any, of the personal estate shall be distributed in the same proportion, to the same persons, and for the same purposes as prescribed for the descent and disposition of the real estate, except that the widow, if any, shall be entitled to receive the same share of such residue as a child of the intestate would be entitled to." It is insisted by plaintiffs in error that the language just quoted implies the existence of children to entitle the widow to a distributive share of the personal property, for it is said: "If there be no child or children in existence, the term or phrase has no possible significance, and it might as well be argued that under the Nebraska statute the widow would take nothing at all unless there be a child or children, or representative of a deceased child or children in existence." This argument is just as applicable to one of the provisions of section 30 aforesaid as to the sixth subdivision of section 176. To illustrate this applicability we quote from section 30: "When any person shall die seized of any lands, tenements, or hereditaments, or of any right thereto or entitled to any interest therein in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the manner following: First. In equal shares to his children," etc. The line of reasoning of

plaintiffs in error, applied to this provision, would be that the statute first entitles children of an intestate to distribution of his property. The use of the word "children" implies that there must be more than one child to render applicable the last above quoted provision of the statute. Therefore, if there be but one child, the estate must be inherited by other relatives than such child, who could take nothing. In enforcing these views, however, plaintiffs in error repudiate this application of their argument and insist that if there was one child such child would take one-half of the personal property and the widow the other half; and therefore, as we understand it, the brothers and sisters of the deceased must, as representatives of the supposed child, take one-half of the entire estate to which, if it did exist, it would be entitled. Let us further illustrate the practical workings of the theory of plaintiffs in error. If there were left surviving two children, the personalty would be divided into three equal parts, of which parts the widow would be entitled to one. If there was but one child, it would take half and the widow the other half. If there was no child, the widow would be entitled to precisely the same distributive share, and no more, than if one child had survived. It seems to us that this is an instance of the *argumentum ad absurdum*. Plaintiffs in error claim to have support for their contention in *Harrell v. Harrell*, 8 Fla. 46, wherein were considered the rights of a widow where there was no child. In the case just cited there was omitted from the quotation of a portion of the section of a statute of 1828, defining the rights of a widow in the personal property of her intestate husband, several words, and this omission renders unintelligible the language of the court with reference to that section as quoted in that opinion. With this omission corrected the language of said section pertinent to our purpose is as follows: "If there be no children, or if there be but one child, in that case she [the widow] shall be entitled to one-half, but if there be more than one child, in that

case she shall be entitled to one-third part in fee simple, except slaves, in which she shall have a life estate, and such claim shall have preference over all others." It was with reference to the above quoted provisions that the supreme court of Florida, by Du Pont, J., used this language: "But the question recurs what shall be the measure of the widow's interest where she elects, under the circumstances of this case, to take a child's part? For her it is insisted that the child's part amounts to the entire estate; that forasmuch as the child would take the entire estate if there were no widow, so the widow will take the whole estate where there is no child. This argument scarcely has the merit of speciousness. It is wholly illogical. The act of 1828 defines very clearly the measure of her interest as dower, viz., one-half. If that be not the measure of her interest under the act of 1838, then she has none. It is very evidently the intention of the statute to place the claim of the widow upon the same footing whether there should be one child or no child." It should be remarked that the act of 1838 above referred to simply provides that the interest of the widow in her share shall be absolute, and confers upon her the power accordingly to dispose of the same, so that by the act of 1838 no change was effected which qualified the act of 1828, in so far as the latter is useful for our purpose. Recurring to the part of the section quoted from the act of 1828 we note that that section provides that the share of the widow shall be the same if there are no children, as if there is one child; hence the reasoning of the court is not applicable to our section 176, chapter 23, Compiled Statutes. If any inference can be legitimately drawn from the case of *Harrell v. Harrell*, *supra*, it is that the language of the statute therein considered is proper to sustain the contention of plaintiffs in error, and that not being found in our statute, the presumption might be against the soundness of such contention.

In considering the provision of section 176, chapter 23,

Compiled Statutes, that the widow, if any, shall be entitled to receive the same share of such residue of the personal property that a child of the intestate would be entitled to, counsel for plaintiffs in error, in their brief, say: "This subdivision must be construed with reference to its subject-matter, and the pivotal point upon which it must turn are the words, 'except that the widow, if any;' therefore without a widow this subdivision has no application. To give it application, therefore, a widow must exist. A widow existing, therefore, we must inquire what a child's share would be. It is obvious that where a widow exists a child can in no event receive more than a like amount that the widow would receive. If, therefore, there be but one child, the child would take one-half, and the widow would take one-half; that being the same share that such child would be entitled to. It follows, therefore, that a child cannot take under that subdivision unless there be a widow, and, therefore, a widow cannot take under that provision any more than a child could take, which in no event could exceed one-half, but might be less if there was but one child. It is plain that if there were no widow, the child or children would inherit under another subdivision, because the subdivision now under consideration does not provide for the inheritance of a child, but provides only what share a widow shall take, and which share, as plainly expressed in the statute, must be that that a child would take. Repeating our former proposition then, that there must be a widow in existence in order to make the subdivision apply, and the widow's right must be measured by what a child would take if the widow existed, and therefore she cannot take more than the largest estate a single child could take, which is precisely one-half." Let us now apply this paradoxical language to the case at bar. Emma Hinds, the widow, takes a child's share, which is one-half, because of the language of subdivision six, which makes her right to take a child's share dependent upon the existence of a widow. But what becomes of the

other half? In one part of the brief above quoted counsel say if there be but one child, such child takes one-half and the widow takes the other half. In this case there is no widow but Emma Hinds, who, therefore, as such, takes the other half. She is thus invested with one-half the title by being entitled to a child's share, and she is entitled to the other half because, in fact, she is the widow; from which it results that she has the entire title, just what she claimed and was adjudged entitled to by the district court. It does not appear to us that the statute is ambiguous or imperfect. The widow, if she takes a child's share, takes it by virtue of being the widow, and not because it is assumed that she is actually a child. In effect, her relationship to the intestate is declared by the statute to be such that she is entitled to the same interest in his personal property that she would be entitled to if she had been his child. There is no attempt to declare that for any purpose she is not to be deemed a widow, but that as such, under certain conditions, she is entitled to receive just what a child of his would be entitled to. If he has no children, the right to take is conferred upon her as a widow, but her status as such is not changed. The judgment of the district court was right and is

AFFIRMED.

GEORGE E. EMORY V. STATE OF NEBRASKA, EX REL. WILLIAM H. MORRIS.

FILED NOVEMBER 3, 1898. No. 10410.

Conflicting Evidence: REVIEW. Where there is presented upon the record no question except the sufficiency of the proofs to sustain conclusions reached upon consideration of conflicting evidence, the order or judgment assailed must be affirmed.

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

Hastings & Sands, W. C. Le Hane, R. W. Sabin, and *R. S. Bibb,* for plaintiff in error.

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

RYAN, C.

This application for a mandamus to compel George E. Emory, as secretary, to certify to a certain nomination was presented to the Honorable C. B. Letton, by whom there was issued on the final hearing a peremptory writ as prayed. This proceeding in error is for the review of this order.

It was recited in the alternative writ that J. E. Cobbey was nominated by a republican convention as a candidate for representative of the thirty-third representative district in the legislature of this state; that by said convention John N. Van Duyn was elected central committeeman for Saline county, George E. Emory was elected central committeeman for Gage county, and P. W. Grant chairman of the committee of which Van Duyn and Emory were members; that by a resolution of said convention said committee was authorized to fill any vacancies for the republicans of said district; that said committee duly received and accepted the resignation of said J. E. Cobbey as candidate aforesaid and proceeded to fill the vacancy caused by said resignation; that Van Duyn presented the name of William S. Grafton to fill said vacancy, and, no other nomination being made, Van Duyn voted for Grafton, Emory refused to vote, and Grant also voted for Grafton; that Emory was secretary of said committee and refuses upon demand to certify said nomination that the name of Grafton may, by proper authority, be placed upon the ballots to be prepared for the voters of Saline and Gage counties composing said thirty-third representative district. It is scarcely necessary to say that the alternative order was to show cause why the respondent persisted in the refusal to make the certificate

demanded. In his answer Emory alleged that the meeting at which Grafton was named and voted for as candidate to fill the place made vacant by the resignation of J. E. Cobbey was continued to an indefinite time without concluding its business, and that thereafter, the session of said committee having been resumed, the nomination of Grafton was declared not to have been duly made and another name was selected to fill the vacancy caused by the resignation of Cobbey. Upon conflicting evidence upon the issue above described, which was the essential issue joined, the order prayed was made, and as there was sufficient proof to sustain the conclusions reached, the order presented for review is

AFFIRMED.

JOHN A. JOHNSON V. EVA C. THOMPSON.

FILED NOVEMBER 3, 1898. No. 8363.

Review. The record presents no disputed question of law, the evidence sustains the verdict, and the judgment of the district court is affirmed.

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

Robert W. Richardson, for plaintiff in error.

John G. Tipton, contra.

RAGAN, C.

In an action of replevin for a piano brought in the district court of Douglas county by Eva C. Thompson against John A. Johnson the former had a judgment and the latter has brought the same here for review on error.

The record presents no disputed question of law, the evidence sustains the verdict, and the judgment of the district court is

AFFIRMED.

CHRISTIAN SPECHT V. CHARLES F. BEINDORF ET AL., EXECUTORS.

FILED NOVEMBER 3, 1898. No. 8417.

1. Notes: CONDITIONS: INDORSEMENTS. A condition or memorandum written in or indorsed on a promissory note by the maker prior to its delivery is a substantive part of such note.
2. ———: TIME OF PAYMENT: NEGOTIABILITY. A contract for the payment of money, to be negotiable, must, among other things, be payable at some time or other, though it may be uncertain when that time will arrive.
3. ———: ———: ———. A promissory note reading, "six months after date, if elected county commissioner, I promise to pay," etc., is not a negotiable instrument.
4. ———: ———: WAGER: PUBLIC POLICY. Such a note is a contract of wager on the result of an election. Its enforcement would tend to the detriment of the public good, and on grounds of public policy it is *held* to be absolutely void.

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

John Q. Burgner and *Connell & Ives*, for plaintiff in error.

Lee S. Estelle, contra.

RAGAN, C.

Christian Specht, claiming to be an innocent purchaser before due of a promissory note executed by one George E. Timme to W. R. Vaughan, brought suit thereon in the district court of Douglas county. Pending the action Timme died, and the same was revived in the name of his executors, who had a judgment, to review which Specht has filed in this court a petition in error. The note sued on was in words and figures as follows:

"$500.00. OMAHA, NEB., Oct. 15, 1890.

"Six months after date we, or either of us, promise to pay to W. R. Vaughan, or order, the sum of five hundred dollars, for value received, payable at the Nebraska National Bank, Omaha, Nebraska, with interest at the rate

of ten per cent per annum from date until paid. And in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent, to be fixed by the court, as attorney's fees, if elected county commissioner. GEORGE E. TIMME."

1. The portion of this contract in reference to its being paid if the maker should be elected county commissioner and promising to pay an attorney's fee if suit should be brought upon the note is a substantive part of the agreement, and the whole writing must be read and construed together as one contract, since the entire writing was made and delivered at the same time. (*Palmer v. Largent*, 5 Neb. 223; *Polo Mfg. Co. v. Parr*, 8 Neb. 379; *Grimison v. Russell*, 14 Neb. 521.)

2. The meaning of this contract is the same as if it read: "Six months after date, if elected county commissioner, I promise to pay, etc." In other words, while this is a contract for the payment of a certain sum of money, it is not by its terms payable at any certain time. Whether the maker of this note would be elected county commissioner was uncertain, and therefore it was uncertain whether this money would ever become payable, and therefore this contract was not a negotiable instrument. To make a contract for the payment of money negotiable it must, among other things, be payable at some time or other, though it may be uncertain when that time will come. Doubtless a note payable on the maker's death might be negotiable, because it is certain that he will at some time die; while a note payable when the maker should be married would be non-negotiable, for the reason that it is not absolutely certain that he ever will be married. But here by the terms of this note it was to be payable when the maker was elected county commissioner. This clause then deprives the instrument of a negotiable character. (*Kelley v. Hemmingway*, 13 Ill. 604; *White v. Smith*, 77 Ill. 351; *Smalley v. Edey*, 15 Ill. 324; *Chicago R. Co. v. Merchants Bank*, 136 U. S. 268; *Mahoney v. Fitzpatrick*, 133 Mass. 151.)

3. The note in suit was a conditional contract for the payment of money, the condition being that the maker should be elected county commissioner. We think this contract is a wager or a gambling contract and as such void. In *Cooper v. Brewster*, 1 Minn. 73, a note was payable when H. H. Sibley should be elected delegate to congress. The note purported on its face to have been given for value received, but the court said: "It was in effect a wager upon an election. It was given for value received. * * * If Sibley was elected then Buford was to receive, and Cooper to part with, one hundred dollars. Each of the parties thus acquired a pecuniary interest in the event of the election and a motive to cast his own vote and procure others to cast theirs, for his private benefit, without regard to the public good. Such a contract should not be upheld. It is against public morals, and tends directly to destroy the purity of elections. No man should be permitted to convert the elective franchise into a device for gambling. It is a sacred trust confided to him by his country which he is bound to exercise in such a way only as, in his judgment, will contribute most to his country's welfare." (*Da Costa v. Jones*, 2 Cowp. [Eng.] 729; *Ditchburn v. Goldsmith*, 4 Cowp. [Eng.] 152.) To the same effect is *Guyman v. Burlingame*, 36 Ill. 201; *Nudd v. Burnett*, 14 Ind. 25; *Merchants Savings Loan & Trust Co. v. Goodrich*, 75 Ill. 554. Section 223 of the Criminal Code of this state makes the betting on the result of any election a criminal misdemeanor punishable by fine. Whether or not the note in suit is void because of the existence of this statute we shall not stop to inquire, as we think the contract is contrary to public policy and void upon that ground. It is true that at common law all wagers were not void; but at common law an action could not be maintained on a wager, if it was contrary to public policy or morals or in any other respect tended to the detriment of the public good. (Chitty, Contracts [10th Am. ed.] 544.)

To make the contract in suit a gambling one or a con-

tract of wager it is not essential that it should appear on the face of the contract or be shown by extrinsic evidence that one of these parties bet that Timme would be elected county commissioner. But since it appears on the face of the contract that a certain sum of money mentioned therein was to be paid to one of the parties to the contract on the election of Timme to office, the agreement upon its face became a wagering contract, and as such is against public policy, and no right of action can be based thereon. The judgment of the district court is

AFFIRMED.

CHARLES C. STEVENS V. STATE OF NEBRASKA.

FILED NOVEMBER 3, 1898. NO. 10320.

Questions for Review: STARE DECISIS. It appearing, after a careful examination, that the record brought here presents no proposition of law which has not been settled by the repeated decisions of this court, the judgment of the district court is affirmed, without an opinion specifically stating the contentions of the plaintiff in error and our reasons for overruling them.

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

R. C. Noleman and *J. H. Edmunds*, for plaintiff in error.

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

RAGAN, C.

Charles C. Stevens files here a petition in error for the review of a judgment pronounced against him by the district court of Sheridan county on an information charging him with stealing cattle. Stevens complains that the verdict of the jury is not sustained by sufficient evidence; that the court erred in rejecting certain testimony offered by him; in not granting him a new trial

on the grounds of newly discovered evidence; and because one of the jurors was disqualified, because he admitted on his *voir dire* examination that he had an opinion as to the merits of the case which it would require evidence to remove. We have patiently and carefully studied and examined this record, and not one of the contentions made by the plaintiff in error can be sustained. The record presents not one proposition of law which is novel and which has not been time and again decided by this court, and it would subserve no useful purpose whatsoever to write an opinion specifically stating the contentions of the plaintiff in error and our reasons for overruling them. The judgment of the district court is right and is

AFFIRMED.

ROBERT KYD V. EXCHANGE BANK OF CORTLAND.

FILED NOVEMBER 3, 1898. No. 8347.

1. **Action Against Sheriff:** VENUE. A sheriff holding an execution against a bank levied the same on a cash tray. He afterwards released the tray on payment to him of a sufficient amount to satisfy the execution, with an agreement on his part to refund the money if the bank should within a time fixed assure him that the judgment, on which the execution was issued, had been superseded. The bank sued the sheriff for money had and received, relying on the agreement. *Held*, That the action was one against a public officer for an act done by him in virtue of or under color of his office, and must be brought in the county where the cause of action or some part thereof arose.

2. ———: MONEY PAID ON EXECUTION: AGREEMENT TO REFUND. The officer's liability in such case is wholly as such officer, and not under the contract. If it were his official duty to return the money, the contract added nothing thereto. If it were not his duty, the contract was illegal and void.

3. **Jurisdiction:** PLEADING. A want of jurisdiction of the person of the defendant, not appearing from the summons, the return, or the petition, may be pleaded by answer.

4. **Actions Against Officers:** VENUE: JURISDICTION. Whether the statute requiring suits against public officers for acts done under color of office to be brought in the county where the cause of action or some part thereof arose, relates to jurisdiction of the person of the defendant, or subject-matter of the action, *quære.*

5. ———: ———: ———: WAIVER: PLEADING. If in such case the defect be one of jurisdiction of the person, it is not waived by demurring to the original petition generally, if such demurrer is sustained for the reason stated in the order that the court is without jurisdiction, and where the plaintiff waives any error in that order by amending his petition.

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

C. C. Flansburg, for plaintiff in error.

George E. Hibner and *Davis, Hibner & Whitmore, contra.*

IRVINE, C.

This action arises largely out of the same state of facts as the *Royal Trust Co. v. Exchange Bank of Cortland,* 55 Neb. 663. The Royal Trust Company secured a judgment against the Exchange Bank in the county court of Lancaster county. An effort was made to vacate the judgment under section 1001 of the Code, but that effort failed for want of service of the conditional order. A transcript of the judgment was filed in Gage county, and an execution issued thereon was delivered to Kyd, who was then sheriff of Gage county. He proceeded to Cortland and levied the execution on the cash tray of the bank. Instant communications resulted between the bank and its attorneys in Lincoln. The attorneys took steps for the purpose of prosecuting error proceedings in the district court of Lancaster county, and superseding the judgment. Some arrangement was entered into whereby Kyd took or retained sufficient money to satisfy the judgment, and released the rest. The bank asserts that he merely retained that much under an agreement to refund it in case within a few days the bank could assure him that it had effected a supersedeas. Kyd asserts

that it was a voluntary satisfaction of the execution. An attempt was made to prosecute error proceedings, and the district court of Lancaster county reversed the judgment of the county court. From the order of reversal error was prosecuted to this court, where it was held that the reversal was erroneous and the error proceedings were dismissed. (*Royal Trust Co. v. Exchange Bank of Cortland, supra.*) This last step does not appear in the record, but all the facts leading to our judgment in the main case appear in this record, and would lead to the same conclusion if necessary to a decision. After the district court of Lancaster county reversed the county court judgment the Exchange Bank brought suit in the district court of Lancaster county against Kyd, the sureties on his official bond, and Mr. Flansburg, the attorney of the Royal Trust Company, to recover the money seized. To the petition Kyd filed a general demurrer. This demurrer was sustained for the reason, stated in the order, that the action was one within the second subdivision of section 54 of the Code of Civil Procedure, to-wit, that it was an action against a public officer for an act done by him in virtue of or under color of his office, and for that reason must be brought in the county where some part thereof arose. The original petition disclosed that fact, and also disclosed that all of Kyd's acts were performed in Gage county by virtue of or under color of the writ issued out of the district court of that county. After the demurrer was sustained the bank amended its petition. This time it proceeded against Kyd alone, and charged him for money had and received under a special contract. Kyd answered in several counts. One of them set up that the matters complained of arose from acts performed by Kyd by virtue of his office, and that the cause of action arose entirely in Gage county. The reply expressly admitted that the cause of action arose in Gage county, and, replying to other defenses, there were admissions which showed that the money had been delivered by the bank to Kyd as

sheriff, because of the execution. When the case came on for trial Kyd objected to the introduction of any evidence, for the reason that upon the pleadings plaintiff was entitled to judgment. In the motion for new trial it is alleged that the verdict is contrary to law. The point is specifically raised in the petition in error as to the jurisdiction of the court. We think it clear that the proceeding was one against a public officer for an act done in virtue or under color of his office. This did not appear from the amended petition, but the answer so pleads, and the reply admitting that the money had come into defendants hands as sheriff, and while he had an execution for the collection of that amount, and because thereof, that fact stood admitted as well as the further fact that the cause of action arose in Gage county.

The plaintiff claims that Kyd proceeded under color of his office only in making the levy, and that his subsequent receipt or retention of a specific sum of money under contract to refund it in a certain event was a personal agreement and not an official act. But all that he did towards the satisfaction of the execution was necessarily under color of his office, if not by virtue thereof. His contract to release or refund the money if the judgment should be duly superseded was a nullity. If his duty required him under such circumstances to repay the money, his promise created no additional liability. If his duty forbade him to do so, his contract was illegal and imposed no obligation. In either event the plaintiff must trace its right through the sheriff's official duty and not through the special contract.

But plaintiff asserts that Kyd, by demurring to the original petition, appeared generally, and cites in support of that contention *Kane v. Union P. R. Co.*, 5 Neb. 105. That case holds that the objection to the jurisdiction in a similar case is to the jurisdiction of the person of the defendant and not to the jurisdiction of the subject-matter, and that it is waived by general demurrer. Without considering whether that decision was sound in its prem-

ises it is not applicable to this case. There the demurrer was to the petition on which the case was tried, the demurrer was overruled, and the defendants answered. If the want of jurisdiction appeared on the face of the petition and the defendant demurred generally, perhaps that waived the defect under the state of pleadings in *Kane v. Union P. R. Co.* If so, the plaintiff in this case should have stood on its petition, because here the demurrer was to the original petition and the demurrer was sustained. Whether it was rightly or wrongly sustained the plaintiff waived the error by yielding to the order and amending. The amended petition did not disclose the want of jurisdiction. The defendant did not demur to that, but he answered; and this was the proper method of objecting to the jurisdiction, even of the person of the defendant, where the want of jurisdiction did not appear from the summons, or return, or the petition itself. (*Hurlburt v. Palmer*, 39 Neb. 158.) The defendant may not have chosen the proper method to raise the objection to the original petition, but the court held it to be proper and sustained his contention. The plaintiff yielded to the ruling and amended, and the defendant at the first practicable stage again raised the question. We cannot hold that the defense was waived by a successful, although perhaps erroneous, insistence thereon. The plaintiff itself waived the error. The district court of Lancaster county was without jurisdiction.

REVERSED AND REMANDED.

PEASE PIANO COMPANY V. JAMES S. CAMERON.

FILED NOVEMBER 3, 1898. No. 8335.

1. **Instructions:** EXCEPTIONS. An exception to all of the court's instructions, without distributive words, is unavailing if any portion of the charge be correct.

2. ———: EVIDENCE: REVIEW. It is not error to refuse an instruction where the only evidence offered to which the instruction would be applicable was rejected. In such case the error, if any, is in rejecting the evidence.

3. **Examination of Witnesses:** SECONDARY EVIDENCE. Although a question is so framed as to apparently call for matters within the knowledge of a witness, or to call his attention to a writing merely to refresh his memory, it is proper to exclude the answer when from what has preceded it is clear that the answer would be not as a matter of personal knowledge, but in the nature of secondary evidence as to the contents of the writing.

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

D. W. Merrow and *A. A. McClanahan*, for plaintiff in error.

C. F. Breckenridge and *R. W. Breckenridge, contra.*

IRVINE, C.

The petition of Cameron against the piano company was in six counts, each asserting a claim arising out of transactions under a contract whereby Cameron acted as a factor in handling and selling pianos of defendant's manufacture. Cameron had judgment and the defendant brings the record here for review. All the matters argued arise out of the second count of the petition. In this plaintiff averred that he had sold pianos in the city of Omaha to each of eight persons named, and had made payment therefor, either in cash or in notes of the purchaser; that commissions were due him in amounts stated on each of said sales. To this count the defendant answered, admitting the sales, alleging that they were made in the form of "leases,"—a term not any place well defined, but which seems to be used in the sense of contracts of sale reserving title in the vendor as security for unpaid purchase-money; that purchaser's notes were taken indorsed by Cameron, and that the purchaser had in each instance failed to pay an amount equal to that for which Cameron was bound to account to the defendant. The affirmative averments were denied in the reply.

The questions sought to be litigated are whether under the contract Cameron was a factor on a *del credere* commission, whether he had discharged his duties on delivery of notes of the purchasers accepted by the defendant, or whether, on the other hand, he was entitled to compensation only after actual payment to the defendant. The record does not properly present these questions.

The court of its own motion gave an instruction as to the meaning of the contract contrary to defendant's theory, and refused one tendered by defendant embracing that theory. The giving of the one and the refusal of the other are assigned as error. But the exception was generally to all the paragraphs of the court's charge, without distributive words. By a line of decisions beginning with *McReady v. Rogers*, 1 Neb. 124, such an exception is unavailing if any portion of the charge be correct.

The instruction tendered by defendant was to the effect that defendant was entitled to collect and receive the whole amount accruing to it under a sale before any commission was earned. This was not applicable to any evidence before the jury. All that was offered for that purpose was excluded. The exclusion of that evidence is assigned as error under a general assignment directed to the whole class of testimony. Rulings on the subject are found at two places in the bill of exceptions. The deposition of Mr. Lay was read. He testified that he was defendant's book-keeper; that settlement was made for the pianos described in the second count in purchaser's notes. On the taking of the deposition in Chicago one of the defendant's books was identified by the witness and a sufficient foundation was laid for its introduction in evidence, but it was not offered. Instead thereof the witness was asked to "state, refreshing your memory from the book about which you have just testified, how many, if any, of the persons named had paid in full on their leases on the 17th day of November, 1894." An objection

to the question was sustained. An offer was made to show by the answer that none had paid in full. The bill of exceptions does not show what answer in fact appeared in the deposition. While the witness was asked to refresh his memory from the deposition it is quite clear from the context that he was not speaking from any personal knowledge of the transactions, and that the attempt was really to avoid offering the book by putting in, in the manner indicated, secondary evidence of its contents. The question was repeated with an immaterial variation, and the same ruling made. Mr. Robinson, a traveling salesman of defendant, was on the stand and his testimony on the same subject was excluded, but only after he had testified that his information was in part, if not altogether, gained by inspection of letters written to defendant by Cameron. These letters were presumably in possession of defendant and were not produced. To have permitted the witness to answer the questions as put would not only be to allow secondary evidence of the contents of written instruments in the control of the party offering the proof, but to allow a witness to give his conclusions from a number of such instruments. The district judge said, in ruling on the objections, that he would hold that the evidence offered was "immaterial." This may have been a slip of the tongue, or it may have indicated an erroneous impression as to the nature of the evidence. But the testimony was incompetent and was properly excluded for that reason. The judgment cannot be reversed for a correct ruling, although an erroneous reason may have been given therefor.

AFFIRMED.

JAMES GADSDEN, APPELLANT, V. GEORGE THRUSH, APPELLANT, AND SCHUYLER NATIONAL BANK ET AL., APPELLEES.

FILED NOVEMBER 3, 1898. No. 8315.

1. **Pleading:** FAILURE TO FILE ANSWER: ESTOPPEL: REVIEW. A party to an action who has failed to answer the petition of another party, stating a cause of action against him, cannot be heard on appeal to question the correctness of a judgment entered on such petition, although other parties put its averments in issue and it was not sustained by the proof.

2. **Mortgages:** DELIVERY: CONTRACT. A executed a note and mortgage to B for the purpose of obtaining a loan from the latter. They were delivered to C, who was to act as an intermediary. B refused to make the loan, whereupon C advanced to A the money from the funds of a bank of which C was cashier. The bank retained the note and mortgage without change and without redelivery, A not knowing how the loan was effected. *Held*, That the mortgage was inoperative, there being no consensus, and there never having been an effectual delivery.

3. ———: PRIOR LIENS: ESTOPPEL. A mortgagee is not estopped from assailing the validity of an apparently senior lien by a mere exception from the mortgagor's covenant against incumbrances of a class of liens which would include that assailed if it were valid.

4. ———: NATIONAL BANKS: USURY: ESTOPPEL. A national bank took as security for a debt, partly pre-existent and partly created at the time, a real estate mortgage, naming an individual, an officer of the bank, as mortgagee. The transaction was usurious. *Held*, That having given the transaction the form of one with an individual for the purpose of evading the liabilities peculiar to national banks, the bank could not be heard to assert its true nature for the purpose of evading the liabilities attaching to individuals and of claiming the privileges of national banks.

APPEAL from the district court of Dodge county. Tried below before MARSHALL, J. *Reversed.*

Frick & Dolezal, for appellants.

Charles J. Phelps, Phelps & Sabin, George H. Thomas, J. A. Grimison, and *Miles Zentmeyer, contra.*

IRVINE, C.

This was an action by Gadsden to foreclose a mortgage made to him by George Thrush and wife. No controversy exists between the parties named. Certain other parties claimed liens on the mortgaged premises. The decree established a first lien in favor of the First National Bank of Schuyler, a second in favor of the Schuyler National Bank, a third in favor of the Nebraska State Bank, and a fourth in favor of the plaintiff. The plaintiff and Thrush appeal; the plaintiff because the court awarded the First National Bank priority over him, and Thrush complaining against the allowance of any lien to the First National Bank, and also because, on a plea of usury by him interposed against the claim of the Schuyler National Bank, the court declined to permit the remedy afforded by the state law, but allowed the principal of the debt with a forfeiture only of unpaid interest.

We shall first consider the case as regards the First National Bank. The lien awarded that bank as a senior lien arose out of a mortgage executed to J. C. Noyes. Noyes does not seem to have been originally a party, but filed an answer and a cross-petition, or such were filed on his behalf. Thereafter an order was made substituting the First National Bank for Noyes as a defendant, and no exception was taken to that order. The bank alleged the making and delivery to Noyes of the mortgage and notes secured thereby, and then pleaded an assignment of the notes and mortgage to the bank. To its cross-petition alleging such facts Thrush made no answer, and so confessed the same. His appeal on this branch is disposed of by that fact. After, by suffering default, confessing the facts pleaded, he cannot take advantage of the proof made by other parties in support of issues by them joined.

The plaintiff answered the cross-petition, among other things denying the averments of an assignment to the

bank and pleading that Thrush had executed the notes and mortgage for the purpose of obtaining a loan from Noyes, and that Noyes had refused to accept the notes or mortgage. The evidence shows that Thrush was indebted either to the First National Bank or to Mr. Bryant, its cashier, in an amount almost equal to the amount of the mortgage. Bryant desiring satisfaction of the debt, suggested to Thrush that probably Noyes would, on the real estate security, lend Thrush enough to discharge the debt. Noyes was an officer of the bank and is in the mortgage described as a citizen of Wisconsin. The notes and the mortgage were executed and handed to Bryant to complete the transaction. Bryant filed the mortgage for record; but Noyes, on learning of the transaction, repudiated it and refused to advance the money. The papers remained with Bryant. Bryant delivered the old notes to Thrush and paid him a small balance in money. This was entered on the books of the bank as a loan by the bank, and the bank seeks to enforce the mortgage as security therefor. It does not appear that Thrush knew that Noyes refused the loan or that he was thereafter dealing with the bank. It is quite clear that Bryant, when Noyes refused to adopt the contract, assumed that the bank might adopt it and retain the security intended for Noyes. It is evident that there was never any legal delivery of either note or mortgage, or if there was, that the consideration failed. They were executed for the specific purpose of securing a loan to be made by Noyes; their possession by Bryant was only that he might act as an intermediary in completing the contract. There was no privity or semblance of privity between Thrush and the bank and no intention of executing a mortgage to the bank or getting a loan from it. Without delivery to and acceptance by the mortgagee the mortgage never became operative. There is no evidence, of course, to support the averment of an assignment by Noyes to the bank. There was neither consensus, nor execution of the contract, and the mortgage is void. (*Shirley v. Burch*, 16 Ore. 83.)

It is argued that the plaintiff is estopped by the terms of his own mortgage from contesting the validity of that in question. Estoppels generally must be pleaded, and this is not pleaded. But the facts create no estoppel. The cases enforcing estoppels against a junior mortgagee and in favor of an asserted claim prior in time are, it is believed, cases where, by recitals in the junior mortgage or by matters *in pais*, the validity of the senior is recognized. There is another class of cases, usually affecting vendees rather than incumbrancers, where a deduction from the consideration money has been made, to compensate the senior lien, and where an equitable obligation arises to discharge it or permit its discharge regardless of its validity. The case before us does not fall within either principle. The mortgage was on the whole estate and recognizes no particular lien. There is simply an exception from Thrush's covenant against incumbrances of "mortgages as now recorded in the county clerk's office of Dodge county, Nebraska." This simply relieved Thrush from any liability under his covenant on account of any then recorded mortgages, whether good or bad. It was very different from a stipulation in the mortgage whereby the mortgagee took his rights expressly subject to the claims of another, or where his mortgage attached only to the residue of the estate after satisfying a prior lien. The proof did not in any way support the averments of the cross-petition; it did support those of plaintiff's answer thereto.

We now come to the lien of the Schuyler National Bank. Thrush was largely indebted to that bank. He obtained a further loan and executed to the bank a note for $5,000 to represent the consolidated indebtedness. At the same time there was made a note for a like amount to William H. Sumner and a mortgage to Sumner to secure the latter note. Sumner was an officer of the bank. He had no individual dealings with Thrush and the sole purpose of the note and mortgage to him was to secure the debt to the bank. Certain payments were made on

the bank's note, so that when it came to foreclosure the bank claimed as due only $3,229. To the cross-petition of Sumner, in which the bank was permitted to join, Thrush pleaded usury. It was clearly shown that the transactions between Thrush and the bank were tainted with usury, and the court so found. But the view was taken that, as the transaction was in effect with a national bank, the remedies afforded by the act of congress in that behalf were exclusive, and that Thrush was not entitled to the benefit of the state laws, whereby he might set off against the principal all payments made of interest. Accordingly there was allowed this bank its principal. It is now firmly established that as against a national bank the remedies allowed by act of congress in case of usury are exclusive, and that payments of usurious interest may not be set off in an action for the debt. But the case before us is complicated by the fact that the mortgage and note here in question were not made to the bank, but to an individual amenable to the state laws, who joins the bank in enforcing the security. We have been cited to no authority on the precise question thus presented, nor, in the course of an independent investigation, necessarily somewhat cursory, have we discovered any. We think, however, that under the circumstances the bank is in no position to assert any privilege under the act of congress.

The inference from the direct testimony and from the circumstances is that if the object of procuring the note and mortgage to be executed to Sumner was not to evade the penalties of the act of congress with respect to usury, it was to evade the inhibition against the taking by a national bank of real estate security for loans made at the time. Whether that inhibition applies to a case where a portion of the debt was pre-existent we need not inquire, because it is now settled that a violation of that enactment does not afford the debtor any ground of relief; the government alone may complain. Still, whichever motive influenced the bank, the object was to evade

the burdens attaching to its position as a national bank. It would be highly unconscionable to permit a person to give a contract a false form to evade the burdens which would follow from its true expression, and then permit him to show the truth as against the form to evade the burdens cast by a contract in the form which has been so chosen. It is said that Thrush might certainly have recovered the penalty, denounced by congress, by an independent action within the period of limitations against the bank, and that therefore the transaction must be regarded as one within the act of congress. This does not follow. One may render himself liable because of a false aspect he throws upon his transactions, and at the same time be thwarted in his effort to evade another liability to evade which he has selected the false aspect. The terse head-note to *Hayes v. People*, 25 N. Y. 390, illustrates the principle: "A married man, it seems, imagining himself to effect mere seduction, may blunder into bigamy."

The decree of the district court is reversed and the cause remanded with directions to ascertain the amount of money advanced to Thrush by the Schuyler National Bank, deduct therefrom all payments, whether of principal or interest, and award foreclosure for the remainder, if any; to postpone the lien of the First National Bank to that of the plaintiff, and for such further proceedings as may be necessary and not inconsistent with this opinion.

REVERSED AND REMANDED.

I. K. BOYESEN V. JACOB HEIDELBRECHT.

FILED NOVEMBER 3, 1898. No. 8391.

Verdict Disregarding Instructions: REVIEW. A verdict rendered in plain disregard of instructions is contrary to law and will ordinarily be set aside, whether or not the instructions were correct.

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

Talbot & Allen and *W. H. Barnes,* for plaintiff in error.

John Heasty, contra.

IRVINE, C.

This was an action by Boyesen, claiming as a purchaser for value, before maturity, of a note made by Heidelbrecht to the Warder, Bushnell & Glessner Company. The defense was that the note was one of three given in payment for a harvesting machine; that the machine had been sold with a warranty; that by the terms of the contract, if the machine failed to comply with the warranty, it might, under certain conditions, be returned and the contract rescinded; that the machine did not comply with the warranty, the conditions had been complied with, the machine returned and the contract rescinded; that plaintiff was not a *bona fide* holder for value. There was a verdict and judgment for defendant.

A glance at the instrument sued on suggests a question as to whether it is negotiable, but both parties so treated it by their pleadings, their course on the trial, and by requests for instructions. There was evidence that plaintiff bought the note before its maturity, paying therefor a little less than its face value, and without any knowledge of the existence of any defense thereto. The note on its face shows that it was given for a machine, but that fact would not charge the plaintiff with notice of the warranty, its breach, or the rescission of the contract. The manager of the original payee testified as to the sale of the note and that at the time even he did not know of any defense thereto. As against the proof of a purchase in good faith there is evidence that plaintiff had in different matters acted as an attorney of the payee of the note, but it was not shown that he occupied such a relation

with respect to this matter or that he knew anything thereof. It was shown that he had previously purchased other notes from the payee, and that the transaction was not unusual. It also appeared that the attorney who brought this suit had done business for the payee of the note. These circumstances are entirely insufficient to rebut the proof of an innocent purchase. Under the evidence and the instructions of the court, which forcibly and perhaps too strongly stated the privileges of an innocent purchaser, before maturity, of negotiable paper, the plaintiff was entitled to a verdict. The verdict was rendered in plain disregard of these instructions. A verdict so rendered is contrary to law, whether the instructions be correct or not. (*Aultman v. Reams*, 9 Neb. 487; *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229; *Standiford v. Green*, 54 Neb. 10.) While a judgment will not be reversed for that reason if the verdict be the only one which could properly be rendered (*Dern v. Kellogg*, 54 Neb. 560), this case does not fall within the exception. If we were to determine that the note was not negotiable and that therefore the instructions in this respect disregarded were not applicable to the case, still the evidence on other issues was conflicting, and as the jury disregarded its duty as to one issue it may have done so as to all.

REVERSED AND REMANDED.

CITY OF YORK ET AL. V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED NOVEMBER 3, 1898. No. 8408.

1. **Constitutionality of Statute:** PLEADING. When it is claimed that a statute or ordinance is invalid because it is in its substance violative of the fundamental law, the inference of invalidity being one following from the fundamental law as compared with the act in question, it is sufficient to generally allege that it is invalid.

2. ———: ———. When the claim is that such an act or ordinance is invalid, not because of its substance, but because not regularly passed or adopted, the defect in the procedings must be specifically pleaded. It is insufficient to allege generally that it was not legally adopted.

3. **Municipal Corporations:** OCCUPATION TAX: RAILROAD COMPANIES: CONSTITUTIONAL LAW: INTERSTATE COMMERCE. A city of the second class adopted an ordinance imposing an occupation tax "on each railroad corporation or company carrying or transporting freight or passengers to or from any point or place within the limits of this city, and to or from any point or place within the limits of this city and any point or place within the limits of this state, and having a depot or place of business within the limits of this city for receiving or discharging such passengers and receiving and delivering such freight. All interstate traffic, commerce, or business of such companies or corporations is hereby excepted and exempted from the levy of such tax." *Held*, (1) That such ordinance was not violative of the federal constitution as imposing a burden on interstate commerce (*Postal Telegraph Cable Co. v. City of Charleston*, 153 U. S. 692, followed); (2) that the statute authorizing the imposition of such a tax was not violative of the state constitution (*Magneau v. City of Fremont*, 30 Neb. 843, followed); (3) that the ordinance was not void because imposing a tax on a business not wholly carried on within the city imposing the tax (*Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692, followed); (4) that the ordinance was not an attempt to impose a tax on the depot of the complaining company in addition to the tax arising from the general assessment of its property.

4. ———: ———: ———: ———. The reference to depots and places of business in such ordinance is merely descriptive of the class of corporations to be taxed, and for the purpose of excluding those doing no part of their business within the city.

5. ———: ———. Section 6 of article 9 of the constitution fixes the power of the legislature to authorize municipalities to impose taxes for municipal purposes, and is independent of section 1 of the same article, which authorizes the legislature to directly impose taxes for general purposes. Therefore the limitation of occupation taxes in section 1 to certain named occupations does not forbid taxes on other occupations for municipal purposes alone.

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

The opinion contains a statement of the case.

T. E. Bennett, for plaintiffs in error.

References as to insufficiency of petition: *Campbell v. Morrison*, 7 Paige [N. Y.] 157; *Bank of Orleans v. Skinner*, 9 Paige [N. Y.] 305; *Pelton v. Bemis*, 44 O. St. 51; *Southard v. Dorrington*, 10 Neb. 120; *South Platte Land Co. v. City of Crete*, 11 Neb. 344; *Dundy v. Richardson County*, 8 Neb. 508; *Northern P. R. Co. v. Barnes*, 51 N. W. Rep. [N. Dak.] 386; *Raleigh & G. R. Co. v. Lewis*, 5 S. E. Rep. [N. Car.] 82; *Mace v. Commissioners*, 5 S. E. Rep. [N. Car.] 740; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Horn Silver Mine Co. v. People*, 12 Sup. Ct. Rep. 403; *Lehigh V. R. Co. v. Pennsylvania*, 145 U. S. 192; *United Line Telephone Co. v. Grant*, 32 N. E. Rep. [N. Y.] 1005; *Odlin v. Woodruff*, 12 So. Rep. [Fla.] 227; *Brewer v. City of Springfield*, 97 Mass. 152; *Dows v. City of Chicago*, 11 Wall. [U. S.] 108.

The ordinance imposing the tax does not violate the constitution of the state. (*Templeton v. City of Tekamah*, 32 Neb. 544; *Magneau v. City of Fremont*, 30 Neb. 843; *State v. Bennett*, 19 Neb. 191.)

The tax is not repugnant to the federal constitution. (*Memphis & L. R. R. Co. v. Nolan*, 14 Fed. Rep. 538; *Osborne v. Mobile*, 16 Wall. [U. S.] 479; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. [U. S.] 456; *Postal Telegraph Cable Co. v. City of Charleston*, 153 U. S. 692; *Richmond & D. R. Co. v. Town of Reidsville*, 8 S. E. Rep. [N. Car.] 124.)

The enumeration in the constitution of certain subjects for taxation does not preclude the legislature from imposing other taxes where there is no prohibition. (*State v. Ream*, 16 Neb. 681; *State v. Lancaster County*, 4 Neb. 537; *Shaw v. State*, 17 Neb. 334; *State v. Dodge County*, 8 Neb. 124.)

Restrictions upon the exercise of the government's power of taxation cannot be raised by implication, but must be expressed in clear and unambiguous language. (*Sawyer v. City of Alton*, 3 Scam. [Ill.] 127.)

J. W. Deweese and *F. E. Bishop, contra.*

References as to sufficiency of petition: *Orgall v. Chicago, B. & Q. R. Co.*, 46 Neb. 4; *Sage v. City of Plattsmouth*, 48 Neb. 558; *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb. 877.

The ordinance imposing the tax is void. It is a charge and regulation upon interstate commerce, and violates the commercial rights guarantied by the national government. (*Southern R. Co. v. City of Asheville*, 69 Fed. Rep. 361; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Clyde Steamship Co. v. City of Charleston*, 76 Fed. Rep. 46; *Leloup v. Port of Mobile*, 127 U. S. 648; *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411; *Crutcher v. Kentucky*, 141 U. S. 47; *Webster v. Bell*, 68 Fed. Rep. 185.)

Neither the city nor the state has authority to tax the business of keeping and maintaining a depot which is a necessary instrument of interstate commerce. (*McCall v. California*, 136 U. S. 104; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114; *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688; *Leloup v. Port of Mobile*, 127 U. S. 648; *Crutcher v. Kentucky*, 141 U. S. 58; *Lyng v. Michigan*, 135 U. S. 161.)

The ordinance violates the state constitution. Subjects of taxation are limited to those enumerated in the constitution. (Constitution, art. 9, secs. 1, 6; *Miller v. Wheeler*, 33 Neb. 765; *Updike v. Wright*, 81 Ill. 53; *Pomeroy v. Pomeroy*, 67 N. W. Rep. [Wis.] 430; *Missouri P. R. Co. v. Haley*, 25 Kan. 35; *Snyder v. Wabash, S. L. & P. R. Co.*, 86 Mo. 613.)

The railroad property, being a unit, is not subject to taxation, except under statutory provision for assessment by the state board. (*Lake Shore & M. S. R. Co. v. City of Grand Rapids*, 60 N. W. Rep. [Mich.] 770; *Gulf R. Co. v. Morris*, 7 Kan. 222; *Chicago & N. W. R. Co. v. Forest County*, 70 N. W. Rep. [Wis.] 79; *Virginia & T. R. Co. v. Washington County*, 30 Gratt. [Va.] 481.)

F. C. Power, also for defendant in error.

IRVINE, C.

This was an action by the Chicago, Burlington & Quincy Railroad Company against the city of York and its treasurer, the object whereof was to restrain the defendants from collecting an occupation tax which the city had undertaken by ordinance to levy against the railroad company. An answer was filed admitting certain averments of the petition and denying others, but pleading no material new matter. Next on the record appears a motion for judgment, and in one of the briefs it is stated that judgment was entered on the pleadings in pursuance of the motion; but it appears from the decree itself that the case was heard not only on the pleadings, but on the "statements and admissions of the parties," and the decree contains findings for the plaintiff. An injunction was allowed as prayed. There is no bill of exceptions, and we have, therefore, no means of knowing what were the "statements and admissions" whereon the court found the issues for the plaintiff. We must therefore assume that these statements and admissions were sufficient to sustain the findings, and must review the case solely to ascertain whether the decree was one which might properly be entered under the pleadings. In other words, practically the only question before us is whether the petition stated a cause of action.

The petition alleged that the plaintiff was a corporation owning and operating a system of railroads, one line of which runs from Chicago westerly through Iowa and Nebraska, and extending into the state of Montana; that said line runs through the city of York; that in said city the plaintiff has a depot for its use in the traffic; that plaintiff's business at York consists wholly of receiving and transporting freight and passengers to said depot in said city from points outside of said city inside and outside of the state of Nebraska, and from said depot to points outside of said city in the state of Nebraska and outside of Nebraska; that no portion of plaintiff's

business is confined within the limits of the city. The petition further avers that the mayor and city council of York pretended to pass an ordinance entitled "An ordinance levying a license tax upon occupations and business within the limits of the city of York, Nebraska; to raise revenue, and providing for collection of such tax, and to repeal all ordinances and parts of ordinances in conflict with the provisions of this ordinance." The essential parts of the ordinance are then pleaded. In its first section it levies a license tax upon the several occupations and businesses within the limits of the city "in this ordinance hereinafter enumerated, to raise revenues thereby in the several different sums on the several different businesses and occupations respectively, as follows." The fourth section is as follows: "The sum of $50 on each railroad corporation or company carrying or transporting freight and passengers to and from any point or place within the limits of this city, and to and from any point or place within the limits of this city and any point or place within the limits of this state, and having a depot or place of business within the limits of this city for receiving and discharging such passengers and receiving and delivering such freight. The interstate traffic, commerce, or business of such companies or corporations is hereby excepted and exempted from the levy of such tax." The ordinance also provides for enforcement of the tax by distress and sale of personal property. The petition then alleges that the defendants threaten to enforce payment by plaintiff of such tax by distress of its property within the city; that the city had no power or authority to pass the ordinance or impose a tax or license upon plaintiff in its occupation or business in said city; that the ordinance is in contravention of the constitution of Nebraska and the constitution of the United States, and, if enforced, results in double taxation of plaintiff. The petition also contains the following averment: "The plaintiff alleges that said ordinance * * * was never passed legally and as by law

provided so as to make it a valid ordinance." So far as the last averment is concerned it is clearly the pleading of a conclusion of law without any pleading of any ultimate traversable facts which would lead to such conclusion. When an act is legal or illegal because of the existence or non-existence of certain facts, those facts must be pleaded. The mere assertion of illegality is not enough. It tenders no issue. Moreover, from certain special findings it is clear that the court did not act on this averment, so that we are relegated to an investigation of the legality of the ordinance, assuming that it was regularly passed. We think this question is properly raised by general averments that it was such an ordinance as the city had no authority to pass; because when the terms of the ordinance are pleaded, its validity or invalidity on this ground are solely inferences of law from the facts pleaded.

The attack on the validity of the ordinance may be analyzed as follows: First, that it is in violation of the interstate commerce clause of the federal constitution; second, that it was passed under a pretended authority contained in the charter of the city, which, under the constitution of the state, the legislature had no power to confer; third, that it undertakes to tax business in part, at least, not conducted within the city; and fourth, that it is an attempt to indirectly retax the company's station or depot property after the same had already been assessed and taxed in pursuance of the general law.

1. The argument on the first head is that the ordinance necessarily imposed a burden on the interstate business of the company. It will be observed that the ordinance contains an express exception from its operation of such interstate business. In this aspect the case is precisely analogous to *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692, 43 Neb. 499. After the decision of that case, and before a motion for rehearing was ruled upon, the supreme court of the United States announced a similar opinion in *Postal Telegraph Cable Co. v. City of*

Charleston, 153 U. S. 692. We must therefore hold, following those cases, that the ordinance infringes no right of plaintiff under the federal constitution.

2. Under the second head attention is called to sections 1 and 6 of article 9 of the constitution of Nebraska. Section 1 is as follows:

"The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

"Section 6. The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

The argument on this head is that section 1 contains a special provision authorizing occupation taxes on certain occupations named in the section, without general words, and that this prohibits the imposition of any such taxes on occupations not within the classes enumerated; that the sixth section was adopted with reference to the first, and applies only to local assessments and taxes based on the general valuation of property. The argument, it must be conceded, has great force, but we do not think it is sound, and it is contrary to the past decisions of this court. In the following cases the general

power of the legislature to authorize municipalities to impose occupation taxes has been recognized: *State v. Bennett*, 19 Neb. 191; *City of Columbus v. Hartford Ins. Co.*, 25 Neb. 83; *State v. Green*, 27 Neb. 64; *Magneau v. City of Fremont*, 30 Neb. 843; *Templeton v. City of Tekamah*, 32 Neb. 542; *Western Union Telegraph Co. v. City of Fremont, supra; German-American Fire Ins. Co. v. City of Minden*, 51 Neb. 870. It is true that in most of these cases the tax in question was levied upon an occupation described in section 1 of article 9 of the constitution, but that is not true of *Templeton v. City of Tekamah* or *Magneau v. City of Fremont*. An inspection of the record in the latter case discloses that the suit was brought by a large number of persons engaged in divers lines of business, many of them not within the enumerated classes. The question here presented was there distinctly raised and argued, and by the court decided adversely to the claim of plaintiff. The decision was largely based on the similarity between our constitutional provisions and those of Illinois, and the construction which had been placed on the Illinois constitution by the supreme court of that state prior to the adoption of our constitution. (*Wiggins v. City of Chicago*, 68 Ill. 378.) It was said in the opinion that sections 1 and 6 of article 9 of our constitution "are identically the same as sections 1 and 9 of article 9 of the constitution of Illinois." Counsel now call our attention to the fact that there is a difference between section 1 of our constitution and the cognate section in Illinois, in that the Illinois constitution, after enumerating the same occupations as ours, adds certain general words. Our attention is also called to the fact that there is another section of the Illinois constitution in express terms rendering specific sections authorizing taxation not exclusive of power to impose other taxes. Still we think the error in statement in *Magneau v. City of Fremont* was verbal only; that the case cited from Illinois was justly entitled to the effect there given it, and that the construction there adopted was correct. Section 6 of our consti-

tution and the cognate section of the Illinois constitution are identical. In *Wiggins v. City of Chicago* the tax complained of was imposed upon an auctioneer, who was actually within the enumerated classes upon whom an occupation tax by the express terms of the constitution might be imposed, and the argument there was that, inasmuch as the legislature was granted power to directly tax such occupations, it could not impose a double tax by authorizing a municipality to also tax them. The court held that taxation for general state and county purposes, and taxation for municipal purposes, were distinct; that the imposition of the tax for each was not a double taxation; and that the grant of power in section 1 did not prevent the legislature, under section 6, from authorizing an occupation tax for municipal purposes, whether or not the occupation taxed was one enumerated in section 1. Such, no doubt, we think, is the force of our constitution. Section 1 fixes the power of the legislature to provide general revenues. Section 6 fixes its power to authorize municipalities to raise revenue for municipal purposes. By section 7 the legislature is forbidden to impose taxes upon municipal corporations, or upon the inhabitants or property thereof, for corporate purposes. This section shows the distinction regarded by the constitution when it authorized the legislature directly to provide revenue by levying taxes and gave it power to tax peddlers, etc., and when in a separate article it gave it power, not to levy a tax for municipal purposes, but to authorize the municipalities themselves to do so. The provisions of section 1 have nothing to do with those of section 6; and the reasons, aside from those already given for holding that the levying of an occupation tax on classes not within section 1 is within the power granted by section 6, are so well stated in *Magneau v. City of Fremont* that we need not here repeat them.

3. The plaintiff contends that it does no business, either by way of transporting freight or passengers, from one point within the city of York to another point within

the city of York; that its entire business connected with York is to carry freight and passengers from points without the city into the city, and from the city to points without the city; that no portion of its business can properly be considered business within the city, and that the city can, therefore, not properly impose a tax on such business. A precisely similar point arose with regard to the transmission of telegrams in *Western Union Telegraph Co. v. City of Fremont, supra,* and the decision was adverse to the plaintiff's position. The writer dissented in that case from the opinion of the court, and he is still of the opinion that the position of plaintiff on that question is well taken, but the case cited was decided after full hearing and deliberation. The majority opinion in that case voiced the final and mature judgment of all the judges and commissioners, except Judge POST and the writer, and Judge POST, in the opinion denying a rehearing, 43 Neb. 499, while expressing an inclination to the writer's views, felt compelled, after the decision of the supreme court of the United States in *Postal Telegraph Cable Co. v. Charleston,* to adopt the conclusion of the majority. That view must now be adhered to.

4. So far as the plaintiff assails the ordinance on the ground that it is an attempt to doubly tax its depot, we think it clearly mistakes the effect of the ordinance. The tax is not imposed upon the depot or place of business, but it is imposed upon the occupation of carrying freight and passengers to and from the city, and is restricted to those corporations having a depot or place of business within the limits of the city for the transaction of such business. The words are used merely as defining the class to which the tax applies, and for the purpose of excluding from its operation any railroad company which might perform some part of the work of carrying freight or passengers to or from the city, but which had no place of business within the city. Such a company, so far as its part of the work is concerned, would perform no

part of it within the city, and would not be amenable to city taxation. The restriction of the tax to companies actually operating within the city was all that was intended by this phrase. It does not operate, directly or indirectly, as a tax on the depot.

The ordinance is not invalid for any of the reasons asserted, and the sufficiency of plaintiff's petition depending upon its invalidity, the petition stated no cause of action, and the plaintiff was not entitled to the relief granted.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. VICTOR ROSEWATER, V. SILAS A. HOLCOMB, GOVERNOR.

FILED NOVEMBER 17, 1898. No. 10007.

Denial of writ of mandamus to require the performance of duties prescribed by a void act of the legislature.

ORIGINAL application for mandamus to compel the governor to conduct personally a trial of charges against certain members of the board of fire and police commissioners of the city of Omaha. *Writ denied.*

Edward W. Simeral, for relator.

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

PER CURIAM.

This action was to compel the respondent to perform certain duties claimed to devolve upon him by virtue of his office. In *State v. Moores*, 55 Neb. 480, it was held that the act of the legislature of 1897 (Session Laws 1897, p. 124, ch. 10, secs. 166-168), in so far as it assumes to confer authority upon the governor to appoint fire and police commissioners in cities of the metro-

politan class, is void. The duty of which it is now sought to compel the performance depends for its exercise upon the force of the statute above referred to, and, as the statute is void, no such duty exists, and therefore its performance cannot be controlled by mandamus. The writ is therefore

DENIED.

STATE OF NEBRASKA, EX REL. HENRY FOX, JR., V. N. A. CLARK, COUNTY CLERK OF NUCKOLLS COUNTY.

FILED NOVEMBER 17, 1898. No. 10430.

Nominating Conventions: VACANCY: DUTY OF COUNTY CLERK: MANDAMUS. A county convention of a political party met and made nominations for the various county offices to be filled at the ensuing regular election, and, by resolution passed, authorized the county central committee to nominate to fill any vacancies that might occur in the nominations of the convention. To the chairman and secretary of the convention was by law assigned the task of preparation of a certificate of the nominations and its filing with the proper officer of the county. They carelessly and inattentively omitted from it one nomination. *Held*, That this created such a vacancy as was within the meaning of the provisions of a portion of a section of the election law, which reads as follows: "Should any person so nominated die before election day, or decline the nomination, as in this act provided, or should any certificate of nomination be insufficient or inoperative, the vacancy or vacancies thus occasioned may be filled in the manner required for original nominations. If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies such committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and secretary of such committee shall thereupon make and file with the proper officer a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination. The certificate so made shall be executed and sworn to in the manner prescribed for the original certificate of nomination, and shall, upon being filed at least eight (8) days before election, have the same force and effect as an original certificate of nomination." (Compiled Statutes 1897, ch. 26, sec. 138, or section 13, Australian Ballot Law.)

ORIGINAL application for mandamus to compel the county clerk of Nuckolls county to insert in the official ballot the name of a candidate selected by the republican county central committee to fill a vacancy on the ticket nominated by the republican county convention. *Writ allowed.*

Cole & Brown, for relator.

G. W. Stubbs, contra.

HARRISON, C. J.

In a relation in an action of mandamus in which an order to the county clerk of Nuckolls county to place the name of Joseph Patterson, as nominee of the republican party for county commissioner of the first district of Nuckolls county, on the ballot, for the use of voters at the next regular election was asked, it was alleged, and for the purposes of the application admitted, that on August 5, 1898, during a session of a county convention of the republicans of Nuckolls county, there were nominated candidates for the several county offices to be filled by selection to be made by the voters at the ensuing regular election. Of the condidates then nominated was Joseph Patterson to canvass for the office of county commissioner for the first district of said county. Of the proceedings of the convention there was a resolution introduced and carried that the republican county central committee be empowered to fill all vacancies in the republican ticket which might occur. The chairman and secretary of the convention filled out and filed with the county clerk a purported certificate of the nominations of the convention, but, through carelessness, failed to include therein the name of Joseph Patterson, and omitted mention of the office for which he was selected as a candidate. When it became known to the persons interested that the certificate filed with the county clerk

was not effective of its purpose as to the one nomination, it was too late to do otherwise than to call the county central committee to assemble and fill the place on the ticket for which the name of no person had been certified as the nominee of the convention. The committee met and named Joseph Patterson for the place, and the action was certified by the chairman and secretary of said body, and the certificate filed with the county clerk at least ten days prior to the date of election. The action of the committee was to comply with its construction of the requirements of the provisions of sections 138 of chapter 26, Compiled Statutes 1897, or section 13 of what is styled the "Australian Ballot Law," which reads as follows: "Should any person so nominated die before election day, or decline the nomination, as in this act provided, or should any certificate of nomination be insufficient or inoperative, the vacancy or vacancies thus occasioned may be filled in the manner required for original nominations. If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and secretary of such committee shall thereupon make and file with the proper officer a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination. The certificate so made shall be executed and sworn to in the manner prescribed for the original certificate of nomination, and shall, upon being filed at least eight (8) days before election, have the same force and effect as an original certificate of nomination."

The sole contention for the respondent was that there was not a vacancy within the import of the section quoted above; hence he was not required in the prepara-

tion of the ballot to notice the certificate, and to put the name of Joseph Patterson thereon as a nominee for public office. While, by a labored effort in that direction, or by some refined reasoning for the purpose, doubtless the vacancy which existed in the roll of republican nominees when Joseph Patterson was nominated by the county central committee might be argued to be one which was not within the terms or meaning of the portion of the section of the election law which we have quoted, when the words employed are given their plain, ordinary significance, it appears that it is just such a vacancy as was in contemplation of the lawmakers in the enactment of said section. The county convention had made a nomination for the office of county commissioner, and its chairman and secretary, to whom was committed, both by the convention and the law on the subject, the work of preparation and filing the necessary certificate of the work of the convention in making nominations, so negligently or inattentively did it that the certificate was insufficient to show the complete results in nominations, and was so rendered inoperative as to the one herein in question, and there was thus created a vacancy in the nominations, clearly within the ordinary signification of the words employed in the section of the Australian Ballot Law to which we have referred. (See *People v. Hartley*, 170 Ill. 370.)

WRIT ALLOWED.

SENECA B. MCINTYRE v. UNION PACIFIC RAILWAY COMPANY.

FILED NOVEMBER 17, 1898. No. 8456.

1. **Instructions:** ASSIGNMENTS OF ERROR. An assignment of error in the motion for a new trial relative to giving instructions must be specific as to each. If *en masse*, and determined without force as to one, the assignment may be overruled.

2. **Carriers:** NEGLIGENCE: ACTION BY SHIPPER FOR VALUE OF HORSE: VERDICT FOR CARRIER. The verdict *held* not contrary to the evidence, nor open to the objection that there was not sufficient in the evidence to support it.

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

Martin Langdon, for plaintiff in error.

W. R. Kelly and *E. P. Smith, contra.*

HARRISON, C. J.

The defendant contracted to safely transport for plaintiff eleven stallions from Jersey, Colorado, to McCamon, Idaho, and during transit one of the horses died, it was alleged, through the carelessness and negligence of the company, its agents and employés. The particular allegation of the petition relative to carelessness and negligence was as follows: "That on the —— day of January, 1891, at Rawlins Station, in the state of Wyoming, the defendant, as such corporation and common carrier, by and through its agents and servants, so carelessly and negligently ran, managed, and operated its locomotive engine, and the cars upon which said stallion was being transported, that the said cars collided with and ran against other cars and obstacles upon said defendant's roads, which were under its control, with locomotive and cars aforesaid, by reason whereof said cars were broken to pieces and wrecked; and by reason of said carelessness and negligence on the part of said defendant, its agents, servants, and employés, said stallion was killed, without any fault or negligence on the part of plaintiff." The contract of shipment was one in which it was provided that some person for the shipper should accompany and have, in certain matters, charge of the live stock, and care for it. In the answer appeared the following statement: "Further answering, the said de-

fendant states on information and belief that when the said horse was placed in the said car it was fraudulently represented by the said plaintiff to be sound and in good health, whereas the said horse was at that time sick and diseased, without the knowledge of said defendant, and that by means of said representation the said plaintiff obtained said transportation of said horse so as aforesaid, which he could not and would not have obtained from the said defendant had said facts been known, and not been willfully and fraudulently concealed from the said defendant." In a trial of the cause to the court and a jury the defendant was given a verdict and judgment, and the plaintiff has prosecuted error proceedings to this court.

One argument is based upon alleged errors of the trial court in giving instructions of its own motion. In the assignment in the motion for a new trial these errors were grouped, and of the instructions embraced therein at least three were without error. This being determined, no further examination of this argument is necessary, or will be made. (*Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege*, 49 Neb. 321, and cases cited.)

It is argued that the verdict was contrary to the evidence, and not sustained by sufficient evidence. A close examination of the evidence discloses that by it it was left questionable or probably in doubt whether the animal received any injuries in the manner alleged in the petition, from which its death resulted; and it also presented conditions or facts from which allowable inferences might be drawn, and the death of the horse be attributable to a cause other than the alleged injuries, and one with which the company could in no manner or degree be chargeable,—*i. e.*, a sickness or disease of the horse. These were matters the settlement of which were directly within the province of the jury, and, with the concurrent conditions of the evidence such as we have just outlined, we do not feel warranted in saying that the decision, as embodied in the verdict, should be set

aside as either contrary to the evidence or not sustained by sufficient thereof. The judgment must be

AFFIRMED.

OMAHA NATIONAL BANK V. E. A. ROBINSON.

FILED NOVEMBER 17, 1898. No. 8458.

1. **Evidence:** REVIEW. The admission of immaterial evidence will, if prejudicial, work a reversal of a judgment.
2. ———: ———: HARMLESS ERROR. Errors in admission of evidence or giving instructions which were not prejudicial to the rights of the complainant are not cause for reversing a judgment.
3. **Attachment:** WRONGFUL SEIZURE: RATIFICATION BY PLAINTIFF. If, in an attachment in which the goods of a stranger to the suit have been taken and sold under the writ, the plaintiff, with knowledge of the true ownership of said goods, receives the proceeds of the sale, it constitutes a ratification of the levy. *Cole v. Edwards*, 52 Neb. 711, followed.

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

Hall & McCulloch, for plaintiff in error.

Gregory, Day & Day, contra.

HARRISON, C. J.

The firm of Edholm & Aiken was, during a portion of the month of January, 1890, and some years prior thereto, conducting a retail jewelry business in Omaha, and on the 18th of said month the bank, plaintiff in error herein, commenced an action against the firm to recover the amount of an indebtedness of the firm to the bank, and procured therein the issuance of a writ of attachment, which was levied on the stock of jewelry of the firm, inclusive of certain chains, etc., ownership of which was subsequently asserted by the defendant in error herein. At the time of the levy of the writ these particular articles were attached to or contained in what are

styled in the record "Canton flannel rolls," and were during business hours unwrapped or unrolled, and displayed in stock, and during hours when the store was closed or of nights kept in the safe. Defendant in error claimed that these goods were sent to Edholm & Aiken as samples, or "memorandum goods," or goods on selection, to be examined, such as were chosen to be retained by the customer and the others returned to the party from whom received and in whom the title remained until a report was made of the selections. These goods were sold under the levy of the process of attachment, and the proceeds applied in payment of the debt for the enforcement of which the writ had been issued, and the defendant in error instituted this action to recover of the bank their value, and as the result of a trial of the issues joined was awarded a judgment.

One of the issues of the litigation was whether the chains, etc., had been sold to Edholm & Aiken or sent to them on selection; and another was, did the bank actively direct the levy of the writ of attachment, and on these particular goods, or, if not, did it ratify the act of the officer in making the levy?

One of the alleged errors which is presented for plaintiff in error is in regard to the admission of testimony. In the appraisal of the goods levied upon a list of the articles was made which covered several pages of the paper used. Some of the pages were numbered and others were lettered, and the ascertainment of the reason for changing from numbers to letters for some of the pages of the inventory was made the subject-matter of interrogatories to a witness for defendant in error. This drew out in the answers, or the answer to the question to which the witness was finally allowed to voice a response, that it was done to separate in the list the goods which were supposed to belong to Edholm & Aiken from those that were supposed to be memorandum goods. We have given almost, if not quite, the exact language of the witness,—exact in the portions material to our inquiry.

It appears that rumor or information of some sort had come to the deputy sheriff who had the appraisal in charge, and the parties who were called and acted as appraisers, that the goods in flannel rolls might possibly be claimed by a person other than the firm, the defendant in the attachment; and to preserve in the list the identity of the particular articles, the pages were lettered to distinguish them from the other pages of the inventory of the general stock, which were numbered. The deputy sheriff gave testimony in the case at bar that they—he and the other parties appraisers—had no knowledge of probable or possible claims of ownership in a person or persons other than the firm except what was derived from hearsay. The list made during appraisement, its particular arrangement of pages, or their designations by letters or numbers, in whole or in part, or the reason for each or all, were wholly without importance or materiality to the issues on trial, and, by the admission of the testimony of which complaint is made, there was placed before the jury the rumors or hearsay on a vital point of litigated matters, and with a direct bearing on a question as to which there was much to bear out the contention of either party and it was well calculated to work prejudicially against the rights of the complainant.

It is also urged that there was an error committed in the admission of the testimony of a witness to the effect that the goods, the damages for the wrongful appropriation of which were sought in this action, were not sold to Edholm & Aiken, but forwarded to the firm as samples or on selection, when it appeared that it was doubtful whether the witness had a personal knowledge in relation to the matter, or other than that derived from hearsay. The allowance of this testimony to be given was, we think, probably an error, but if so, it worked no prejudice to the rights of the complaining party.

At the time of the issuance and levy of the writ of attachment in the suit by the bank against the firm of Edholm & Aiken, or on January 18, 1890, it appeared

that D. E. Thompson was either in possession or claimed the right of possession of the stock of jewelry under and by virtue of a chattel mortgage executed and delivered to him by the firm, and the sheriff, as was his right, under such circumstances, demanded an indemnity bond, and one was given by the bank which contained a recitation of the reason for its being executed and delivered,—*i. e.*, that "one D. E. Thompson claims said stock by virtue of a chattel mortgage and claims to have had possession at the time said sheriff took possession under said writ." It is also disclosed by the evidence that said bond was executed and delivered prior to any assertion of a claim of ownership of any of the goods by or for the defendant in error. The indemnity bond was offered in evidence for defendant in error and was received over the objection for the bank, the ground of the ruling at the time of its reception being stated by the court as follows: "Well, I will receive it for that one purpose only, as tending or not tending, as the case may be (counsel may discuss that question), whether or not there is any ratification of the act of the sheriff, or authorization by the bank of the act of the sheriff in attaching the property; that is all,—showing no liability on the bond but simply the one fact,—and it is a matter for the jury to say from all the facts in the case. For that purpose I will receive it."

At the time the bond was given the defendant in error was not claiming any of the property which had been attached. He was not in the contemplation of the parties. The bond was made for the purpose of indemnifying the officer against the claim of Thompson, and cannot be said to have been a ratification of the levy with any other conditions than were then elemental of it and known, or with any other claims than were then existent against it and known. It was established by the evidence that the bank did not give directions in regard to the levy, did not designate any goods upon which it should be made, but that it was delivered to the officer to be

levied on the property of Edholm & Aiken. It has been said: "When an officer is directed to serve a writ and there is a reasonable doubt that the title to the property is in the defendant, the officer may demand an indemnifying bond from the creditor before he levies upon the property, and, if such bond of indemnity is not given, the officer is under no obligation to make a levy on the property. Where the defendant's property in the goods is disputed, the sheriff has a common-law right to require indemnity before seizing the property. When the property which the officer is directed to seize is not in possession of the defendant, but is in possession of a third person, and there is reason to doubt that the defendant owns such property, the sheriff may lawfully require a bond of indemnity before he makes the attachment. If the property is attached without any controversy as to the title and is afterward claimed by a third person, the officer may then demand a bond of indemnity before he proceeds any further." (1 Shinn, Attachment sec. 203.)

It is clear that the bond in question here was not given with a view to any claim of defendant in error to the goods upon which the writ was to be levied; hence it cannot be said that the giving of the bond was in effect a direction of a levy on his goods. It was not executed as a part of a specific direction to do something of which the bank had no knowledge. It was asked to be given because of the claim as it stated of D. E. Thompson, and executed in response to such request. It seems clear that the indemnity bond furnished no evidence to establish a direction by the bank of the levy of the attachment writ on the property of defendant in error, or of a ratification by it of such a levy; hence it was error to admit it, and one well calculated to be harmful to the rights of the plaintiff in error.

It is further argued in this same connection that this, if an error, was without prejudice, for the reason that there was undisputed testimony of a demand for defendant in error on the bank to release the levy on these

goods, which was refused. The testimony on this point shows a demand on the cashier of the bank, not for a release of the levy, but a surrender of the goods to the attorney for defendant in error. The cashier referred the attorney to the counsel for the bank with the remark that whatever they did would be all right. A demand was then made on counsel for not a release of the levy but again that the goods be given to attorney for defendant in error, and this was refused on the ground that the goods could not be delivered to defendant in error as they were claimed by D. E. Thompson, and the bank would be answerable to him if it gave the goods to a third party. A refusal of a demand of the true owner and with knowledge of such ownership to release the levy would have constituted a ratification. (*Cole v. Edwards*, 52 Neb. 711.) But not so a refusal of a demand to deliver the goods to the party; but with full knowledge of the claim of ownership of the goods by defendant in error the bank applied for an order for their sale and received it. The sale was made and it received the proceeds. This, if the ownership was as claimed, would be an adoption or ratification of the act of levy. (*Cole v. Edwards, supra.*) This last being true, the error in the admission of the bond was without prejudice.

There is a criticism in the argument of some of the instructions given, the basis of it being that in each the trial court essayed to embrace all elements necessary to a verdict favorable to a designated party and omitted a material one. If taken literally, and out of the connection in which given, each of the said instructions may be said to be open to the objection urged against it; but, in view of the circumstances and facts developed in evidence, and when read as they were in connection with the other instructions, it hardly seems possible that any one would or could misunderstand them or fail to catch their true import, and we doubt whether the technical errors committed—the subject of the complaint—could alone be enough to work a reversal of the judgment. We

do not deem it best at this time to discuss the sufficiency of the evidence to sustain the verdict. The question of the defendant in error's ownership of the property was a question for the jury, and there was testimony admitted which, we have hereinbefore stated, should have been excluded. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

GEORGE A. HOPKINS V. WASHINGTON COUNTY.

FILED NOVEMBER 17, 1898. No. 8441.

1. **Order on Debtor:** ACCEPTANCE. An order by a creditor in favor of a third person on the debtor to pay to the third person a portion of an entire debt is inoperative in law if without the acceptance or consent of the debtor.

2. **Forms of Action.** The distinction between law and equity is not abolished in this state. Section 2 of the Code of Civil Procedure, however, provides that there shall be but one form of action, called a "civil action," in which rules of law or doctrines of equity may, under proper pleading and proper states of facts, either or both be enforced.

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

Horton & Blackburn and *Richard S. Horton*, for plaintiff in error.

Clark O'Hanlon and *W. H. Munger, contra.*

HARRISON, C. J.

During the course of erection under contract, the various stipulations and conditions of which we need not particularly notice of a court house for Washington county, Richards & Co., the contractors, had purchased of the Paxton & Vierling Iron Works material to be used in the performance of the work, and in the transaction

of the furnishing and sale of such material, and evidencing a portion or all of the indebtedness thus created, Richards & Co. executed and delivered to the Paxton & Vierling Iron Works promissory notes, which were duly assigned to the plaintiff herein, and it is alleged in the petition in the action "That, to secure said notes assigned to said plaintiff as aforesaid, said Richards & Co. delivered to him an order bearing date May 15, 1891, signed by them and drawn on the county supervisors of said Washington county for the sum of $1,000 (a copy of said order is hereto attached, marked 'Exhibit B,' and made part thereof); that at the time said order was delivered to said plaintiff said county was largely indebted to said Richards & Co.; that on the 19th of May, 1891, said plaintiff filed said order with the county clerk of said county; that on the 14th of July, 1891, and also on the 22d of August, 1891, said county supervisors refused to recognize said claim as evidenced by said order, by two certain resolutions, copies of which are hereto attached and marked 'Exhibit C and D.'" It was also of the allegations of the petition "That prior to the 15th of May, 1891, said Richards & Co. had at request of said Washington county purchased material and furnished labor and built and constructed for said Washington county a court house at Blair, said county, and that there was on said 15th of May a large amount due and owing from said Washington county for said labor and material furnished and for the construction of said court house." A demurrer to the petition was overruled, and the defendant answered. In the answer it was alleged that due and written notice, as required by law, was given plaintiff of the refusal of the county board to recognize his claim. For the plaintiff a reply was filed in which a statement was made relative to the time of the full accrual of the indebtedness of the county to Richards & Co., on which considerable stress is laid in the argument for the plaintiff, but this allegation was of such nature that,—under the rules of pleading,—appearing in a re-

ply, it must be deemed controverted as upon direct denial. (Code of Civil Procedure, sec. 134.) A jury was waived and the cause tried to the court and, following the findings, a judgment was rendered for the county. There is no bill of exceptions; hence we are without the evidence adduced at the trial.

In error proceedings on behalf of the plaintiff it is urged that the judgment is contrary to the rules of law applicable to and governable of the conditions and relative rights of the parties which arose from the transactions in question; also, that the only issuable matter in the controversy was that of the giving notice of the rejection of the order by the board. It is further argued in this connection that when it was determined by the trial judge, as it was in one finding, the notice was not given, the plaintiff became entitled to a judgment, as it had been settled by the overruling of the demurrer by one of the judges of the district in which the cause was pending that the excuse which plaintiff had pleaded for not sooner taking an appeal from the action of the county board was forceful and sufficient, and this ruling could not be annulled or rendered ineffective by the different decision of the question by another judge of the same district at any subsequent stage of the proceedings. To what we deem a proper disposition of the controversy the decision on the demurrer, or the question of notice, is not a necessary element of discussion, and we need not further refer to it.

In relation to what matters were for trial in the district court it may be said that the record discloses that the plaintiff seems to have thought there were others than he now asserts was the only one; for in a demand for special findings there were several questions of fact incorporated, one of which was "whether at the date of the execution and filing of said order the defendant was indebted to Richards & Co.," and to this the trial court gave a negative answer, on the ground that at the time of the order and the board's action in respect thereto

there had been no certificate of a supervising architect of the building that any sum was due the contractor and maker of the order; but aside from any other things which are disclosed by the record is one which arises from the order, coupled with some other facts which fully appear. The order was as follows:

"OMAHA, NEB., May 15, 1891.

"*To County Commissioners, Washington Co., Blair, Nebraska*—DEAR SIRS: Please pay to the order of George A. Hopkins the sum of $1,000 and deduct the same from the amount due on the contract.

"Yours, etc., RICHARDS & CO."

There were several other like assignments of or orders for payments of parts of any sum which might be due Richards & Co. to different persons; also one in favor of a bank,—all of which received at the hands of the county board similar treatment to that accorded the one in suit. It also appeared that in an action by Richards & Co. against the county judgment had been rendered for the balance due the former, and in a suit by parties who had furnished material used in the erection of the court house and laborers in the construction thereof, for such purpose the amount of such judgment had been taken and by order of the court distributed. The order herein involved was but for a portion of the amount, if anything, then due Richards & Co. from the county, and, without the consent or acceptance of the latter, was invalid. This is on the ground that the creditor may not split up a single cause of action into many, thus subjecting the debtor to a multiplicity of suits, and to many complications, embarrassments, and responsibilities not within the purview of or contemplated in the original contract. (8 Am. & Eng. Ency. Law [2d ed.] pp. 1069, 1070; *German Fire Ins. Co. v. Bullene*, 51 Kan. 764, 33 Pac. Rep. 467; *Welch v. Mayer*, 36 Pac. Rep. [Colo.] 613; *Snedden v. Doerffler*, 39 Pac. Rep. [Colo.] 68.) This is the rule at law; and the reason for it which we

have stated was, as we have set forth, present and of force in the transactions with which we have to deal herein. We are not unmindful of the rule in equity that where a creditor gives to a third person an order on a debtor for a definite part of the debt, it will constitute a valid equitable assignment *pro tanto* which will be enforced by a court of equity, or in an equitable action, and that this doctrine is recognized in many jurisdictions in the law courts. (8 Am. & Eng. Ency. Law [2d ed.] p. 1070, and notes.) In this state there is but one form of action, to be called a "civil action," (Code of Civil Procedure, sec. 2); but the distinction between law and equity is not abolished. There is one form of action, in which either relief may be sought and obtained; and if the facts pleaded and proved demand, the rules of either law or equity, or both, may be enforced. (*Turner v. Althaus*, 6 Neb. 54; *Wilcox v. Saunders*, 4 Neb. 569; *Cropsey v. Wiggenhorn*, 3 Neb. 108.) But the case at bar is an action at law in all its elements, by its pleadings and facts, and calls for the enforcement of the rule at law. What rule might have been enforced had the pleadings, issues, and facts been different, we need not decide. The judgment must be

AFFIRMED.

MARY MCCLELLAN V. JOHN HEIN ET AL.

FILED NOVEMBER 17, 1898. No. 8376.

1. **Witnesses:** CROSS-EXAMINATION: EXCEPTIONS. An exception in relation to the allowance of improper cross-examination of a witness examined, and determined not well taken.

2. **Rulings on Evidence:** DISCRETION OF COURT. Where testimony is received without objection, and a motion is made to strike it out on the ground of its incompetency, what disposition shall be made of the motion is a matter discretionary with the court. (*Gran v. Houston*, 45 Neb. 813.)

3. **Erroneous Admission of Evidence:** HARMLESS ERROR. The admis-

sion of incompetent or immaterial testimony furnishes no ground for the reversal of a judgment, if it was not prejudicial to the rights of the complaining party. (*Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745; *Graham v. Frazier*, 49 Neb. 90; *Rightmire v. Hunteman*, 42 Neb. 119.)

4. **Trial:** EVIDENCE: DISCRETION OF COURT: REVIEW. The request of the plaintiff, who has closed the evidence in chief after the introduction of rebuttal evidence has been reached and is in progress, to be allowed to return to the evidence in chief, open that branch of the trial, and adduce further evidence therein, is within discretion of the trial court, and unless its ruling thereon is accompanied by an abuse of such discretion, it can furnish no reason for a reversal of the judgment.

5. ———: REBUTTAL EVIDENCE. Strictly correct practice requires rebuttal evidence to be confined to that which explains, disproves, or counteracts the evidence introduced for the adverse party, but evidence which would have been proper in chief or corroborative of portions of the evidence in chief, which is also pertinent in rebuttal, may, in the discretion of the trial court, be admitted in rebuttal.

6. **Erroneous Instructions:** HARMLESS ERROR. That an instruction is given which is not applicable either to the issues or evidence will not work a reversal of a judgment if the rights of the complaining party were not prejudiced.

7. **Instructions:** EXCEPTIONS. The exception to a portion of the instructions as a "paragraph" *held* entirely proper, and the portion to which reference was made to clearly come within the meaning of the word used.

8. **Failure to Mark Instruction "Given":** REVIEW. That the trial court omitted to write the word "given" on the margin of a numbered portion of its charge to the jury is no sufficient reason for the non-consideration by this court of the exception of the defeated party to such instruction, if it appears from the record that the instruction was in fact part of the charge.

9. **Intoxicating Liquors:** SALE: DAMAGES. Under the provisions of our statute in regard to damages caused by furnishing intoxicating liquors, it is not necessary that the liquor furnished, or any resultant intoxication, should be the sole or even principal cause of the damages. It is sufficient if it contributes to produce the injuries. (*Cornelius v. Hultman*, 44 Neb. 441; *McClay v. Worrall*, 18 Neb. 44.)

ERROR from the district court of Madison county. Tried below before SULLIVAN, J. *Reversed.*

F. M. Cookingham and *S. O. Campbell*, for plaintiff in error.

Reed & Gross, contra.

HARRISON, C. J.

Mary McClellan, in her own behalf and as next friend for her minor children, commenced this action in the district court of Madison county against John Hein, a licensed dealer in intoxicating liquors in the town or city of Madison, and the co-defendants, his sureties on his bond as such dealer, to recover damages alleged to have been suffered by plaintiff as occasioned by reason of the intoxication of her husband produced by liquors procured of the principal defendant, John Hein, in his saloon or place of business. It was pleaded that the intoxication, the cause of the damages, was of date December 31, 1892, and in this connection it was further stated: "That on the said 31st day of December, 1892, while so intoxicated as aforesaid, the said Edward D. McClellan undertook to drive his team of horses attached to a sled to his home, about fifteen miles distance from said city of Madison; that immediately upon starting from said city of Madison, said horses became nervous and frightened, and by reason of his said intoxication said Edward D. McClellan was unfit and unable to drive, manage, or control said horses, and in consequence thereof, said horses ran away, throwing said Edward D. McClellan with great force upon the ground, dragging him a great distance over rough and frozen ground, over logs and cross-walks, whereby his face was crushed and bruised, his upper jaw badly crushed, his lower jaw fractured in two places, his nose broken, and his spine injured; that by reason of his said injuries the said Edward D. McClellan is unable to breathe through his nostrils, and is unable to chew or masticate sufficient food to nourish him, and is permanently injured and totally disabled for the per-

formance of any labor whatever." The damages asserted were loss of means of support for the family.

The answer for the principal defendant consisted of an admission of the facts that he was a licensed liquor dealer in Madison, had given the bond as alleged in the petition, and that on or about the 31st day of December, 1892, the husband of Mary McClellan, Edward D. McClellan, had met with an accident and been injured, but it was alleged that such injuries resulted from a negligent and careless attempt on his part to drive a somewhat wild and unmanageable team of horses attached to a sled, of which many portions, and more especially the particular and immediate ones of the attachment or hitching of the horses, were so defectively constructed and unfit for the purpose as to be very unsafe; that when McClellan started from the city to his home, on the day mentioned, by reason of his carelessness in driving, a portion of the gearing to which the horses were hitched failed of its purpose, the team became frightened and ran away, and McClellan received the injuries the subject of complaint in the petition. It was denied that any liquor was obtained on said day of John Hein or in his place of business by Edward D. McClellan. The permanency of the injuries was also denied. For the bondsmen the answer was a general denial as to all the allegations of the petition, except the execution of the bond, which was admitted.

The trial judge stated to the jury in the instructions, and we think correctly, that the disputed questions were: Was the intoxication of McClellan at the time of the injuries of the occasioning causes of the accident in which they were received? If he was intoxicated at the time, did the defendant Hein sell or furnish to him any of the liquor which caused or contributed to such conditions? Has the plaintiff suffered damages by reason of such injuries? There was also a statement in the instructions that all questions of litigation except the three, reference to which by the court we have just

quoted, were either admitted or conclusively proven. The trial resulted in a verdict and judgment for defendants, of which the plaintiff asks a reversal.

In one assignment of error the complaint is of the allowance, in certain designated questions asked of Edward D. McClellan, of an improper cross-examination. In the argument in this court we are directed on this subject to pages 43 and 44 of the bill of exceptions. In the petition in error the eighth interrogatory on each of said pages is the one designated, and the only one to which objection was interposed. Of the one on page 43 it must be said it was an inquiry on an entirely different branch of the case than is indicated in the argument, and moreover it was not an improper question. In regard to the one on page 44, suffice it to say that it was not objected to as improper cross-examination.

Another subject of argument is that there was admitted testimony in respect to negotiations for a settlement between Edward D. McClellan and the proprietor of a saloon other than Hein, and at whose place of business it was claimed McClellan procured some of the liquor he drank on December 31. The greater portion of this testimony was received without objection, but it was moved that all of the testimony of the witnesses who gave it, on this subject, be stricken out, which motion was overruled. Whether it should sustain the motion to strike out was discretionary with the trial court, and naught but an abuse of such discretion would call for a reversal of the judgment. (*Gran v. Houston*, 45 Neb. 813.) This testimony, we think, was wholly immaterial; but, in view of the issues and the manner they were presented by the instructions for the consideration of the jury, it does not seem probable or possible that any prejudice did or could result to the rights of the complainants through its reception, and the assignment of error must be overruled. (*Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745; *Graham v. Frazier*, 49 Neb. 90; *Rightmire v. Huntcman*, 42 Neb. 119.)

During the rebuttal there were called for plaintiff two witnesses, from whom it was sought to elicit that they had been in Hein's saloon on December 31, had seen Edward D. McClellan there, and that he was then and there, and by Hein or some one acting for him, furnished with intoxicating liquors. An objection that it was improper, in rebuttal to the interrogatory to each of said witnesses, in answer to which the testimony we have just outlined would have been responsive, was sustained for plaintiff. It was then asked that she be allowed to open the case in chief and introduce the testimony of these witnesses. This request was denied and the action of the trial court in this regard was assigned for and is argued as error.

Whether the plaintiff should be allowed in furtherance of justice to open the case and introduce the further testimony offered was discretionary with the trial court, and to work a reversal of the verdict and judgment there must have been an abuse of discretion elemental of the ruling. (*Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592.) The matter offered was corroborative of one point in the case in chief of plaintiff,—*i. e.*, the question of whether Edward D. McClellan obtained any intoxicating liquor in Hein's saloon on December 31, and could all have been properly introduced as part of the plaintiff's evidence in chief; but it was also directly contradictory of testimony on the same point introduced for the defendants, and might properly, and without an abuse of the discretion of the trial court, have been received in rebuttal, and without error. (8 Ency. Pl. & Pr. 132; *Goodman v. Kennedy*, 10 Neb. 270.) But when the issues in litigation are considered in this connection, and that there were two vital branches thereof, a determination of either of which, independently of the other, favorably to the contention for defendants, must lead to a verdict in their favor, it becomes apparent that it cannot be soundly asserted that the ruling here was prejudicial; and this view is strengthened by the proposition that the

trial court has everything and everybody connected with the trial before it, and in many things, among which is the direction of the course and the mode of the conduct of the trial, must be allowed to determine what is proper and just, and without a clear abuse of the right or power, its decision should not be vacated. It follows that this assignment is unavailing.

It is argued that the court erred in giving in charge to the jury instructions numbered 2 and 3 requested for defendants. As we view the case, if it be conceded that these instructions were not applicable to the issues or evidence, and they probably were not, yet it must be said that it is evident no prejudice resulted from their giving, and no reversal of the judgment can be claimed successfully. (*Burlington & M. R. R. Co. v. Gorsuch*, 47 Neb. 767.)

An attack is made upon an instruction numbered 7 of the court's charge to the jury. The instruction was in the following terms: "If you find from the evidence that the accident in question would have happened whether plaintiff was drunk or sober, then, of course, the plaintiff cannot recover, and your verdict should be for the defendants; but if you find from the evidence that McClellan was intoxicated, and that the accident would not have happened but for that fact, and that the plaintiff, or her children, have been injured in their means of support, then and in that case you should find for the plaintiff, provided you further find that the defendant Hein, at his saloon in Madison, Nebraska, sold or furnished said McClellan any of the liquor that caused or contributed to his intoxication."

Before examining the questions raised in regard to the instruction we must notice some objections to the consideration of the exception, and assignment of error, under which this complaint is made, which have been presented in argument for defendants. The exception was as follows: "Plaintiff excepts to the seventh paragraph of the instruction given on court's own motion." Im-

mediately after the close of the instructions the same matter was stated in substance and the word "paragraph" was employed in the same connection. In the assignment of error in reference to the same subject-matter in the motion for a new trial, likewise in the petition in error, the same term was used. It is urged for defendants that this word "paragraph," if given its true meaning, and applied to the charge of the court, would direct us to a portion thereof numbered "5," and not to what was by the court indicated as "7." There is quoted in the brief the definition of "paragraph" as given in "Webster's International Dictionary," as follows: "A distinct part of a discourse or writing; any section or subdivision of a writing or chapter which relates to a particular point, whether consisting of one or many sentences. The division is sometimes noted by the mark [¶], but usually, by beginning the first sentence of the paragraph on a new line and at more than the usual distance from the margin." Contrary to the conclusions at which counsel arrive from the application of this definition to the matter in hand, we think the arrangement made by the court, and the portion of its charge numbered "7," clearly indicated by the term "paragraph" used in the exceptions and other places to which we have referred.

It is further urged for defendants that it was a statutory duty of the court to write on the margin of each instruction read in the charge to the jury the word "given;" that there was a failure to do this as to the seventh in this case, and, inasmuch as the foregoing is true, possibly the instruction was not actually given, and plaintiff's exceptions to it should not be considered. There are several statements in the record which establish with unmistakable clearness the fact that the instruction or paragraph in question was given. Furthermore, where a party directly relies upon the failure of a trial court to write on the margin of each instruction the word "given," there must have been a specific exception for that reason at the time of the giving, and we feel constrained to hold

that where it appears that the instruction was in fact given, the failure to so mark it on the margin cannot work the non-consideration of alleged errors in it.

It is insisted for the plaintiff that the instruction is defective, in that in the opening sentence it makes direct reference to the intoxication of the "plaintiff," when doubtless it was intended to use the word "husband" after "plaintiff's" in the instruction, or "husband of" before the word "plaintiff." Whatever may have been the intention, and there can be no doubt about what it was the intention to express, it does not seem possible that the jury could read or hear the instruction without acquiring a full knowledge and understanding of its import in the particular portion to which attention is directed in this branch of the argument.

We may now pass to the consideration of the substance of the instruction. It is erroneous, in that it states a rule by which there was excluded from the consideration of the jury the intoxication of Edward D. McClellan as a contributing or assisting cause of the accident, and conveyed to that body the idea that the intoxication, if determined to exist, must be shown to be the primary or main and governing cause. This is contrary to the established doctrine in this state. Under the provision of our statute it is not necessary that the liquor furnished by the defendant be the sole or even the principal cause of the alleged injury. It is sufficient if it is a contributory cause. (*McClay v. Worrall*, 18 Neb. 44; *Cornelius v. Hultman*, 44 Neb. 441; *Gran v. Houston*, 45 Neb. 813; *Sellars v. Foster*, 27 Neb. 118.)

There are other assignments of error, but they need no discussion at this time. They are of matters the determinations of which would be of no material assistance in conducting another trial.

The judgment must be reversed for the error in the instruction and the cause remanded.

REVERSED AND REMANDED.

SULLIVAN, J., took no part in the decision.

LOUIS W. KRONCKE, ADMINISTRATOR, V. FRED A. L. MADSEN ET AL.

FILED NOVEMBER 17, 1898. No. 8454.

1. **Witnesses:** TRANSACTIONS WITH PERSONS DECEASED. Under section 329 of the Code of Civil Procedure evidence concerning transactions and conversations between a witness directly interested in the result of the suit and a person deceased is incompetent, as against the latter's representations, with certain specified exceptions. In case the evidence of the person deceased shall have been taken and read in evidence by his representatives in regard to any transaction or conversation, then such interested witness may be examined alone in regard to the facts testified to by such person deceased.

2. **Note:** LIABILITY OF SURETY. One who signs a note as surety is liable for the payment thereof precisely to the same extent as his principal.

3. ———: ———: INSTRUCTIONS. In an action against the sureties on a note it is error to instruct the jury that they are not liable thereon to the same extent as the principal, and that the contract of the sureties is to pay only when the liability of the principal is fixed and ascertained by a judgment at law against him, and execution issued thereon and his property exhausted.

4. ———: ———: JUDGMENT. Section 511 of the Code of Civil Procedure cannot be invoked in determining the liability of a surety to his obligee or payee, but merely requires that a judgment against a principal and surety shall state which is the principal debtor and which the surety, and provides, as between them, the mode of enforcing the same.

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

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

Robertson & Wigton and *B. T. White, contra.*

NORVAL, J.

On April 8, 1893, C. Madsen, Fred A. L. Madsen, and Ane M. Madsen executed and delivered to one Herman G. Kroncke their promissory note for the sum of $1,043.10 payable on demand. On July 9, 1893, C. Madsen died.

and subsequently this action was brought by the payee against the other two makers of the note. During the pendency of the suit plaintiff died, and the action was revived and proceeded in the name of Louis W. Kroncke, as administrator of the estate. C. Madsen signed the note after the names of the other makers had been attached, preceding his signature with the words "signed as surety," and then delivered the instrument to the payee. Ane M. Madsen, in her answer, alleges that at the time she signed the note she was the wife of C. Madsen and was possessed of certain real estate, and that she did not sign with reference to or upon the faith and credit of her separate property, or with the intent to bind the same. Her answer, as well as that of Fred A. L. Madsen, avers that C. Madsen received the entire consideration of the note, and that each defendant executed the said instrument "with the express agreement and understanding with all parties concerned that the said C. Madsen, whose name appears to said instrument as having signed the same as surety, should sign said note as principal and one of the makers thereof without limitation as to his liability; that this defendant was surety only upon said note for said C. Madsen; that when this defendamt signed said note the said C. Madsen had not yet signed the same, but that it was agreed and understood that the said note should not be delivered to the plaintiff until the said C. Madsen should sign the same as one of the makers thereof; that, without the defendant's knowledge or consent, and contrary to said agreement, said note was signed by said C. Madsen with the words preceding his signature, 'signed as surety,' and that the said note was, without the knowledge and consent of the defendant and without authority, delivered to the plaintiff after having been so signed by said C. Madsen." These allegations were put in issue by the reply of plaintiff. A verdict was returned against the plaintiff, and he brought here for review the judgment entered thereon.

The trial court permitted the defendant Fred A. L. Madsen, over the objections of plaintiff, to testify to a conversation between him and the deceased, Herman G. Kroncke, with respect to the signing of the note in suit. This ruling is assigned as error, on the ground that plaintiff is the representative of a deceased person, and the witness was directly interested in the result of the litigation; and section 329 of the Code of Civil Procedure is invoked to sustain the contention. This section provides that "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." This statute is plain and free from ambiguity. It excludes every person having a direct legal interest in the result of a civil cause, in which the adverse party is the representative of a person deceased, from testifying to any transaction or conversation between such witness and the person deceased, unless the case falls within one of the exceptions enumerated in said statute. (*Kroh v. Heins*, 48 Neb. 691.) One of the exceptions is if the evidence of the person deceased shall have been taken and read in evidence by the representative in regard to a particular transaction, then the person having such direct legal interest may be examined in regard to the matters testified to by such person deceased, but cannot further testify concerning such transaction or con-

versation. (*Parish v. McNeal*, 36 Neb. 727.) The ruling assailed is within the exceptions of the rule stated. The deposition of plaintiff's intestate was taken, and the administrator caused to be read in evidence the portion thereof relating to the giving of the note in suit, and the conversation the deceased had with the defendant Fred A. L. Madsen. It was entirely competent, therefore, to receive the evidence of the latter concerning the facts or matters covered by the portion of the deposition of the deceased which was read in evidence by his representative.

Complaint is made of the giving to the jury by the judge of the following instruction requested by the defendants: "1. You are instructed that the parties to a note, one or more of whom sign as surety, are not liable thereon to the same extent as the principal to the note. The contract of the sureties is to pay only when the liability of the pricipal is fixed and ascertained, and the property of the principal exhausted; and the sureties have a right to remain exempt from liability until the liability of the principal is fixed by a judgment at law against him as principal and execution issued thereon, and his property exhausted." This instruction was erroneous in more than one particular. It is not true, as this instruction asserts, that a surety on a note is not liable for its payment to the payee as fully and to the same extent as the principal maker. The liability of the surety for the debt to the holder of the obligation is no greater and no less than that of the principal. (*Wilson v. Campbell*, 1 Scam. [Ill.] 493; *Berg v. Radcliff*, 6 Johns. Ch. [N. Y.] 307.) Again, the contract of the surety is absolute, and his liability does not depend upon the fact that the property of the principal has been exhausted in an attempt to collect the debt from him, nor is the right to recover against the surety conditional upon the fact that judgment has been recovered against the principal and an execution has been issued thereon and his property exhausted. As soon as the principal has made de-

fault, a recovery can be had against the surety without exhausting the remedies as against the principal. "Suretyship is an undertaking to answer for the debt, defaults, or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound. It is a primary obligation, and the creditor is not required to proceed first against the principal before he can recover from the surety. The surety and principal may be joined as defendants in one suit, or the surety may be sued alone, without any effort having been made to recover the debt from the principal." (24 Am. & Eng. Ency. Law 716.) As sustaining the same doctrine see *Garey v. Hignutt*, 32 Md. 553; *Wendlandt v. Sohre*, 37 Minn. 162; *Wilson v. Campbell*, 1 Scam. [Ill.] 493; *People v. Butler*, 74 Mich. 643, and cases cited in brief of plaintiff in error.* Under the instructions the jury were as much bound to return a verdict for the defendants as if they had been peremptorily instructed so to do, for no judgment had ever been entered against the principal maker of the note, and it was not shown that his property had been exhausted. The trial judge, when he gave the instruction, probably had in mind either the rule applicable to guarantors of the collection of commercial paper, or section 511 of the Code of Civil Procedure, which declares: "In all cases where judgment is rendered in any court of record within this state, upon any other instrument of writing, in which two or more persons are jointly or severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his or their co-defendant, it shall be the duty of the clerk of the said court, in recording the judgment thereon, to certify which of the defendants is the principal debtor, and which are sureties or bail. And the clerk of the court aforesaid shall issue execution on such

United States v. Cushman, 2 Sum. [U. S.] 436; *Geddes v. Hawk*, 1 Watts [Pa.] 280; *Abercrombie v. Knox*, 3 Ala. 728; *Keaton v. Cox*, 26 Ga. 162; *Reigart v. White*, 52 Pa. St. 440; *East India Co. v Boddim*, 9 Ves. Jr. [Eng.] 464; *Kearnes v. Montgomery*, 4 W. Va. 29.

judgment, commanding the sheriff or other officer to cause the money to be made of the goods and chattels, lands and tenements, of the principal debtor, but for want of sufficient property of the principal debtor to make the same, that he cause the same to be made of the goods and chattels, lands and tenements, of the surety or bail. In all cases the property, both personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution." The foregoing provisions are not applicable here. They require in an action upon a written instrument against the principal and sureties that a judgment for plaintiff shall state which defendant is principal debtor and which the surety, and that the execution issued on such judgment shall command the officer to cause the money to be first made from the property of the principal debtor and that his property shall be exhausted before the property of the surety shall be seized in execution. That section has nothing to do with determining the liability of a surety, but merely provides how the judgment shall be entered, and as between the principal and surety, the mode of collecting the same. That section is without force where the principal debtor is not sued with the surety, as was the case at bar.

The third and second requests of the defendants, which were given to the jury, were also erroneous, both because they assumed the existence of evidence tending to prove a certain fact, when no evidence of that character was given; and the third request was faulty, in that it submitted to the jury for them to find whether the note in suit had been changed after it had been executed by the sureties, while no issue of that kind was presented by the pleading and evidence. For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN B. WATKINS ET AL., APPELLEES, V. JOHN H. BUGGE ET AL., APPELLEES, IMPLEADED WITH MATTIE E. SHELLY ET AL., APPELLANTS.

FILED NOVEMBER 17, 1898. No. 8475.

1. **Mechanics' Liens**: STATEMENT: REGISTRATION. To entitle a subcontractor to a mechanic's lien he must file his sworn statement or claim for lien with the register of deeds of the proper county.
2. ———: ———: ———. In our mechanics' lien law "filed in the office of the register of deeds" and "filed with the register of deeds" are equivalent expressions and are used interchangeably therein.
3. ———: ———: ———. The proper filing of a claim for a mechanic's lien consists in placing the sworn statement in the custody of, and leaving the same with, the proper officer for the purpose of recording.
4. ———: ———: ———. The failure of a register of deeds to record the sworn statement of claim of lien filed does not affect the validity of the lien. All the lienor is required to do to perfect his lien is to file the verified claim in seasonable time with the proper officer. The actual recording thereof is not a prerequisite to securing the lien.
5. ———: TIMES OF FURNISHING MATERIAL: CONTRACT. Each order and delivery of material made at different times does not necessarily constitute a separate contract. To constitute a single contract it is not necessary that the materials should all be furnished at one time, but may be obtained at different times and still be embraced in a single contract, if such was within the contemplation of the parties.
6. ———: ———: ———. When certain materials are to be furnished to be used for the construction of a building for a stipulated sum, and at the time the contract therefor was made it was agreed that all additional materials required to complete the improvement should be furnished by the material-man at, and for, the prices previously charged by him for like articles, and in pursuance thereof additional materials are ordered and delivered from time to time during the progress of the work, all items may properly be regarded as having been furnished under a single contract.

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

McCoy & Olmsted, for appellants.

George B. Lake and *Hamilton & Maxwell, contra.*

NORVAL, J.

In July, 1894, Mattie E. Shelly employed John H. Bugge to furnish the materials and erect a residence and barn on lot 5, in block 5, in Hanscom Place, an addition to the city of Omaha. The plaintiffs John B. Watkins and George A. Hoagland, copartners doing business under the name and style of J. B. Watkins & Co., sold to Bugge certain building materials, which were delivered on the premises and used in the construction of said house and barn. Before the buildings were completed, on September 10, 1894, Mattie E. Shelly and Thomas C. Shelly mortgaged the lot to the defendant Truman Buck to secure the sum of $3,500, which mortgage, on the same day, was duly recorded in the office of the register of deeds of Douglas county. Afterward Watkins & Co. furnished and delivered certain other materials for use in making said improvements, and on November 24, 1894, they filed with the register of deeds of said county a duly-verified statement or claim for a lien on account of all the materials so furnished as aforesaid. Subsequently this action was commenced to foreclose said lien. Buck filed therein a cross-petition, praying a foreclosure of his mortgage. A decree was entered establishing and foreclosing the mechanic's lien, and awarding the same priority over the mortgage. The Shellys and Buck have prosecuted separate appeals.

It is contended by appellants that the petition of plaintiffs does not state facts sufficient to constitute a cause of action, for the reason said pleading contains no averment that the sworn statement or claim of lien was filed with the register of deeds, or that it was ever recorded by him. The allegations of the petition upon this subject are: "That on the 24th day of November, 1894, and

within two months from the date of furnishing said lumber and building material, the said plaintiffs made an account in writing of the items of said lumber and building material, and, after making oath thereto as required by law, filed the same in the office of the register of deeds of said Douglas county, Nebraska, claiming a mechanic's lien therefor upon said real estate and the buildings thereon, at an expense of one and 50-100 dollars." Section 2, article 1, chapter 54, Compiled Statutes, declares: "Any person or subcontractor who shall perform any labor for, or furnish any material or machinery or fixtures for any of the purposes mentioned in the first section of the act, to the contractor or any subcontractor who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him or them from such contractor or subcontractor for such labor or material, machinery or fixtures, together with a description of the land upon which the same were done or used within sixty days from the performing of such labor or furnishing such material, machinery or fixtures, with the register of deeds of the county wherein said land is situated, and if the contractor does not pay such person or subcontractor for the same, such sub-contractor or person shall have a lien for the amount due for such labor or material, machinery and fixtures, * * * and the amount so paid shall be held and deemed a payment of such amount to the original contractor. * * * Said sworn statement and claim of lien shall be by such register of deeds recorded in the same manner as other liens provided for by this chapter, and such lien shall remain in force for the same length of time as other liens provided for in this chapter."

The objection urged against the petition, that it is defective because it is not averred that the claim for lien was "filed with the register of deeds," is so dry and technical that it rattles as we write down the point. It is true the statute requires that the sworn statement of the

amount due the person or subcontractor claiming the lien must be "filed with the register of deeds;" and the petition meets this demand of the law, since it avers that the verified account in writing of the items of lumber furnished was filed "in the office of the register of deeds of said Douglas county." The filing could not legally have been in the office of register of deeds, unless the sworn statement was filed with such officer. That the legislature used interchangeably in the mechanics' lien law the expression "filed in the office of register of deeds" and "filed with the register of deeds" is manifest. In said section the latter form of expression is used, while in section 3 of the same act it is written, "file the same in the office of the register of deeds of the county." This court has frequently used interchangeably the words "file in the office of register of deeds" and "file with the register of deeds." (*White Lake Lumber Co. v. Russell*, 22 Neb. 126; *Noll v. Kennedy*, 37 Neb. 879; *Wells v. David City Improvement Co.*, 43 Neb. 366; *Drexel v. Richards*, 48 Neb. 322, 732; *Nye v. Berger*, 52 Neb. 758.) The proper filing of a claim for a mechanic's lien consists in placing the sworn statement in the custody of, and leaving the same with, the proper officer for the purpose of recording, and the petition sufficiently avers that this was done in the case at bar.

The other objection urged against the petition is equally without merit. It was not necessary for the plaintiffs to set forth in their petition that their statement of lien was recorded by the register of deeds. It is true the law makes it the duty of that officer to record all sworn statements and claims of liens filed with him, but the subcontractor's lien cannot be defeated by the failure of the register of deeds to record the sworn statement of the lien which had been deposited in his office for that purpose. All the law requires of the lien claimant is that he shall file his sworn claim of lien with the proper officer for the purpose of being recorded. It is the filing, and not the recording, that confers the right

to a lien. This principle was recognized and applied by this court, as to deeds, in *Perkins v. Strong*, 22 Neb. 725. The syllabus to that case, which fully reflects the views of the court expressed in the opinion, reads as follows: "A purchaser of real estate who takes his deed to the office of the register of deeds and deposits it with him for record, and pays the fees for recording and entering the same on the numerical index, discharges thereby his duty of notice to the public; and if through the fault alone of the register the deed is lost or mislaid, and not entered of record or entered on the index, such failure will not work to the prejudice of the title of such purchaser, even in favor of a subsequent purchaser without actual notice. (*Lee v. Bermingham*, 30 Kan. 312.)" Of the same purport is *Deming v. Miles*, 35 Neb. 739. If through the neglect or omission of a register of deeds a deed is not spread upon the records of his office, and the title of the purchaser is not affected or prejudiced by such omission, it is difficult to see how the right to a mechanic's lien can be defeated by the mere failure of such officer to record a mechanic's lien which had been duly filed with him or in his office. The law makes it no part of the duty of the lienor to see that his statement of lien is recorded. It merely devolves upon him to have such statement filed, and he is not required to force the register of deeds, either at the point of a loaded revolver or by legal proceedings, to record his claim of lien, to make the lien effective. A mechanic's lien is acquired by the proper filing with the register of deeds of the sworn claim for such lien within the period fixed by law, and not by the recording of the lien. (*Noll v. Kennedy*, 37 Neb. 884; *Cummins v. Vandeventer*, 52 Neb. 478; *Wilson v. Hopkins*, 51 Ind. 231; *Adams v. Buhler*, 30 N. E. Rep. [Ind.] 883; *Adams v. Shaffer*, 31 N. E. Rep. [Ind.] 1108; *Leeper v. Myers*, 37 N. E. Rep. [Ind.] 1070; *Smith v. Headley*, 33 Minn. 384; *Goodman v. Baerlocher*, 88 Wis. 287; *Red River Lumber Co. v. Fricl*, 73 N. W. Rep. [N. Dak.] 203.) A petition substantially like

the one at bar was sustained in *Davenport v. Jennings*, 25 Neb. 87.

It is argued that Watkins & Co. withdrew their claim for lien from the office of the register of deeds; hence it was essential that they should plead that it had been recorded. We fail to find any statement or averment in the petition upon which to predicate this argument. There is no allegation in the petition that the claim for lien was taken by plaintiffs from the register's office, whatever may be the facts disclosed by the evidence. It is the sufficiency of the petition that is challenged, and the pleading must be tested without regard to the evidence adduced on the trial. So construing the petition, we are firmly convinced that it is sufficient at the points at which it has been assailed by appellants.

The next argument is that the evidence is insufficient to sustain the findings and decree, inasmuch as there is no proof in the record that plaintiffs' claim for lien was filed with or recorded by the register of deeds of Douglas county. It was established beyond controversy that the plaintiffs duly filed a verified statement of lien in the proper office on November 24, 1894, and at the same time paid $1.50 for recording fees. This was sufficient to show that such sworn statement was delivered to the register of deeds for record. Whether it was actually recorded or not is unimportant, as we have already shown. *Noll v. Kenneally*, 37 Neb. 879, and *Cummins v. Vandeventer*, 52 Neb. 478, cited by appellants to support their contention that the evidence must disclose that the lien statement was recorded, are not in point here. In those cases the filing and recording of the claims for lien were averred in the petition, but no testimony was given to establish the filing of the sworn statement for lien. Had the evidence in the case at bar failed to show the filing of plaintiffs' verified account of items furnished, then the cases mentioned would be decisive of the one under review.

It is insisted that the materials were furnished by plaintiffs, not under a single contract, but under thirty-

three wholly distinct and independent agreements, and that twenty-five of which were fully performed and completed more than sixty days prior to the filing of the sworn statement for lien, and therefore such statement is false and untrue, too general and indefinite to attach to any one of the several contracts, and is insufficient in law to sustain a lien for any of the materials, since the lien claims state that the materials were furnished "under a verbal contract." It is the settled doctrine in this state that a material-man cannot tack one contract to another and thereby obtain a lien for the materials furnished under both by filing a sworn statement or claim for lien within the statutory period from the date of the furnishing the last item of material under either of the contracts. (*Central Loan & Trust Co. v. O'Sullivan*, 44 Neb. 834; *Hansen v. Kinney*, 46 Neb. 207; *Nye v. Berger*, 52 Neb. 758.) The doctrine stated is entirely sound, and if the case at bar falls thereunder, the decree of the trial court cannot be sustained, for the reason that many of the items of material for which a lien was awarded were furnished more than sixty days prior to the filing of claim for lien, and under defendants' theory, in pursuance of several independent contracts. The record discloses that Watkins & Co. entered into a contract with Bugge to furnish a certain list of materials to be used in the erection of the house and barn in question for the stipulated sum of $1,032. The items of material included in this list were furnished from time to time as needed, the first delivery thereof having been made on July 23, 1894, and the last delivery occurred on October 3, 1894, and within sixty days from the filing of the lien claim. It was also disclosed that additional materials, not included in said list, aggregating in value over $400, were delivered by plaintiffs at various dates between July 24, 1894, and October 4, of the same year, which materials were used in the construction of the house and barn. It is insisted by appellants that each one of said deliveries was in pursuance of a separate contract, and such con-

tention is supported by the testimony of Mr. Bugge, whose deposition was read by the defendants. On the other hand, the testimony of John B. Watkins, one of the plaintiffs, is to the effect that when the original bill of lumber, amounting to $1,032, was sold it was agreed between plaintiffs and Bugge that whatever additional materials should be required to complete the buildings were to be furnished by plaintiffs, and at the same prices they had sold Bugge similar materials in the past, and that in pursuance of said arrangement the extra materials were furnished and delivered on various dates as ordered. The trial court found specifically that each of the several items in plaintiffs' claims of lien was not furnished under several distinct contracts or agreements, but under an indivisible one, and such finding is not outside of, but within, the evidence. The fact that the materials were ordered and delivered on different dates does not create separate contracts. If it be true, as there is evidence tending to show, that all the materials were furnished to plaintiffs under a single understanding and agreement, the contract is indivisible, although the materials were delivered on various days, and a portion of the items was furnished at the stipulated sum, and the remainder as extras. The materials having been delivered under a single contract, the statement to that effect in the claim for lien was not false as argued by counsel for defendants, and the sworn statement for lien was sufficiently specific and definite to meet the requirement of the law. Before the buildings were completed Bugge abandoned his contract with the Shellys, and afterward they ordered of plaintiffs certain materials to complete the improvements, and such materials are included in the sworn account filed as a claim for lien. No prejudice, however, could result therefrom, as the items so ordered by Shellys were paid for by them and credit given therefor in the lien statement. Moreover, said items were not included in said account for the purpose of extending the time for filing the lien, since such

filing was made less than sixty days from the delivery of the last item under the original bill of lumber bought.

It is insisted that the sworn statement did not apply and refer to the items aggregating $1,032, for the reason they were furnished under a written agreement and not under an oral one, as stated in the claim for lien. This argument lacks merit, and is based alone on the fact that Bugge submitted to plaintiffs a list of materials for them to make an estimate upon. They did as requested, and verbally agreed to furnish the items included in such list for the sum last above stated. This did not constitute a written contract or agreement within the meaning of the law. The decree is sustained by sufficient competent evidence, and it is

AFFIRMED.

OMAHA FIRE INSURANCE COMPANY v. M. R. DRENNAN ET AL.

FILED NOVEMBER 17, 1898. No. 8451.

Insurance Policies: LIMITATION OF ACTIONS: PUBLIC POLICY. A clause in an insurance policy limiting the right of action to a different time from that allowed by statute is void, as against public policy.

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

W. W. Morsman, for plaintiff in error.

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

NORVAL, J.

This was an action on a policy of fire insurance. A general demurrer to the petition was overruled, and defendant elected to stand on its demurrer. A judgment was rendered in favor of plaintiffs for the amount of the policy, to reverse which is the object of this proceeding.

The sufficiency of the petition is assailed. It alleges "that the following provision, to-wit: 'It is hereby expressly provided that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or equity, until after full compliance by the assured with all the foregoing requirements; nor unless such suit or action shall be commenced within twelve months next after the fire shall have occurred; and should any suit or action be commenced against the company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim,'—inserted in said policy was printed in very small type and was read with much difficulty; that when said application and contract of insurance were made and the premium paid, the plaintiffs did not contemplate the insertion of said proviso in said policy, and the defendant's agent did not make any reference thereto, nor did the plaintiffs have any knowledge thereof; that the application upon which said policy was issued was oral, and no reference was made to said proviso as a part of said contract, nor to any of the conditions which said policy would contain, nor did the plaintiffs ever expressly agree to make said proviso or condition a part of said policy; to the contrary thereof, the defendant agreed to indemnify plaintiffs against loss or damage by fire in consideration of the sum of $2, which was paid by plaintiffs to defendant when the contract of insurance was made; that in writing said policy defendant inserted said proviso without the knowledge or express consent or authority of the plaintiffs, and said plaintiffs never expressly agreed to said insertion; that at the time said policy was applied for and delivered to plaintiffs, defendant, or its agent, did not inform or advise said plaintiffs that said condition was inserted in said policy, and that nothing was said by plaintiffs or defendant, or its agent, about said proviso being in said policy, or about any of the conditions in said policy;

that no consideration other than the $2 referred to above was paid at the time said contract of insurance was made, and that no special or separate consideration was demanded or paid for said proviso. Plaintiffs therefore allege that by reason thereof said proviso is a nullity." It also appears from averments contained in the petition that the suit was commenced on February 23, 1894, and that the loss occurred on January 29, 1892. The question presented is whether the action is barred by reason of the clause contained in the policy and set out in the petition, since more than one year had elapsed between the date of the fire and the institution of this suit. The averments in the petition set out above, following the clause of the policy, counsel for plaintiffs concede, were inserted to bring the case within the rule laid down in the opinion in *Barnes v. McMurtry*, 29 Neb. 178, wherein it is stated that "If there was no consideration in support of the provision it would be like any other contract having no consideration to support it,—a *nudum pactum*. If such a provision was in the contemplation of the parties when the application for insurance was made, or was in the application itself, then no doubt the original consideration paid for the insurance, and the policy issued thereon, would bind the insured, but a mere voluntary restriction, not in the application nor in the contemplation of the parties placed in the policy as a proviso, in print too fine to be read by a person of middle age, without spectacles, cannot be considered a part of the contract." We are asked to overrule that decision as being unsound in principle as well as contrary to authority. We refrain from either approving or rejecting that decision, for the reason that the ruling in the case before us by the trial court, that the action was not barred, is sustained by the opinion of this court in *Miller v. State Ins. Co.*, 54 Neb. 121. The policy therein involved contained a stipulation that the insured should not be liable for loss under the policy unless suit should be brought within six months from the date of the loss. It was

held that such clause was against public policy, and, therefore, not enforceable in the courts. That decision controls the disposition of this case. The petition was sufficient, and the demurrer was properly overruled.

In brief of defendant below it is suggested that the judgment was for an excessive sum. The original transcript disclosed this contention to be true. But after the filing of said brief plaintiffs suggested to this court a diminution of the record, which was sustained, and a perfect transcript of the final judgment was filed, which shows that judgment was obtained for the correct amount. The judgment is

AFFIRMED.

DANIEL D. JOHNSON ET AL. V. CHARLES A. BOUTON.

FILED NOVEMBER 17, 1898. No. 8418.

1. **Injunction:** POWER OF JUDGE AT CHAMBERS. A district judge at chambers has no power to determine finally an action for injunction, or to enter an order out of term time dismissing a cause.
2. **Jurisdiction:** CONSENT. Consent of parties cannot confer jurisdiction of the subject-matter.
3. **Injunction:** ACTION ON BOND. An action on a temporary injunction bond will not lie until there has been a final adjudication of the injunction cause on its merits.

ERROR from the district court of Scott's Bluff county. Tried below before NEVILLE, J. *Reversed.*

F. A. Wright and *C. C. Wright*, for plaintiffs in error.

George W. Heist and *M. J. Huffman, contra.*

NORVAL, J.

In July, 1891, Daniel D. Johnson commenced an action in the district court of Scott's Bluff county to enjoin Charles A. Bouton from diverting or interfering with the

waters of Winter creek. A temporary injunction was allowed by the judge of the district court of said county, and Johnson, with William H. Wright and Thomas Roberts, as his sureties, entered into a bond or undertaking to the defendant to pay him all damages which he might sustain by reason of the suing out of said injunction, if it should be finally determined that the same ought not to have been granted. This undertaking was filed with, and approved by, the clerk of said court. Subsequently, in vacation, the judge of said court entered an order dismissing the cause. Thereupon this suit was instituted by Bouton against the principal and sureties upon the injunction bond. Plaintiff obtained judgment in the sum of $300, and the defendants have brought the record here for review.

A number of errors are assigned, based upon the admission of testimony, the giving of instructions, and the sufficiency of the evidence to sustain the verdict and judgment, which present for consideration substantially the same question, namely, was the order entered during vacation dismissing the injunction suit without jurisdiction and void? A judge of the district court possesses only such authority or jurisdiction at chambers as is conferred by statute. (*Ellis v. Kart*, 7 Neb. 381.) Authority is given a district judge in vacation to grant, dissolve, or modify a temporary injunction, but he is given no jurisdiction out of term time to make an order dismissing an injunction suit or to make any other final disposition of such cause. This was expressly ruled in *Browne v. Edwards & McCullough Lumber Co.*, 44 Neb. 361. The fact that the parties to the injunction suit stipulated that the decision on the merits should be entered by the judge in vacation is unimportant. That jurisdiction of the subject-matter cannot be conferred by agreement of parties is elementary. The record before us fails to show that any order was ever entered vacating or dissolving the temporary order of injunction, either in term time or in vacation. The order of dismissal entered by the judge

at chambers is void, and there has never been a final disposition of the case in which the injunctional order was granted; hence a right of action on the bond has not yet accrued, and this suit was prematurely brought. (*Browne v. Edwards & McCullough Lumber Co.*, 44 Neb. 361.) The judgment, for the reasons stated, is

REVERSED.

JOHN HAMPTON ET AL. V. FRANK C. WEBSTER ET AL.

FILED NOVEMBER 17, 1898. No. 8397.

1. **Fraud:** PROOF. Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence.
2. **Action on Covenant of Warranty:** PLEADING. In an action to recover damages for breach of covenants of warranty of title it is essential to allege in the petition that plaintiff has been evicted by title paramount.

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

George B. France, for plaintiffs in error.

N. V. Harlan and *Harlan & Taylor, contra.*

NORVAL, J.

In March, 1893, William H. Holden and Frank C. Webster were the owners of certain real estate in York county, which they traded to John Hampton for lot 10, block 40, in David City. Warranty deeds for the respective tracts were executed and delivered, the grantee mentioned in the deed to the York county land being Matilda Hampton, wife of the said John Hampton. Holden and Webster insist that Hampton, to induce the exchange of properties, falsely represented that he was the absolute owner in fee of said lot 10; that the same was free from all liens and incumbrances; that he had a perfect right to sell and convey the same; that, relying on

said representations, he executed the deed conveying to Matilda Hampton the York county property, and that the Hamptons, at the date of the execution and delivery of said deeds, had a good title to the undivided one-half of said lot 10, and that the other one-half interest was owned, as the record discloses, by one Sally Milburn. This suit was instituted by Holden and Webster, as they insist, to recover damages for the fraud and deceit, while the defendants contend that the action is upon the covenants of warranty contained in the deed executed by the Hamptons. We confess that the petition is so framed as to justify either interpretation, for while it sets out the representations which induced the exchange, and that plaintiffs relied thereon, plaintiffs also plead the covenants of warranty and aver that the same have been broken by the defendants. Plaintiffs obtained judgment, and defendants prosecute error.

The evidence wholly failed to make out a case of fraud and deceit. The following is the chain of title of record to lot 10, block 40, in David City: Patent from the United States to Union Pacific Railroad Company, March 26, 1875; Union Pacific Railroad Company to Phœbe W. Miles, warranty deed, December 23, 1873; Phœbe W. Miles to Mary E. Phœnix, deed dated October 30, 1882; Mary E. Phœnix to Fred E. Wilson, deed, December 26, 1889; Fred E. Wilson to D. E. Coleman, January, 1890; D. E. Coleman and wife to Nora Wilson and Sally Milburn, January, 1890; Fred E. Wilson and Nora, his wife, to Matilda J. Hampton, July 18, 1892. At the time the exchange of properties was made the deed records of Butler county disclosed a complete and perfect chain of title in fee simple in the defendant Matilda J. Hampton to the undivided one-half of the said lot 10, although the deed from the Wilsons and wife to her purported to convey the entire fee, and that the title to the other one-half appeared on the records to be vested in Sally Milburn. There is to be found in the record no evidence to show that Sally Milburn has any interest whatever

in the lot, and that the deed from the Wilsons to Matilda J. Hampton did not in fact, as it purported to do on its face, convey the full title to the lot to the grantee named therein. There is some evidence introduced by plaintiff below, although somewhat of a hearsay character, from which the inference might be drawn that Sally Milburn quitclaimed her interest in the property to said Fred E. Wilson, prior to the conveyance from the Wilsons to Matilda J. Hampton, and that the deed from Sally Milburn never has been recorded, but for some cause has been withheld from the record. It is elementary that fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence. The burden, therefore, was upon the plaintiffs below to show by competent evidence that they did not obtain a good and perfect title to the lot in dispute. The proofs do not show any defects in their title. They merely disclose that the record title is incomplete; and Hampton did not represent that the record title was without flaw. The charge of fraud and deceit in the petition is not sustained by sufficient evidence.

If the action be regarded as on the covenants of warranty for a breach thereof, there can be no recovery, for the reason the petition fails to state facts sufficient to constitute a cause of action. There is no allegation in the pleading anywhere that plaintiffs have been evicted or dispossessed of the premises by any one claiming a paramount title. Such an averment was indispensable to maintain an action for a breach of covenants of warranty of title. (*Mills v. Rice*, 3 Neb. 76; *Scott v. Twiss*, 4 Neb. 133; *Real v. Hollister*, 20 Neb. 112; *Cheney v. Straube*, 35 Neb. 521.) In any view of the case, the judgment cannot stand. It is accordingly

REVERSED.

CHARLES HAMMOND v. JOHN W. EDWARDS.

FILED NOVEMBER 17, 1898. No. 8385.

1. **Conflicting Evidence:** REVIEW. A verdict on conflicting evidence, approved by the trial court, will not be disturbed in the appellate court.
2. **Instructions:** PAYMENT: ISSUES. Instructions set out in the opinion examined, and *held* to be based upon the testimony and to have fairly submitted the case to the jury.
3. **Vendor and Vendee:** CONDITIONAL PAYMENT TO BANK: FAILURE OF BANK. A vendor of real estate sent a deed to a bank to be by it held until purchaser should pay the consideration to the vendor, when the bank was to deliver the deed. There were liens against the property which it took some time to remove. The purchaser deposited the entire consideration with the bank, conditioned that the same should be retained by it and not paid to the vendor until the liens were discharged. Before the liens were all removed the bank failed. *Held*, That the loss fell upon the purchaser.
4. **Assignments of Error:** AMOUNT OF RECOVERY. Error in the assessment of the amount due will not be reviewed under an assignment in the motion for a new trial that the verdict is not sustained by sufficient evidence.
5. ———: ———. Excess in the amount of recovery cannot be considered in this court when not assigned as error in the petition in error.

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

Lamb & Adams and *Davis & Hibner*, for plaintiff in error.

Harwood, Ames & Pettis, contra.

NORVAL, J.

John W. Edwards brought this action to recover a balance claimed to be due him on certain real estate sold to the defendant. A jury trial resulted in a verdict for the plaintiff for $603.13, for which sum judgment was rendered against the defendant. It is undisputed that plaintiff, a resident of the state of Illinois, sold to the de-

fendant, who resided in Nebraska, a quarter section of land, situate in Franklin county, this state, for the agreed consideration of $2,900, of which sum $25 was paid when the contract was made. A deed to the land in question was executed by Edwards, and sent to the Capital National Bank of Lincoln. Hammond paid in, or deposited with, said bank the remainder of the purchase-money, to be by it paid to the vendor when the incumbrances against the premises were removed and title perfected. Edwards has since received the entire consideration, less $500 and the sum of $1.90 deducted from the remittances by the bank to the plaintiff as exchange. The Capital National Bank failed with the $500 remaining in its hands, and the same has not been paid to either party. The question involved is who did the bank represent in the transaction? If the money belonged to the plaintiff upon its deposit in the bank, it is obvious there can be no recovery in this case. Plaintiff testified that he sent the deed to the bank, to be delivered by it to the defendant upon the payment of the balance of the consideration to Edwards, and not to the bank. There was also introduced evidence tending to prove that Hammond had control over the money at all times; that a certificate of deposit for the $500 was issued in the name of Hammond, and payable to his order, which was retained by the bank with the title papers, and such certificate was found in the bank vault by the receiver on his taking possession of the assets. From the evidence adduced, including the correspondence between the parties, and between Edwards and the bank, we are persuaded that it was sufficient to sustain the finding that the title to the money was in Hammond, and the bank having failed while the money remained on deposit therein, the loss was on the defendant. There was more or less conflict in the oral evidence adduced on the trial, and we refrain from disturbing the verdict based thereon.

Error is predicated upon the giving of certain instructions. The fourth reads as follows: "It appears from

the evidence that the plaintiff, at the time of the claimed payments, was a resident of, and present in, the state of Illinois, and that the defendant was a resident of, and present in, the state of Nebraska, and the transactions as to the disputed payments were had through the Capital National Bank of Lincoln, Nebraska. It also appears from the evidence, as undisputed, that the defendant paid the full amount of the $2,900 into the Capital National Bank; and it also appears from the evidence, as undisputed, that of such amount the plaintiff did not receive the sum of $500, and that, further, there was deducted from the remittances from the plaintiff the sum of $1.90 charges for exchange." It is insisted that it was prejudicial error to state to the jury that it was undisputed that of the amount paid by the defendant to the bank plaintiff did not receive the sum of $500, as it assumed the existence of a fact not established on the trial. This objection is unsound. It was shown beyond all controversy that the $500 in dispute never reached the plaintiff, and whether it did or not, was not in issue in the case; but the question involved was, was the receipt of the money by the bank a payment to Edwards? There was no ground for the jury to infer from this instruction, as argued by counsel for defendant below, that the trial judge regarded the receipt of the $2,900 as not a payment of that sum to plaintiff. The views and impressions of the court upon that point were not given to the jury, but by other portions of the charge they were left to draw their own conclusions from the evidence submitted by the respective parties.

Objection is made to the fifth instruction, which declares: "The question at issue in this case is, for whom was the Capital National Bank acting in the transaction between the plaintiff and defendant; and, if the bank was acting for the plaintiff, then, did the defendant, in paying in the $500 to the bank, pay the same unreservedly so far as he, the defendant, was concerned?" This was an appropriate direction to the jury. There was evidence

introduced to the effect that Hammond retained the right to direct the bank as to the disposition to be made of the money it received for the defendant, and that he informed the bank that it should retain the $500 until the title to the property was perfected, so that the money was not paid to the bank unreservedly by Hammond. Plaintiff was advised by the bank of defendant's instructions regarding the withholding of part of the money, but this fact did not constitute the bank Edwards' agent and prevent him from recovering the money from the defendant. If the latter desired the jury informed as to the meaning of the word "unreservedly" as employed in the fifth instruction, he should have tendered a proper request to charge.

The sixth instruction reads thus: "If you find from the evidence that the plaintiff authorized the Capital National Bank to receive the money for him from the defendant, and sent the deed to the land purchased to be delivered to defendant upon payment of the purchase price, then the bank will be authorized to receive the money from the defendant for the plaintiff, and an unreserved payment by the defendant to the bank of the money in question would be a payment to the plaintiff." The foregoing is assailed for the use of the word "unreserved," it being argued that payment to the bank was payment to the plaintiff, although the money was received by the bank upon condition or conditions imposed by the defendant. To this proposition we do not agree. If the payment of this money to the bank was conditional, then plaintiff was not bound thereby, so long as the conditions had not been complied with, notwithstanding the bank was authorized by plaintiff to receive the consideration for the land, since until the defendant released all interest in the money, and the plaintiff had the right to demand the same from the bank, there was in law no payment to Edwards. The bank had no right to bind him by accepting a conditional payment. The instruction was not faulty in the particular suggested.

The seventh instruction is criticised by counsel upon substantially the same ground, and no special consideration of this instruction at this time is necessary. If the money had been paid to the bank unconditionally, then there would be ground for argument that when the bank became insolvent the loss fell on Edwards, and not upon the defendant. But the jury have found that it was not so paid, and such finding is supported by sufficient evidence. The verdict is in harmony with the instructions given.

We have examined the rulings of the court on the admission of testimony, and find no error therein prejudicial to the rights of the defendant. It would serve no useful purpose to set out in this opinion the rulings complained of, or to state at length our reason for sustaining them.

It is finally argued that the verdict and judgment were for too large a sum, since the jury allowed the amount of exchange charged by the bank on the money remitted Edwards, also interest on the $500 from the date of the contract. It is asserted that interest should have been computed only from the date plaintiff perfected his title. Whether the verdict was excessive or not was not called to the attention of the trial court in the motion for a new trial, and therefore cannot be reviewed at this time. Error in the assessment of the amount due cannot be considered under an assignment in a motion for a new trial that the verdict is not sustained by sufficient evidence. (*Riverside Coal Co. v. Holmes*, 36 Neb. 858.) Moreover, there is no assignment in the petition in error relating to the amount of recovery. This alone is fatal upon that point. (*Oliver v. Chicago, B. & Q. R. Co.*, 40 Neb. 845; *Beavers v. Missouri P. R. Co.* 47 Neb. 761; *Barmby v. Wolfe*, 44 Neb. 77; *Montgomery v. Albion Nat. Bank*, 50 Neb. 652.) The judgment is

AFFIRMED.

NEW HOME SEWING-MACHINE COMPANY V. WRIGHT THORNBURG ET AL.

FILED NOVEMBER 17, 1898. No. 8427.

1. **Records of County Court:** MANDAMUS: DISTRICT COURT. It is the duty of the county judge to make up a record containing a true history of the proceedings had before him in every cause; and the district court is authorized, upon a proper showing, to coerce the performance of such duty.
2. **Jurisdiction of District Court:** INFERIOR COURTS: TRANSCRIPTS FOR REVIEW. The jurisdiction of the district court to review and reverse the judgment or final order of an inferior court, board, or other body exercising judicial functions does not attach until there is presented to it a duly authenticated transcript of the record containing the judgment or final order complained of.

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

John P. Maule, for plaintiff in error.

James McNeny, contra.

SULLIVAN, J.

In the county court of Webster county Wright Thornburg recovered judgment against the New Home Sewing-Machine Company for expense incurred and time lost in defending an ordinary civil action alleged to have been instituted against him maliciously and without probable cause. To purge the record in that case of false entries and to obtain a reversal of the judgment rendered against it the company filed in the district court of said county a petition alleging, in addition to the facts already mentioned, (1) that the plaintiff is a Massachusetts corporation and has neither an office nor place of business in this state; (2) that the officer's return of service on the summons issued by the county judge is as follows: "The president, secretary, or treasurer could not be found in my county, and I therefore served this summons on the

within named C. S. Jones, agent of the New Home Sewing-Machine Company, by delivering to him a true and certified copy of the same, with all the indorsements thereon. C. L. Winfrey, Constable;" (3) that the company seasonably challenged the jurisdiction of the county court over its person and showed the court by affidavit that C. S. Jones, on whom the writ was served, was not the company's managing agent and possessed no authority from it except to travel in the state soliciting orders and collecting money; (4) that the company did not at any time appear in the action, except to object to the jurisdiction of the court; (5) that the challenge to the jurisdiction was overruled and judgment rendered in favor of Thornburg for $235.50, without any evidence being produced or any trial being had; (6) that the defendant James Duffy, the county judge before whom the proceedings were had, made entries in the record of the case showing that the company had appeared generally in the action; (7) that these entires were false, and that Duffy had refused, on request, to correct the same. Both the defendants joined in a general demurrer to the petition. The demurrer was sustained and the action dismissed. Of this ruling of the district court the company complains and brings the record here for review.

The judgment must be reversed. Section 28 of chapter 19, Compiled Statutes 1897, is as follows: "The district court may, by rule, compel an inferior court or board to allow an appeal, or to make or amend records according to law, either by correcting an evident mistake or supplying an evident omission." By this section the district court was authorized to compel Duffy, as county judge of Webster county, to write a true history of the case; and, on the conceded facts, it should have exercised its authority. The remedy of the company, by a proceeding in error to reverse the judgment on the ground that it was rendered without jurisdiction of its person, being obstructed by false recitals of fact contained in the record of the case, its right to have those

recitals stricken out and the record corrected and made to speak the truth, is a substantial one. The relief demanded, to this extent, should have been granted.

The further contention of the company that its petition in the district court should have been treated as a petition in error, and that the judgment of the county court should have been reversed, cannot be sustained. Assuming the averments of the petition to be true, the record of the county court is, by no means, lacking in reversible error; but, until a duly authenticated transcript of such record shall be presented to it, the district court is not authorized to review the proceedings and reverse the judgment. No attempt has been made here, either by brief or oral argument, to justify the ruling of the district court on the demurrer, and we are not informed upon what theory it was held that the petition did not make a case entitling the company to a correction of the record. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HARRIET BRONG ET AL. V. THOMAS B. SPENCE.

FILED NOVEMBER 17, 1898. No. 8403.

1. **Conflicting Evidence:** REVIEW. A verdict rendered on substantially conflicting evidence, and approved by the trial court, will not be set aside on the ground that it is not sustained by adequate proof.
2. **Unauthorized Contract of Agent:** RATIFICATION BY PRINCIPAL. A principal who accepts the fruits of a contract made by an agent in excess of his authority is liable to the person with whom such contract was made, although misinformed as to some of its provisions.
3. ———: PERSONAL LIABILITY. One who assumes, without authority, to contract for another is not personally liable in an action on such contract unless he is within its terms.
4. **Joint Assignments of Error:** REVIEW. Where two defendants

join in a motion for a new trial, and also file a joint petition in error in this court, the judgment will be affirmed unless the record discloses error prejudicial to both.

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

Edw. C. Biggs and *J. J. Thomas,* for plaintiffs in error.

G. H. Terwilliger, contra.

SULLIVAN, J.

Harriet Brong and Jacob Brong, by this proceeding in error, seek to reverse a judgment of the district court of Seward county rendered against them and in favor of Thomas B. Spence for the sum of $63.32. In his petition the plaintiff alleges that, under and pursuant to the terms of a contract between himself and the defendants, he furnished feed for one team, board and lodging for two men, and twenty-two days' labor to a contractor who was engaged in putting down a well on the farm of Harriet Brong. The defendants answered separately, denying the contract. The Brongs were husband and wife. They lived in Pleasant Dale. Mrs. Brong owned an eighty-acre farm, which she leased in 1894 to Thomas B. Spence. The well on the farm failing to furnish an adequate supply of water, Jacob Brong was instructed by his wife to cause it to be repaired. He proceeded to execute his commission, but, after consulting with Spence, was induced to wander outside of his authority and enter into a written contract with a man named Swain for a new tubular well. This agreement provided that Swain should receive seventy-five cents per lineal foot for sinking the well, be furnished with a sufficient supply of water to enable him to prosecute the work, and have his men boarded and lodged while the work should be in progress. Mrs. Brong read the contract and acquiesced in its terms, only upon being assured by her husband that Spence had agreed, in consideration of the

new well being put down, to furnish board and lodging for the men, feed for the team, and furnish all necessary help. On the trial the defendants contended that such was the arrangement between Brong and the plaintiff. The plaintiff, however, denied it, and, upon substantially conflicting evidence, the jury, under proper instructions, resolved that issue against the defendants.

In the further consideration of the case, therefore, we proceed on the assumption that the board, lodging, horse feed, and labor were furnished at the request of Brong and under circumstances affording an implied promise to pay for the same. Was Mrs. Brong bound by the agreement between her husband and Spence? She undoubtedly ratified the contract with Swain with a full knowledge of its provisions. This, of course, included a ratification of the engagement in regard to furnishing water and boarding and lodging the men. To perform the obligations imposed by the Swain contract Spence was employed, with her knowledge and consent. She was, it is true, misinformed as to the arrangement between Spence and her husband, but that was not the plaintiff's fault, and we do not see why it should prevent him from recovering for services rendered and accommodations furnished for Mrs. Brong's benefit and in fulfillment of the contract with Swain. In *Hughes v. Insurance Co. of North America*, 40 Neb. 626, this rule was laid down: "The acceptance by a principal of the fruits of an unauthorized contract made by his agent is a ratification of such agent's conduct, and said ratification relates back to the date of the performance of the act ratified, and the principal is bound by the effects thereof, and the results flowing therefrom, as much so as if he had himself performed the act." And in *Bradford v. Peterson*, 30 Neb. 96, it was said: "In a number of cases this court has held that where a husband constructs a house on the land of his wife, of which fact she has full knowledge, the agency of the husband will be presumed; in other words, the wife, by her silence where she should speak,

in effect admits that the work is being done for her benefit." The liability of Mrs. Brong upon her husband's contract was conclusively established, and, therefore, the action of the trial court in giving, and refusing to give, certain instructions in regard to the law of agency, if error, was without prejudice.

The court charged the jury as follows: "If you further find from the evidence that Jacob Brong contracted with the plaintiff to board and lodge two men and to feed their team while engaged in putting down said well, and if you further find from the evidence that Jacob Brong employed the plaintiff to furnish two men and one team to haul water to be used in putting down such well, and if you further find from the evidence that Jacob Brong was acting as the agent of his wife, then you should find for the plaintiff and against both defendants." The giving of this instruction is assigned as error. We think it is not a correct statement of the law. It, in effect, directed the jury to return a verdict against Brong in case they found that he made the contract with Spence, and in so doing acted as the agent of his wife. It is perfectly clear, on principle and authority, that if Brong was the agent of his wife and avowedly acted in that capacity, without assuming to bind himself, he incurred no personal obligation and is not liable in an action on the contract. (1 Am. & Eng. Ency. Law [2d ed.] 1119.) And even if he were not the agent of his wife, the contract would not bind him unless he was within its terms. (*Cole v. O'Brien*, 34 Neb. 68; *Bartlett v. Tucker*, 104 Mass. 336; *Hall v. Crandall*, 29 Cal. 568; *Duncan v. Niles*, 32 Ill. 532.) The instruction was prejudicially erroneous, yet that fact does not lead to a reversal of the judgment. Both defendants joined in a single motion for a new trial, and they also join in the petition in error filed in this court; so that, under a familiar rule of practice, an affirmance of the judgment against either of them requires an affirmance as to both. (*Knight v. Darby*, 55 Neb. 16; *Long v. Clapp*, 15 Neb. 417; *Dorsey v. McGee*, 30 Neb.

657; *Scott v. Chope*, 33 Neb. 41; *Minick v. Huff*, 41 Neb. 516; *Gordon v. Little*, 41 Neb. 250; *Cortelyou v. McCarthy*, 53 Neb. 479.) The judgment of the district court is

AFFIRMED.

J. S. GRABLE V. R. WALTER BEATTY.

FILED NOVEMBER 17, 1898. No. 8464.

1. **Action on Note Secured by Mortgage.** The holder of a note, which is secured by a mortgage, may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged property primarily liable for the debt.
2. ———. In the absence of an agreement by a mortgagee to look primarily to his security for satisfaction of the debt, a foreclosure of the mortgage is not a condition precedent to an action at law on the secured claim.

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

George R. Chaney and *H. D. Walden*, for plaintiff in error.

E. O. Kretsinger and *F. B. Sheldon, contra.*

SULLIVAN, J.

This was an action by Beatty against Grable, in the district court of Gage county, upon the following instrument:

"On the first day of May, A. D. eighteen hundred and ninety-four, for value received, we promise to pay to the order of Horace P. Green the principal sum of one thousand dollars, lawful money of the United States of America, with interest thereon at the rate of seven per cent per year, from April 17, 1889, until maturity, payable semi-annually according to the tenor of ten interest notes, one being for thirty-seven and 50-100 dollars, and

nine each for thirty-five dollars, bearing even date herewith, both principal and interest notes payable at the Charter National Bank of Media, Pennsylvania (with exchange on New York). And if default be made in the payment of any of said notes so secured, or any part of them, as the same mature, for the space of thirty days, or if the maker of this note and interest notes attached hereto shall allow the taxes or any other public rates and assessments on the property, or any part thereof, given as security for the aforesaid notes to become delinquent, or shall do any act whereby the value of said mortgaged property shall be impaired, then upon the happening of any of said contingencies the whole amount herein secured shall at once be and become due and payable at the election of the holder of the note, his heirs or assigns, and the mortgagee, his legal representatives or assigns, may proceed at once to collect this note and foreclose the mortgage given to secure said note and sell the mortgaged property to satisfy said debt, interest and costs, and taxes, public rates or assessments that may be due thereon which shall be secured by mortgage and also included in judgment in such foreclosure. These notes are secured by mortgage of even date herewith, duly recorded in Gage county, of the state of Nebraska. This note bears interest at the rate of ten per cent per year, payable half-yearly after maturity. All right of homestead is hereby waived.

"Dated at Beatrice, state of Nebraska, on the seventeenth day of April, 1889. J. S. GRABLE.

"J. L. TAIT

"Attest:

"A. L. GREEN."

The plaintiff recovered judgment, and the defendant, by this proceeding in error, brings the record here for review.

Grable sought, both by motion and answer, to have the action transmuted into a suit to foreclose the mortgage given to secure the note above set out. He now con-

tends that the two instruments are separate parts of a single, indivisible contract, and that their provisions are so blended and interdependent that an action cannot be maintained upon the note alone. We cannot assent to this proposition. The note unconditionally binds the defendant for the payment, at a fixed time, of a definite sum of money. Subordinate provisions authorize the payee, under certain circumstances, to accelerate the maturity of the obligation, and then to collect it. By the express terms of his contract the defendant became personally and absolutely liable for the payment of $1,000, together with the interest accrued thereon. Neither in the note nor in the mortgage is there found any stipulation making the mortgaged premises primarily liable for the payment of the debt. The plaintiff might have resorted to his security in the first instance, but he was under no contract obligation to do so. In the absence of special circumstances, there can be no doubt of the right of a creditor, whose claim is secured by mortgage, to recover a judgment at law without having first exhausted his remedy by foreclosure. (*Meehan v. First Nat. Bank*, 44 Neb. 213; *Hargreaves v. Menken*, 45 Neb. 668; Code of Civil Procedure, secs. 848, 850, 851.) The defendant, however, contends that it stands admitted in the record that the mortgagee agreed to resort primarily to the security for satisfaction of his claim. This contention is based on the fact that the court sustained a demurrer to Grable's answer, in which, after pleading various provisions of the mortgage, he alleges: "That in consideration of said special stipulations and agreements so made and entered into by the said defendants, the said Horace P. Green then and there agreed to and with the said defendants to accept a conveyance of the said real estate, and look to the said real estate for the payment of said note and the interest thereon, and agreed that if default be made in the payment of said note, interest, or taxes, or either of them, or upon a breach in the conditions of said note or mortgage, he would fore-

close the mortgage on said real estate under and according to the laws of the state of Nebraska, and sell the same, to pay said debt, all of which the plaintiff well knew when he purchased said note, as shown by said special stipulations so accepted by him, from said Green." By the foregoing allegation it was evidently the intention of the pleader to state a conclusion deduced by him from the facts antecedently averred. Those facts do not sustain his conclusion. The mortgagee did not agree to look to the mortgaged property for satisfaction of his claim, and the plaintiff, who is indorsee and owner of the note, could not lawfully be required to change his form of action into a suit to foreclose the mortgage. The judgment is right and is

AFFIRMED.

UNITED STATES SCHOOL-FURNITURE COMPANY V. SCHOOL DISTRICT NO. 87, LANCASTER COUNTY.

FILED NOVEMBER 17, 1898. No. 8461.

1. **Unauthorized Acts of Agent:** RATIFICATION BY PRINCIPAL. The unauthorized transaction of an agent must be either adopted or rejected, by his principal, as a whole. Incident to the acceptance of the benefits of an agency is the assumption of its burdens.
2. ———: ———. A principal will generally be held to have ratified the unauthorized acts of his agent by knowingly accepting and retaining the benefits of such acts.
3. **Harmless Error.** Where the verdict returned is clearly right and is the only one warranted by the evidence, the judgment will be affirmed, although errors may have intervened at the trial.

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

Cobb & Harvey, William B. Price, and *Billingsley & Greene,* for plaintiff in error.

Kelley & Browne, contra.

SULLIVAN, J.

In the district court of Lancaster county the plaintiff in error sued the defendant school district upon a written contract for the sale of certain school furniture. The answer alleged payment. The jury found in favor of the defendant, and to reverse a judgment rendered on the verdict the plaintiff prosecutes error to this court. About the essential facts there is no dispute. The contract in question was executed for the plaintiff by its authorized agent, J. M. Murdock. It provided that the furniture should be "delivered, set up in schoolhouse," and that payment therefor should be made in cash or by warrants bearing seven per cent interest. In due time the furniture was shipped from the factory in Burlington, Iowa, to Lincoln, Nebraska, where, on direction of the plaintiff, it was turned over to Murdock, and was by him delivered and set up according to the terms of the contract. The school district thereupon, in partial performance of its part of the agreement, paid to Murdock the sum of $533.55. Out of this money Murdock paid certain freight charges, drayage, and the expense of setting the furniture in place. The balance he seems to have appropriated to his own use.

The defendant contends that the furniture company, with full knowledge of the material facts, ratified and approved the act of its agent in collecting the money due to it from the school district. We think this contention is sustained by the undisputed proof. The plaintiff authorized Murdock to deliver the furniture and set it up in the schoolroom. In doing this it was necessary that he should pay freight charges, drayage, and other expenses. With the money obtained from the defendant he paid these charges and advised his principal of the fact. His principal found no fault and made no objection. It cheerfully acquiesced in this part of the transaction, and has not at any time offered to reimburse the defendant to the extent that the money collected was

applied to its use and for its benefit. Even at the trial it did not offer to credit the school district with the amount so applied. Having determined to sue for the full contract price of the furniture, it was certainly the plain duty of the furniture company to tender back to the defendant so much of the money paid to Murdock as had been necessarily expended by him in performing the conditions of the contract. The retention of such money, while attempting to coerce payment of the entire sum for which the furniture was sold, puts plaintiff in the incongruous attitude of holding fast to the fruits of an agency while insisting that the agency never existed. This it cannot do. A principal must adopt the acts of his agent as a whole. He will not be permitted to retain the part which is beneficial and reject that which is not. (*Rogers v. Empkie Hardware Co.*, 24 Neb. 653; *Kansas Mfg. Co. v. Wagoner*, 25 Neb. 439; *Waterson v. Rogers*, 21 Kan. 529.) The plaintiff, by its conduct, clearly ratified the acts of Murdock so far as they were advantageous to it, and that, in contemplation of law, amounted to a ratification of the entire transaction. In *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68, the facts being quite similar to those in the case at bar, the present chief justice delivering the opinion said: "The principal, after knowledge of the facts, must return, or tender a return, of the proceeds or benefits received by him by virtue of the unauthorized acts of the agent, or be held to have ratified the acts; and this applies to corporations as principals, equally as to persons." And in *Hughes v. Insurance Co. of North America*, 40 Neb. 626, the same principle was announced by RAGAN, C., as follows: The acceptance or retention by the principal, after knowledge of the facts, of the fruits of an unauthorized act of an agent is a ratification of the agent's act, and it relates back to the time of the act and makes it as if the agent had been empowered to perform it at its date, and the principal is bound in all respects as if he himself had been the actor. Other evidence tending to establish ratifica-

tion is contained in letters written by the plaintiff to Murdock and to the school district, but a discussion of such evidence would be unprofitable in view of the conclusion already reached. Although errors may have intervened at the trial, the verdict returned was the only one warranted by the proofs, and the judgment is therefore

AFFIRMED.

MARION A. CARSON ET AL., APPELLEES, V. JEFFERSON H. BROADY ET AL., APPELLANTS.

FILED NOVEMBER 17, 1898. No. 8436.

1. **Title of Landlord:** DENIAL BY TENANT: ESTOPPEL. It is a general rule of law that a landlord's ownership of demised premises cannot be denied by his tenant while the latter is in possession under the lease; and this principle is applicable to every case in which an entry upon land has been effected by the permission of the owner and in recognition of his title.

2. **Landlord and Tenant:** ADVERSE POSSESSION. A tenant remaining in possession of the demised property after the expiration of his term, without any open or express repudiation of the relation created by the lease, is not, in contemplation of law, holding adversely to the owner, whatever may be his secret intention.

3. **Partition:** CONFLICTING TITLES. In an action for the partition of real property among several co-owners, the district court cannot properly adjudicate upon conflicting legal titles.

4. ———:———: DECREE: ESTOPPEL. But if, in such case, the issue is tried without objection, and the disputed title conclusively established in favor of one of the parties, the other will not be heard to question the correctness and binding force of the judgment.

5. **Tenants in Common:** PURCHASE OF OUTSTANDING TITLE: CONTRIBUTION. The purchase by a tenant in common of an outstanding title to, or incumbrance on, the joint estate inures to the common benefit; and the purchaser is, in such case, entitled to contribution from his co-tenant.

6. ———: ———: ———. But this rule is not applicable to the purchase of a title or incumbrance by one of the parties before becoming a tenant in common with the other. In such case, the acquisition being neither actually nor constructively for the

benefit of any future co-owner, the right of contribution does not arise.

7. **Tax Liens:** FORECLOSURE: LIMITATION OF ACTIONS. An action to enforce a tax lien becomes barred at the expiration of five years from the time the cause of action accrued; and, where a void tax deed has been issued to the lien claimant, the issuance of the deed and the failure of the title which it assumes to convey are concurrent events.

8. ———: ———: ———. When the right to enforce a tax lien by action is barred, the lien itself is extinguished and ceases to be a charge upon the land.

9. **Tenants in Common:** IMPROVEMENTS: PARTITION. Where one tenant in common has had exclusive possession of the joint estate, and has made lasting and valuable improvements thereon, without consulting his co-tenant, there should, in partition, be allotted to him the portion of the property on which such improvements are situated, if that can be done without prejudice to the rights of his co-owner.

10. ———: ———: ———. If, in such case, the property is not susceptible of physical division, it should be sold and the proceeds divided after deducting therefrom, for the benefit of the party in possession, such sum as the court shall determine the salable value has been enhanced by the improvements.

11. ———: LEASE: POSSESSION. A tenant in common who leases the interest of his co-tenant and remains in possession after the expiration of the term, discharging the obligations imposed upon him by the contract, will be presumed to be holding under the lease and subject to its provisions, in the absence of evidence indicating a surrender of the demised interest or termination of the tenancy by mutual consent.

APPEAL from the district court of Richardson county. Heard below before BUSH, J. *Reversed in part.*

J. H. Broady, for appellants.

Reavis & Reavis, contra.

SULLIVAN, J.

This action for the partition of 160 acres of land lying in Richardson county was commenced by Marion A. Carson, Edith Carson, William Carson, and L. Ward Carson against Jefferson H. Broady and John Tighe. The

defendants answered, denying plaintiffs' title, alleging title in themselves by adverse possession, and setting up a claim for moneys expended by them in purchasing outstanding tax titles, paying taxes, and improving the premises. From a decree confirming the shares of the parties, directing partition, and adjusting incidental equities the defendants have appealed.

The facts out of which the litigation has arisen, and which are essential to an understanding of the questions here presented for decision, may be summarized as follows: The real estate in controversy was originally owned by David E. Carson, who died intestate in the year 1862. His heirs were his six brothers and sisters. In October, 1877, William Carson, one of these brothers, also died intestate, leaving surviving him his widow, Louise W. Carson, and four minor children. These children are the plaintiffs in this action. In 1875 a tax deed for the entire tract, based on a sale for the delinquent taxes of 1872, was issued by the treasurer of Richardson county to Edwin S. Towle. In 1877 Elizabeth Shrauger purchased Towle's interest in the premises and proceeded at once to occupy and improve the same. In June, 1880, Shrauger sold and delivered possession of the west eighty to Henry Nedrow. In 1877 a treasurer's deed, based on a sale of the land for the delinquent taxes of 1874, was issued to Charles Brunn, who, in June, 1881, sold and transferred his interest to the defendants. In September of the last named year the defendants obtained from the surviving brothers and sisters of William Carson a deed for their undivided interest in the land; and desiring to secure the one-sixth interest of the plaintiffs, who were then minors, proceedings were instituted at the instance of defendants to bring about, for their benefit, a guardian's sale of the land. These proceedings were afterwards abandoned, but, while they were pending, the defendants, in order to obtain a title on which they could maintain ejectment against Shrauger and Nedrow, secured from the plaintiffs, on October 14, 1881, a lease for their one-

sixth interest. This lease was immediately recorded and action for possession commenced. A compromise of these cases was afterwards effected whereby the possession of Shrauger and Nedrow was surrendered, and their interests conveyed, to Broady and Tighe, who have ever since occupied the premises.

These appellants now insist that they were in the exclusive, adverse occupancy of the land for more than ten years before the action for partition was commenced, and that the right of the plaintiffs to assert their title is barred by the statute of limitations. This contention cannot be sustained. The defendants recognized the validity of plaintiffs' title, and by relying on it and claiming under it they effected a compromise of the ejectment suits and were thus let into possession of the land. It is an ancient and well settled rule of law that a tenant cannot, while occupying the premises, deny his landlord's title. This is so even where he was in possession before the lease was made. (*Richardson v. Harvey*, 37 Ga. 224; *Thayer v. Society of United Brethren*, 20 Pa. St. 60; *Lucas v. Brooks*, 18 Wall. [U. S.] 436; *Sage v. Halversen*, 75 N. W. Rep. [Minn.] 229.) And the principle is applicable to every case in which the possession of land has been obtained by the permission of the owner and in recognition of his title. (*Dubois v. Marshall*, 3 Dana [Ky.] 336; *Downer v. Ford*, 16 Cal. 345; *Love v. Edmonston*, 1 Ired. [N. Car.] 152.) The relation of landlord and tenant was created by the lease. The defendants, until the answer was filed in this case, did not repudiate that relation or indicate by any clear and unequivocal act their intention to hold adversely. Under these circumstances their holding was not adverse, in contemplation of law, whatever may have been their secret purpose. Besides, at the time they obtained possession, they were, with the plaintiffs, tenants in common of the land. They were negotiating for the purchase of the plaintiffs' title; they recognized its validity then, and even as late as 1889 made application to buy it. They did no act at any time evincing an

intention, on their part, to oust their co-tenants; and they could not by a mere silent, peaceable possession, however long continued, extinguish the plaintiffs' title. (*Warfield v. Lindell*, 30 Mo. 272; *Purcell v. Wilson*, 4 Gratt. [Va.] 16; *Day v. Davis*, 64 Miss. 253; *Peeler v. Guilkey*, 27 Tex. 355; *Holley v. Hawley*, 39 Vt. 525.)

In the brief filed for the appellants it is argued that the title of the plaintiffs' being denied, the court was without authority to determine the questions in issue in an action to partition the land. Upon this point it is sufficient to say that the issues were tried without objection, and the averments of the petition established by undisputed proof. The defendants submitted their cause to the court without protest. They would have willingly accepted the decision had it been favorable to them, and they cannot be heard to complain on this ground because it is against them.

We proceed now to consider the equities of the parties incident to a partition of the land. The defendants ask to be reimbursed for moneys expended in purchasing outstanding tax titles and in improving the property. In the case of *Brown v. Homan*, 1 Neb. 448, it was held that the purchase by a tenant in common of an outstanding title to, or incumbrance on, the joint estate, would inure to the common benefit and entitle the purchaser to contribution. And this is believed to be the universal rule. (See collection of cases in 7 Am. & Eng. Ency. Law [2d ed.] 354.) By compromising the actions against Shrauger and Nedrow, and obtaining their interests under the tax deed issued to Towle, the defendants secured for themselves and for the plaintiffs, as their lessors and co-tenants, the immediate, peaceable possession of the land, and thus extinguished a valid lien and an adverse occupancy. Having shared in the benefits of the purchase, and claiming now the fruits of the lease which became at once effective by the settlement of the litigation, the plaintiffs are bound to contribute their just proportion of the amount paid by the defendants in effecting the com-

promise. (*Titsworth v. Stout*, 49 Ill. 78; *Lee v. Fox*, 6 Dana [Ky.] 172; *Oliver v. Montgomery*, 42 Ia. 36; *Moon v. Jennings*, 119 Ind. 130; *Watson's Appeal*, 90 Pa. St. 426; *Packard v. King*, 3 Colo. 214; *Calkins v. Steinbach*, 66 Cal. 117.) But the claim of the defendants for money expended in purchasing the interest of Charles Brunn is on an entirely different footing. It cannot be allowed. At the time Brunn's rights were acquired the defendants had no title to the land. They were not the plaintiffs' co-tenants and did not actually, or by implication of law, purchase for the benefit of the plaintiffs, as well as for their own advantage. By the Brunn deed they secured for their own exclusive benefit a lien for the amount of the taxes paid by Brunn. This lien they might have enforced by an appropriate action seasonably brought. They were entitled to have one-sixth of the amount paid by them charged as a specific lien against plaintiff's interest in the land, and to obtain satisfaction by a sale of such interest. They, however, failed to move in the matter within the time limited by the statute for that purpose, and, under the decisions of this court, their lien is now extinguished. An action for the enforcement of a tax lien is barred at the expiration of five years from the time the cause of action accrued. (*Helphrey v. Redick*, 21 Neb. 80; *Warren v. Demary*, 33 Neb. 327; *Black v. Leonard*, 33 Neb. 745.) It is also settled by *Alexander v. Thacker*, 43 Neb. 494, that the statute in such cases begins to run when a void tax deed is issued, and not at the time such deed is judicially determined to be null. The vital infirmity of the treasurer's deed to Brunn was congenital, and, therefore, the execution of that instrument, and the failure of the title which it assumed to convey, were concurrent events. And according to the rule established by *Alexander v. Shaffer*, 38 Neb. 812, and *Foree v. Stubbs*, 41 Neb. 271, when the cause of action became barred the lien itself was extinguished and ceased to be a charge upon the land.

Since the defendants have been in possession of the

land they have made lasting and valuable improvements thereon. These improvements were made without the privity or consent of the plaintiffs, but not in ignorance of the fact that they were co-owners. Under these circumstances, if the property can be divided without prejudice to the rights of the parties, there should be set apart to the defendants the portion on which the improvements are situated, and if it cannot be divided, but must be sold, there should be deducted from the gross proceeds of the sale such sum as, in the opinion of the court, the salable value has been enhanced by such improvements, and the balance should be divided between the litigants according to their respective interests. This is the general rule and is sustained by the great weight of the authorities, but exceptional cases may arise in which it would be inequitable to permit it to govern. (*Sarbach v. Newell*, 30 Kan. 102; *Dean v. O'Mera*, 47 Ill. 120; *Moore v. Thorp*, 16 R. I. 655; *Ford v. Knapp*, 102 N. Y. 135; *Johnson v. Pelot*, 24 S. Car. 255; *Ward v. Ward*, 40 W. Va. 611.) There is, however, no difficulty in applying it in this case, for plaintiffs in their brief say: "We have no purpose, nor are we instructed, to insist upon anything that is not plainly justifiable upon the broadest principles of equity and exact justice. Our first and only purpose was to procure a division of this land according to the rights of the parties. When we take twenty-six acres and a fraction from one side of the quarter section in question, we do not expect the court to advise the referees to give us the part upon which the most valuable improvements are located. We do not ask that. We only want the land, and if in the division of the land some of the hedge fence shall be given to us, we are willing to pay for that, if our friends on the other side will pay us for the use of the land while they have had it, and we are willing that a balance shall be struck on the basis of our share of the Shrauger claim, coupled with the improvements on the part that shall be awarded to us, provided, as against that, the appellants be required to account for the use of

the land for the last twelve years." In view of the conclusions reached on the several questions discussed by counsel, we find no difficulty in adjusting the rights of the parties in accordance with the foregoing offer and request. It now remains to dispose of the claim of the plaintiffs for use and occupation. The lease executed to the defendants was for a term of three years and imposed on the lessees the duty of paying taxes and making repairs. Neither at the expiration of the term fixed, nor afterward, was there any communication between the parties indicating a surrender of the demised interest or a termination of the tenancy by mutual consent. The defendants, however, paid the taxes and made necessary repairs up to the time this action was commenced, without demanding contribution. From these facts we infer that they continued to hold under the lease and subject to its provisions. Indeed, there is excellent authority for presuming, from the mere retention of possession, that the relation of landlord and tenant continued, as in other cases, under an implied renewal of the contract. (*Chapin v. Foss*, 75 Ill. 280; *Harry v. Harry*, 127 Ind. 91, 26 N. E. Rep. 562; *O'Connor v. Delaney*, 53 Minn. 247.) The holding, then, being under the lease, the provisions of that instrument fix the mutual rights and obligations of the parties with reference to taxes and rent during the entire period that the defendants have been in possession of the property.

The judgment, to the extent that it confirms the shares of the parties and directs partition to be made, is affirmed. In all other respects it is reversed. The cause is remanded to the district court with direction to allot to the defendants the portion of the land upon which are situated the most valuable improvements, and to charge upon the share assigned to the plaintiffs a lien in favor of the defendants (1) for the value of any improvements placed by them on that part of the land; (2) one-sixth of the amount paid for the conveyances obtained from Shrauger and Nedrow; and (3) interest on the latter sum

at the rate of seven per cent from the time the money was expended. If the land shall be sold, in consequence of being incapable of physical division without prejudice to the owners, the court will ascertain what sum has been added to its sale value by the improvements in question. Such sum shall be awarded to the defendants, and the balance only shall be subject to distribution.

JUDGMENT ACCORDINGLY.

IRVINE, C., not sitting.

VILLAGE OF ARLINGTON V. ESTELLE BAROTHY.

FILED NOVEMBER 17, 1898. NO. 8455.

Review Without Bill of Exceptions. Where there is no bill of exceptions in the record and the errors assigned only challenge the correctness of the conclusion deduced by the court from the evidence received, and the ruling of the court excluding evidence offered on the trial, the judgment will be affirmed.

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

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

Walton & Mummert, contra.

SULLIVAN, J.

This action was brought in the district court of Washington county to restrain the defendant Estelle Barothy from encroaching upon one of the public streets of the village of Arlington. The trial resulted in a finding and judgment in favor of the defendant. It is now claimed, on behalf of the village, that the conclusion and decree of the trial court are not sustained by sufficient evidence, and that there was prejudicial error in the exclusion of certain testimony tendered by the plaintiff in support of

the allegations of its petition. These questions cannot be determined without the aid of a bill of exceptions, and no such document is to be found in the record before us; neither is there any allusion to it in the certificate of the clerk. Error does not affirmatively appear and the judgment is, therefore,

AFFIRMED.

JOHN F. CORNELL, AUDITOR OF PUBLIC ACCOUNTS, v. FRANK IRVINE.

FILED NOVEMBER 17, 1898. No. 10232.

1. **State Officers:** AUDITOR OF PUBLIC ACCOUNTS. An incumbent of a state office, of which the duration and salary are definitely fixed by statute, is not accountable to the auditor of public accounts of the state for the manner in which, as such incumbent, he has discharged the duties of his office.

2. ———: EXTRA SERVICES: COMPENSATION. Where a state officer has rendered services outside of, and not incompatible with, his duties as such officer, it is not proper for the auditor of public accounts of the state to refuse to issue a warrant in payment of such extra services merely because the said state officer's salary, already paid, was for the period during which the said extra services were rendered.

3. **Commissioner of Supreme Court:** LECTURER BEFORE COLLEGE OF LAW: COMPENSATION. A statute created the office of commissioner of the supreme court, prescribed his duties, provided his compensation, payable quarterly, and only forbade, during his term, his engaging in the practice of law. *Held*, That neither upon principle nor upon statutory grounds was such commissioner properly denied compensation for lectures delivered to a law class of the state university, since such extra services were not incompatible with, or included within, the scope of his duties as such commissioner.

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

Cases cited by counsel are discussed in the opinion.

C. J. Smyth, Attorney General, and *Ed P. Smith, Deputy Attorney General,* for plaintiff in error.

Frank Irvine and *M. B. Reese,* for defendant in error.

RYAN, C.

The defendant in error appealed to the district court of Lancaster county from the disallowance of his claim by the auditor of public accounts of this state, and on his appeal secured the allowance sought by him, and the said auditor now seeks to reverse the judgment of the district court by these proceedings in error. Omitting mere formal parts the petition in the district court was in the following language:

"The said Frank Irvine, appellant, for cause of action states:

"1. That the said John F. Cornell is, and for more than a year past has been, the auditor of public accounts of the state of Nebraska, and as such auditor is charged with the duty, among other things, of examining certificates drawn by the regents of the University of Nebraska, and drawing warrants thereon upon the state treasurer for the payment of claims against said university.

"2. That a contract exists, and for many years past has existed, between the said appellant and the said regents whereby the said appellant is engaged to deliver each year, so long as said parties see fit to continue said contract, lectures before the senior class of the College of Law of said university at the agreed compensation of $20 per lecture.

"3. That in pursuance of said contract, and at times fixed by the authorities of said university, the said Frank Irvine did, during the months of February and March, 1898, to-wit, on three successive Wednesdays at 2 o'clock P. M., and on three successive Thursdays at 10:45 o'clock A. M., deliver six lectures before said class, and thereby was entitled to receive from the funds of said university devoted to said college of law the sum of $120.

"4. That there was at all times mentioned, and is now, a specific appropriation by the legislature available and sufficient for the maintenance of said college of law and for the payment of said claims of appellant.

"5. That, as more fully appears from the transcript filed herein, the said board of regents caused to be issued and signed by its secretary and president a certificate that said services had been performed, and that said Frank Irvine was entitled to said sum and directing appellee to draw his warrant upon the state treasurer therefor. Said certificate was duly presented to said appellee, and all things requisite and necessary to require the drawing of said warrant were by appellant and said board of regents done and performed, and it thereby became the duty of said appellee to draw his warrant as aforesaid, directing said treasurer to pay to appellant the sum aforesaid.

"6. That said appellant is, and for five years last past has been, one of the commissioners of the supreme court, and as such commissioner has drawn from the treasury his salary as provided by law, and about the 1st day of April, 1898, drew his salary as such commissioner for the quarter ending the 31st day of March, 1898.

"7. The said appellee examined and rejected said claim and certificate and disallowed the same and refused to draw his warrant therefor, giving as his sole and only reason for such action, in the official notice thereof served on the appellant, that, from certain opinions rendered by the attorney general, he was led to believe that said appellant was not entitled to receive compensation for the services so by him rendered to said university, because he filled such position as commissioner and received salary as such.

"Wherefore appellant prays that the decision of said auditor be reversed and that this court, by its order and mandate, require the appellee to issue his warrant for the sum of $120 as required by law. Appellant also prays

judgment for costs, and such other relief as may be just and lawful."

To the above petition the auditor filed a general demurrer, which was overruled, and, as the auditor elected to stand upon his demurrer, in the further orderly progress of the cause there was judgment as prayed in the petition.

The duties of commissioners of the supreme court, their salaries, and the limitations upon their right to pursue other vocations are found in sections 22*e*, 22*f*, and 22*g*, chapter 19, Compiled Statutes 1897. The salary of each is thereby made equal to that of a judge of the supreme court, his duties are to aid in the performance of the duties of said court in the disposition of the cases therein pending, and during the term of his office he is forbidden to practice law. The contentions on behalf of the auditor are that the defendant in error, by accepting the office of commissioner of the supreme court, engaged to give all of his time during ordinary business hours to the duties of that office, and that with this implied engagement the delivery of lectures to students of the law college during ordinary business hours was incompatible; and, furthermore, that having received compensation as commissioner from the state for his entire time, he is not entitled to compensation from the same source for duties performed during the same time, even though these duties did not pertain to his office as commissioner. In this connection we mention the fact that there was much controversy in argument as to whether there is involved in this proceeding the right to hold two offices, merely to say that, in our opinion, too much stress has been laid on this proposition. As we understand the argument of the attorney general, it is based upon the assumption that to pay the claim of the defendant in error would be opposed to public policy, for the reason that the duty of lecturer is incompatible with that of commissioner, and because the time of the defendant in error, already paid for as commissioner, must, to a

certain extent, be appropriated to his duties as lecturer. In support of this contention there are cited *Commissioners of Montgomery County v. Bromley*, 108 Ind. 156, *State v. Buttz*, 9 Rich. [S. Car.] 156, and *Commonwealth v. Hawkes*, 123 Mass. 525.

In the first of these cases Bromley was township trustee and as such kept open his office for the transaction of business of the township every working day during his term, and for his services on all of said days he was paid out of township funds at the rate of $2 per day. During said official term Bromley performed the duties of overseer of the poor of his township, and for these services in the case decided he claimed compensation from the county. The statutes of Indiana provided that township trustees should be overseers of the poor within their respective townships and should perform all the duties with reference to the poor of such townships. It was also originally provided by the statutes of that state that the overseers of the poor in each township should be entitled to receive $1 per day for each day necessarily employed in the discharge of his duties as such overseer of the poor, to be allowed by the board of commissioners of his county. The same *per diem* compensation was originally allowed to a township trustee while engaged in the performance of his other duties, to be paid out of the township fund. Afterward, in 1879, there was enacted a statutory provision as follows: "The *per diem* of township trustees shall be as follows: For each actual day's service they shall be allowed to be paid, out of the township fund, two dollars; provided that, for all services as overseer of the poor, said township trustees shall be paid out of any funds in the county treasury not otherwise appropriated on the order of the board of county commissioners." In reference to the language just quoted the supreme court of Indiana said: "As a statutory provision that section might, perhaps, have been so framed as better to express the precise legislative meaning intended to be conveyed; but, construed in the light of antecedent

legislation and with reference to the purpose which the legislature clearly had in view in passing the act of March 31, 1879, we interpret it to mean that for services in the ordinary civil and school business of the township the trustees shall be paid at the rate of $2 per day out of the township fund, and that for services as overseer of the poor he shall be paid at the same rate out of the county treasury, and that separate accounts must be kept of the amount of each class of services rendered from time to time. We further interpret the section under consideration to mean that, as applicable to both classes of service, an allowance of only $2 can be made for an actual day's service, without reference to the manner in which the day may have been divided between the two classes of service; and that, consequently, a township trustee is not entitled to receive out of any fund more than $2 for official services performed during one day." It will be readily seen that the point decided in the above case was not the same as that which is involved in this. Under statutes in existence previous to 1879 a township trustee as such received $1 per day for services, to be paid out of the township fund; as overseer of the poor he was entitled to receive from the county $1 per day for his services as such overseer. The township trustee was, *ex officio*, overseer of the poor, and hence, when in 1879 there was allowed $2 per day to township trustees, this legislation was understood by the court to evidence a legislative purpose to pay but $2 per day for services rendered by township trustees, whether rendered as such trustee in strictness, or only *ex officio*.

The scope of the opinion in *State v. Buttz, supra*, is fully described in the syllabus, which is in this language: "(1.) A solicitor who accepts the office of representative in congress thereby vacates his office of solicitor. (2.) Where one holding an office accepts another which is incompatible therewith, he thereby vacates the first. (3.) There is nothing in the constitution of the state which abrogates the common-law rule that the same person

cannot hold at the same time two incompatable offices. (4.) The office of state solicitor and member of congress are incompatible with each other." The opinion contains a very full and able exposition of the proposition that the acceptance of an office of which the duties are incompatible with the duties of another office already held, *ipso facto*, vacates the office first held. In the case at bar the question is not whether by lecturing to the law class the defendant in error vacated his office as commissioner of the supreme court, for the incompatibility asserted to exist is not claimed to involve such consequences as in the above case were held to result from certain restrictive provisions of the constitution of South Carolina.

Commonwealth v. Hawkes, supra, is governed by the principle which was the pivotal point in *State v. Buttz, supra*, and which has just been held inapplicable to the facts now under consideration.

In addition to the three adjudicated cases just considered the attorney general has referred to 1 Dillon, Municipal Corporations [4th ed.], section 227, but this section we find upon examination to be devoted to the discussion of the vacation of an office already held by the mere acceptance of another incompatible therewith, and throws no new light upon that question.

Having completed an analysis of the cases and views of text-writers cited on behalf of plaintiff in error, we shall now devote our attention to those cited by defendant in error and such others as, with necessarily limited time at our command, we have been able to discover. Introductory to this task it is appropriate to quote something of the views of English jurists with reference to considerations of public policy as applied to judicial investigations.

In *Richardson v. Mellish*, 2 Bing. [Eng.] 229, Burrough, J., said: "I, for one, protest, as my lord has done, against arguing too strongly upon public policy:—it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from

the sound law. It is never argued at all, but when other points fail."

In *Davies v. Davies*, 36 L. R. Ch. D. [Eng.] 364, after having approvingly quoted the saying of Burrough, J., that "public policy is a very unruly horse, and when once you get astride it you never know where it will carry you," it was added that "Public policy does not admit of definition and is not easily explained."

With these cautionary remarks in mind we shall now state rather what is held by the courts than try to formulate any general principle to be upheld by authority.

In *United States v. Ripley*, 7 Pet. [U. S.] 18, it was held that though General Ripley had been receiving the pay and emoluments of an army officer, he was entitled to payment for services in preparing plans of fortifications, procuring and forwarding supplies, etc., such services not being within the line of his duties.

In *United States v. Fillebrown*, 7 Pet. [U. S.] 28, the first paragraph of the syllabus is as follows: "The United States instituted an action to recover a balance certified at the treasury, against the defendant, on the settlement of his accounts as secretary to the commissioners of the navy hospital fund. Upon this settlement, the defendant set up a claim for compensation, for what he considered extra services, in bringing up and arranging the records of the board, antecedent to his appointment as secretary; and also for commissions on the disbursement of moneys under the orders of the board. These claims were rejected by the accounting officers of the treasury and were, on the trial, set up by way of set-off against the demand on the part of the United States. Held, that the allowance of compensation by a fixed salary to the defendant, as the secretary of the board of the navy hospital commissioners, did not exclude his right to claim extra compensation for the disbursement of moneys belonging to the navy hospital fund."

In *United States v. Saunders*, 120 U. S. 126, it was held that a clerk in the office of the president of the United

States who was appointed clerk of a committee of congress and performed the duties of both positions was entitled to compensation appropriated and allowed by law for each of said classes of services.

In *Evans v. City of Trenton*, 4 Zab. [N. J.] 764, it was held that while a municipal officer is bound to perform such duties as his office properly requires without regard to the adequacy of his fixed compensation therefor, yet that for services performed upon request, and which it was not a part of his official duty to perform and which any other person might as well have performed, he was entitled to compensation from the city.

In *Love v. Baehr*, 47 Cal. 364, the attorney general was held properly to have been compensated by the legislature by a salary for services performed as a member of the board of examiners,—those services not being within the line of his duties as attorney general and consequently not to have been paid by his salary as such officer.

In *McBride v. City of Grand Rapids*, 47 Mich. 236, it was held that a city officer is entitled to be paid for acts done, under appointment of the common council, outside of his official duty; and there was the same holding in *Langdon v. Town of Castleton*, 30 Vt. 285.

We find the question of the incompatibility of employments as affecting distinct rights to compensation treated of in *Bryan v. Cattell*, 15 Ia. 538. Bryan, in January, 1861, was commissioned, qualified, and entered upon the discharge of his duties as district attorney. In July of the same year he was commissioned captain in a volunteer regiment for a term of three years, or during the civil war then in progress. By mandamus proceedings he sought to recover compensation as district attorney for the whole term to which he had been elected as such, notwithstanding the fact that for the greater part of said term he had been performing his duties as captain outside the limits of his state. For the part of his term during which he was outside the state, because of an ex-

press statutory provision, his claim for compensation was denied, but for the three months of his term during which he was within the state which was not governed by such statute his demand for compensation was enforced. In passing upon this branch of the case Wright, C. J., for the court, used this language: "We have no statutory declaration, in general language, prescribing what offices, from their nature, are incompatible. Looking to the common law, we are of the opinion that the incompatibility must be such as arises from the nature of the offices, or their relation to each other. Or, as Mr. Bouvier has it, 'They are such as are subordinate to, or interfering with, each other; for example, a man cannot be at once judge and clerk of the same court.' Bailey, J., in *Rex v. Tizzard* (17 Eng. C. L. 191) says: 'The two offices are incompatible, where the holder cannot in every instance discharge the duties of each.' And that incompatibility, as here used, must be such as arises from the nature of the duties, in view of the relation of the two offices to each other, seems to have its foundation in reason. If appellant's proposition is correct, then plaintiff would have surrendered his office if he had volunteered and gone into the service as a private. The acceptance of a captaincy would not change it, for his obligation to continue in the service would be no greater in the one case than in the other. The effect of such a rule would be to have the vacancy depend, not upon the acceptance of an office, but upon a particular employment. And yet this will scarcely be claimed. Not only so, but it by no means necessarily follows that a person in the military service might not discharge all the substantial duties of the attorneyship. It is scarcely probable that he could or would, and yet he might. Suppose the plaintiff in this case had been permitted by his superior officers to return and attend all the courts in his district. Would it have been claimed that because he was captain he was disqualified from discharging such duties? Or suppose he had been so connected with the

service that his regiment had been retained in the state or stationed in the county of his residence. Would his right to discharge the duties of the former office have been disputed? It seems to us clearly not, and if not, it is plain that there is nothing in the nature of the two offices incompatible with each other. The objection rests more upon how and where the duties of the second office are to be exercised than upon any necessary conflict between such offices." Following the above language there was a discussion of the right of an officer to receive payment for services which, from the nature of his office, he should, but has not, performed. On this subject it was said: "The better and safer rule doubtless is, that if he is, in point of law, actually in office, he has a legal right to the salary pertaining to it. His conduct may be such as to render him liable to removal, but when the statute makes no deduction for absence or neglect of duty, and the state takes no step as a consequence of such absence or delinquency, we suppose it is the legal right of the officer to demand the full salary allowed him by law. Different questions might and would, of course, arise when it was claimed that there had been a relinquishment of the office, or that the party, by removal from the state, or by resignation, or the like, had abandoned it. Such questions do not arise, however, in this case, and for the three months named, therefore, we hold the plaintiff was entitled to his salary."

The statute which created the office of commissioner of the supreme court in terms made incompatible with the duties of that office but one line of employment and that was the practice of law. It seems to us that this fact serves to illustrate the proposition stated by Chief Justice Wright for the Iowa supreme court, that the state can guard its interests by fixing the limit outside of which an officer may not perform other functions. In the case at bar general words of restriction could as well have been employed as particular words, and if it had been the legislative intent by statute to declare the du-

ties of a commissioner of the supreme court to be incompatible with the duties of lecturer to the law class, no doubt the desired inhibition would have been extended beyond the practice of law, either by broader, particular restrictive terms, or by language as effective, but general in its nature. The incumbent of an office of which the duration for a certain term of years and the salary are fixed by statute is not in any degree answerable to the auditor of public accounts for the manner in which he discharges his official duties. If during his said term such incumbent, under proper authority, renders services not incompatible with the duties of the office of which he is an incumbent, it is no sufficient answer to his claim for such extra services for the auditor of public accounts to urge that this claimant, as such incumbent, has already, by the state, been paid a salary for the quarter during which the extra services were rendered. The duties of a commissioner of the supreme court, neither by common law, nor by statute, are incompatible with the duties of a lecturer to a class in the college of law, and we are therefore of the opinion that the district court properly overruled the demurrer in this case, and accordingly its judgment is

AFFIRMED.

IRVINE, C., took no part in the decision.

SULLIVAN, J., dissenting.

The judgment in this case enforces a claim entirely meritorious. I think, however, the contract which is the basis of the action contravenes sound public policy and that the decision will prove to be a mischievous precedent. I therefore dissent.

NORVAL, J.

I am constrained, upon authority, to concur in the affirmance of the judgment of the trial court.

J. R. WEBSTER, ADMINISTRATOR, v. CITY OF HASTINGS.

FILED NOVEMBER 17, 1898. No. 9901.

1. **Statutes:** EVIDENCE OF ENACTMENT. The certificate of the presiding officer of a branch of the legislature that a bill has duly passed the house over which he presides is merely *prima facie* evidence of that fact, and evidence may be received to ascertain whether or not the bill actually passed. Following *State v. McLelland*, 18 Neb. 236.

2. ———: ———: HOUSE JOURNALS. The journals of the respective houses are records of the proceedings therein, and if it should appear from them that a bill had not actually passed, the presumption in favor of the certificate would be overthrown and the act declared invalid. Following *State v. McLelland*, 18 Neb. 236.

3. ———: ACTION FOR DAMAGES: JUDGMENT ON PLEADINGS. Where a defendant pleaded as a defense to a claim for damages non-compliance with a statutory condition precedent indispensable to a right to maintain such action and plaintiff pleaded in avoidance of the alleged statute that it had never been introduced into either branch of the legislature, and that no bill of the same title or of similar import had ever been read, passed, or voted upon in either of such branches, *held*, that a motion for judgment in favor of the defendant upon the pleadings was improperly sustained.

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

Webster & Rose, J. L. McPheely, B. F. Smith, and *Ed L. Adams,* for plaintiff in error.

L. J. Capps, Tibbets Bros., Morey & Ferris, contra.

RYAN, C.

This cause has been several times under consideration in this court as between Jefferson H. Foxworthy and the city of Hastings. Its previous history need not at this time be considered, for the questions now presented arise, for the most part, independently of former discussions. On November 16, 1886, Jefferson H. Foxworthy filed in the district court of Adams county an amended petition,

in which he alleged that the defendant, the city of Hastings, on January 21, 1886, was a city of the second class under the laws of this state; that said city, on the date above named and for some time before, had suffered one of its streets to become and remain dangerous to persons using it, by reason of accumulations thereon of ice and snow, though it was the duty of said city to cause the removal of said obstruction; that after nightfall of said day said Foxworthy, without fault on his part, slipped on said ice and snow and by falling was greatly injured; that said Foxworthy, on July 28, 1886, as soon as he was sufficiently recovered from his said injuries, filed with the city clerk of the city of Hastings his sworn statement, showing the time, place, and circumstances of his said injury and the names of the witnesses thereto as fully as known to him, and that his damages amounted to $20,000. Among other defenses the defendant alleged that on January 21, 1886, it was a city of the second class of more than 5,000 and less than 25,000 inhabitants; that no statement of the claim for damages alleged to have been sustained by plaintiff was filed within six months of the date of the alleged injury, as required by law, and that by reason of the failure to file such claim the district court was without jurisdiction to try the cause. On July 8, 1896, plaintiff filed an amended reply, in which, in substance, he denied that defendant, on January 21, 1886, or prior thereto, was organized under the laws of Nebraska as a city of the second class of more than 5,000 and less than 25,000 inhabitants, and averred that the defendant was a city of the second class organized under the law entitled "An act to provide for the organization, government, and powers of cities of the second class and villages," approved March 1, 1875; that defendant claims to be incorporated under what is published as, and purports to be, an act approved March 5, 1885, entitled "An act to amend the title, and sections 1, 2, 3, and 4, of an act entitled 'An act to provide for organization, government, and powers of

cities of the second class having more than ten thousand inhabitants,' approved March 1, 1883" (Session Laws 1885, p. 148, ch. 14), but plaintiff avers that said act is void, for that no bill of such title was ever introduced into either house of said legislative assembly, nor was any bill of that, or yet of any, title expressing its subject or purpose ever read or voted upon or passed, or the title thereof ever agreed to, in or by either house of said legislative assembly." There were in said reply the following averments: "The act to which said act of March 5, 1885, purports to be amendatory, entitled 'An act to provide for the organization, government, and powers of cities of the second class having more than ten thousand inhabitants, approved March 1, 1883,' was and is unconstitutional and void, because its subject-matter is not expressed in its title and it conflicts with the title and provisions of an act to provide for the organization, government, and powers of cities and villages, approved March 1, 1879, which was not and is not repealed nor by it referred to or amended, and was and is yet in force, and no law existed, or now exists, requiring plaintiff to file his claim in the city clerk's office." On May 17, 1897, the defendant filed the following motion: "Comes now the defendant and moves the court that judgment be rendered in favor of defendant on the pleadings in this cause and this action be dismissed for the following reasons: (1.) Under the issues as joined the defendant is entitled to judgment. (2.) Under its pleadings a judgment in favor of plaintiff could not be sustained. (3.) Plaintiff's petition does not state facts sufficient to constitute a cause of action. (4.) The issues in this cause, as disclosed by the pleadings, have been adjudicated in favor of defendant in this action. (5.) The new matter in plaintiff's amended reply is not proper to be pleaded in a reply, nor can it aid the petition or be considered by the court." The action taken with reference to this motion is described in the following journal entry: "And now on this 18th day of May, 1897, the same being one of the days

of the May, 1897, term of this court, this cause came on to be heard upon the motion of defendant for judgment on the pleadings, and after argument by counsel for both plaintiff and defendant, the court, being fully advised, sustains said motion and finds for the defendant on the pleadings." A motion for a new trial was filed by plaintiff which presented the grounds relied upon in his reply, and this motion, as the record shows, was overruled and an exception was taken to this ruling, whereupon there was a judgment dismissing plaintiff's action and taxing the costs against him. After these proceedings were had plaintiff died, and in this court the action has been revived in the name of plaintiff's administrator.

It is urged by the defendant that the averment of the filing of a notice of plaintiff's claim was essential to the statement of plaintiff's right to bring suit. On the theory of the defendant, that the statute required this step to be taken, this position may be conceded to be correct. On the other hand, if, as plaintiff alleged, there was in existence no statute requiring the filing of notice of plaintiff's claim, it was not incumbent upon plaintiff, in stating his cause of action, to allege that a claim for damages had been filed with the city clerk of defendant. Whether or not there was such a failure to comply with constitutional requirements regulating the enactment of statutes was a question presented by the reply of plaintiff, in which it was distinctly averred that the act requiring the filing of a claim was void and never had an existence, for the reason that no bill of such title was ever introduced into either house of the legislative assembly, neither was that bill nor any bill of that, or yet of any, title expressing its subject or purpose ever read or voted upon or passed, or the title thereof agreed to, in or by either house of said legislative assembly. Manifestly, if these averments were true, the statute under which the defendant insisted upon the filing of a claim with the city clerk was as ineffective as though it had never existed. If this assumption of plaintiff that there was no statute

was correct, he was not required to assert and prove a negative. The defendant, by answer, first asserted the existence of this statute, plaintiff denied its existence and alleged facts to show it had never become a law, and these we shall now consider.

It is provided by section 418, Code of Civil Procedure, as follows: "The proceedings of the legislature of this state, or any state of the union, or of the United States, or of any foreign government are proved by the journals of those bodies respectively, or of either branch thereof, and either by copies officially certified by the clerk of the house in which the proceedings were had or by a copy purporting to have been printed by their order." In *State v. McLelland*, 18 Neb. 236, the syllabus, which reflected the full purport of the opinion correctly, was in this language: "The certificate of the presiding officer of a branch of the legislature that a bill has duly passed the house over which he presides is merely *prima facie* evidence of that fact, and evidence may be received to ascertain whether or not the bill actually passed." "The journals of the respective houses are records of the proceedings therein, and if it should appear from them that a bill had not actually passed, the presumption in favor of the certificate would be overthrown and the act declared invalid." In *State v. Robinson*, 20 Neb. 96, it was said: "It could serve no good purpose to re-examine the question or rediscuss the principle involved, as we are satisfied with the reasoning of Judge MAXWELL in *State v. McLelland*." In *State v. Moore*, 37 Neb. 13, with doubts intimated as to the advisability of adopting such a rule, it was recognized as having been settled by the decisions of this court in this state. In *Re Granger*, 56 Neb. 260, the writer has intimated his disapproval of the rule, and yet then, as now, recognizing it as established, he feels bound to express the views of this court as controlled by its former opinions. The defendant, by its motion, conceded that every fact well pleaded by plaintiff was susceptible of proof, and, as we have already seen, this court

is committed to the doctrine that evidence was admissible to show such pleaded non-compliance with constitutional provision as rendered abortive the attempted legislation. The judgment of the district court was therefore erroneous and is accordingly reversed, and the cause is remanded for further proceedings not inconsistent with the view of this court as above expressed.

REVERSED AND REMANDED.

RAGAN, C., not sitting.

IRVINE, C., dissenting.

If the maxim *stare decisis* is to be regarded, there is no escaping the conclusion expressed in Commissioner RYAN'S opinion. I concur in his view, that the past decisions of the court compel that conclusion, but I more heartily concur in his expression of disapproval of the principle of those decisions. *State v. McLelland*, 18 Neb. 236, plainly declares that the certificate of the presiding officer of a branch of the legislature that a bill duly passed his house is only *prima facie* evidence of that fact; that it may be rebutted by other evidence. Other cases have followed that rule. But we are in this case for the first time confronted with its mischievous results. If the fact of the due enactment of a statute is to be tried on any available evidence, certain results follow of such character as to bid us pause and re-examine our premises. Being an issue of fact it is to be tried by the triers of fact,—in many cases a jury. Being an issue of fact its determination in one court or in one case will be no bar to its retrial in other courts, or in the same court, in an action where the parties are different. One jury or one judge may, on conflicting evidence, find that a statute was passed and is therefore the law of the state. Another may find that it was not passed and is therefore inoperative. The law will be one thing for one man and another thing for another man, depending upon the dili-

gence of his counsel and the temper, or perhaps prejudice, of a jury. A city will be governed by one law when A sues it and by a different law when B sues it. No issue of bonds will be valid until after their maturity, when in a suit thereon a jury shall say that the legislature passed the law authorizing the issue, and then they will be valid only as to the specific bonds in action. I need not amplify the illustrations. Such a state of affairs produces a confusion in our statute law suggesting anarchy. The court should not hesitate to overrule a false precedent, or any number of false precedents, when the mischief of following them is manifestly greater than that flowing from their disturbance. Certainly the uncertainty of the law from the disturbance of three or four precedents relating to a rule of evidence is less mischievous than a perpetual uncertainty as to the very existence of every statute in the books.

There are three views which may be taken of the subject. One is that the enrolled act deposited with the secretary of state and bearing the certificates of the presiding officers of the two houses and the approval of the governor is the final and unimpeachable evidence not only of the terms of the act, but of the fact of its due enactment. A second is that the court must take notice of the passage of an act, but may inform itself from other sources than the enrolled act. The third view is that formerly taken by this court, that the question is one of evidence, the enrolled act establishing a bare presumption. The second view is one taken by many courts, but as between that and the third the latter is more logical. Whether or not an act passed the legislature is clearly a question of fact, and if it be one of doubt to be determined upon conflicting data it should be tried as an issue of fact. The uncertainty would be no greater than to permit its determination unassisted by rules of evidence by the process of judicial notice. I think, however, that the first view is the only one which is safe and the only one which can be reached by an investigation based

either on history or on fixed legal principles. I do not propose to extensively discuss the rationale of the question. It is no new theme. In a foot-note to *Field v. Clark*, 143 U. S. 649, are collected the decisions of nearly all the American courts on the subject, and it is hardly possible to add anything to the reasons advanced in those decisions. By a recurrence to *State v. McLelland, supra*, it will be found that this court was largely controlled in its conclusion by *Gardner v. Collector*, 6 Wall. [U. S.] 499. In that case there was no attempt to impeach the enrolled act. There was no dispute as to the existence of the statute or its due enactment. The question was as to the time of its approval. It bore the following signature: "Approved Dec. 24, Abraham Lincoln." The contention was that the court could not look beyond this to ascertain the year of its approval, although the journals of congress showed that it was passed in 1861 and the records of the secretary of state showed that it was deposited with him December 26 in that year. The constitution did not require the president to certify the time of his approval. It provided merely for his signing the bill, and all the court held was that the act was not defeated by the absence of a certificate not required by the constitution, and that extrinsic facts might be resorted to to fix the time of the approval, not to impeach the enrolled act or show irregularity in its passage. This was the construction placed upon the case in *Field v. Clark*, 143 U. S. 649, when the supreme court of the United States, having before it most exhaustive briefs citing the whole multitude of cases on the subject, announced the rule that the enrolled act, attested by the presiding officers of the two houses, bearing the approval of the president and deposited in the department of state, is the unimpeachable proof of its due enactment as enrolled. Many of the decisions of the state courts, including our own, to the contrary, have been thus based wholly or in part on an utter misconception of *Gardner v. Collector*. Our constitution provides (art. 3, sec. 11): "The

presiding officer of each house shall sign in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and concurrent resolutions passed by the legislature." There can be no doubt that this was placed in the constitution for the very purpose of effecting a solemn authentication of the fact of passage of a bill. The presiding officer must not only attest it, but he must do so in the presence of the house while it is in session and capable of transacting business. The authentication thus obtained becomes the act of the house itself, and could have been provided for no other purpose than to make it the final evidence of the fact. The constitutional requirement for keeping and publishing legislative journals is for the purpose of insuring publicity of the proceedings. It was plainly adopted because of the practice maintained in parliament until recent times of keeping those proceedings secret. Those journals were not meant to impeach in after years the solemn authentication provided for in the other section. If the rule in *Field v. Clark*, which is that adopted by very many of the ablest state courts, be followed, the statute law must always be certain. The only mischief which could possibly result would flow from the fraudulent enrollment of a bill. If the provisions of article 3, section 11, of the constitution shall be regarded in their spirit by the presiding officers and members of the legislature, that evil can be avoided. But if it be disregarded, which we cannot presume against a co-ordinate branch of the state government, the mischief of an occasional statute surreptitiously authenticated is incalculably less than the mischief of perpetual uncertainty as to the existence of any statute.

SULLIVAN, J., concurs in the foregoing dissenting opinion.

APOLLONIA HOFFMAN, APPELLANT, V. PHILEPENE BECKER ET AL., APPELLEES.

FILED NOVEMBER 17, 1898. No. 8443.

Bill of Exceptions: OMISSIONS: REVIEW. The entire omission from the bill of exceptions of evidence necessary to sustain an essential controverted averment of appellant's petition necessitates the affirmance of the judgment of the district court.

APPEAL from the district court of Platte county. Tried below before SULLIVAN, J. *Affirmed.*

C. J. Garlow, for appellant.

McAllister & Cornelius, contra.

RYAN, C.

This action was brought in the district court of Platte county by Apollonia Hoffman for a judgment in the sum of $9,000, which plaintiff alleged was the value of her dower interest in certain lots in Columbus. The defendants were the widow and minor children of John P. Becker, who, as his heirs, claimed to be the absolute owners of the above-mentioned lots. The brief of appellant sets out what purports to be a stipulation of facts, and in their brief counsel for appellees admit that the stipulation of facts and the statement of the case are correctly given in appellant's brief, but the bill of exceptions fails to show that any statement of facts whatever was offered in evidence or considered on the trial of the issues determined by the district court. In this condition of the proofs the judgment of the district court must be affirmed, for, not to mention any other disputed fact, there was issue joined on the essential averment of plaintiff that her deceased husband, during his lifetime, was the owner of the aforesaid lots, and on this proposition no evidence was offered.

AFFIRMED.

SULLIVAN, J., not sitting.

FIRST NATIONAL BANK OF OMAHA, APPELLEE, V. WILLIAM J. HAHN ET AL., APPELLANTS.

FILED NOVEMBER 17, 1898. No. 8439.

Review: CONFLICTING EVIDENCE. A ruling of the district court upon fairly conflicting evidence will not be disturbed on appeal.

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

Meikle & Gaines, for appellants.

Congdon & Parish and *Hall, McCulloch & Clarkson, contra.*

RYAN, C.

This is an appeal from an order of confirmation of a sale of real property on a decree of foreclosure entered in the district court of Douglas county. It is insisted that upon motion to that effect the appraisement should have been vacated and confirmation denied upon the assumption that there was no evidence contradicting the showing of a value of the property greatly in excess of the appraisement as shown by affidavits. This view of the condition of the evidence ignores the appraisement itself, which is the sworn statement of three disinterested persons upon an actual view of the premises appraised. It is, therefore, the not unusual case of a ruling upon consideration of conflicting evidence, and in such cases the ruling assailed must be sustained. The judgment of the district court is

AFFIRMED.

D. SOLOMON & COMPANY ET AL., APPELLANTS, V. C. M. SCHNEIDER ET AL., APPELLEES.

FILED NOVEMBER 17, 1898. No. 8423.

1. **Corporations:** POWER TO CONFESS JUDGMENT. Under our statute corporations for pecuniary profit may sue and be sued, complain and defend in courts of law and equity; and therefore the statute conferring power upon any person to confess judgment applies to such corporations when such judgment has been rendered as described in the case at bar.

2. **Principal and Surety:** JUDGMENT: RELEASE OF SURETY. Where a bank as plaintiff obtains judgment for the sole purpose of collecting a debt due from one defendant, its right to so proceed is not impaired by the consideration that another defendant, sustaining the relations of surety to the first, will be released by such enforcement by the bank of its right to receive payment.

3. **Debtor and Creditor:** COLLECTION OF DEBT. After a plaintiff has fairly collected a debt justly due him from a debtor, it is his right to dispose of the amount so collected in any manner he sees fit, without thereby subjecting himself to liability to other creditors of the same debtor.

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

McCabe, McGilton & Rath, and *R. S. Horton*, for appellants.

References: *Louisville Banking Co. v. Eisenman*, 94 Ky. 83; *Swift v. Smith*, 65 Md. 428; *Russell v. M'Lellan*, 14 Pick. [Mass.] 63; *Newton Mfg. Co. v. White*, 47 Ga. 400; *Lehigh Bridge Co. v. Lehigh Coal & Navigation Co.*, 4 Rawle [Pa.] 9; *Burleigh v. Piper*, 51 Ia. 650; *Shaw v. Robinson*, 50 Neb. 403; *Tillson v. Downing*, 45 Neb. 549; *Allison v. Brandt Printing Co.*, 37 S. W. Rep. [Tenn.] 10; *Ingwersen v. Edgecombe*, 42 Neb. 740; *Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co.*, 50 Neb. 283; *Wyman v. National Bank of Commerce*, 51 Neb. 636; *Roseboom v. Whittaker*, 132 Ill. 81; *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. Rep. 496.

W. W. Morsman, contra.

References: *Harrington v. Conner*, 51 Neb. 214; *Wallachs v. Robinson*, 50 Neb. 469; *Capps v. Hastings Prospecting Co.*, 40 Neb. 470; *Haas v. Bank of Commerce*, 41 Neb. 754; *Watts v. Gannt*, 42 Neb. 869; *Sunday Creek Coal Co. v. Burnham*, 52 Neb. 364; *Landis v. Evans*, 113 Pa St. 335; *Hickman v. Caldwell*, 4 Rawle [Pa.] 376; *McCoy v. Reed*, 5 Watts [Pa.] 302; *Alabama Gold Life Ins. Co. v. McCreary*, 65 Ala. 127; *Matthews v. Mobile Mutual Ins. Co.*, 75 Ala. 85; *Walpole v. Ink*, 9 O. St. 142; *Ballin v. Merchants Exchange Bank*, 89 Wis. 278; *Sanford Fork & Tool Co. v. Howe*, 157 U. S. 312.

Montgomery & Hall, also for appellees.

RYAN, C.

This action was brought in the district court of Douglas county by certain judgment creditors of C. M. Schneider & Co., a corporation, and the other defendants alleged to be in complicity with it in an attempt to defeat and hinder said creditors in the collection of their several judgments. As the action progressed other parties having claims of like nature with those of the original plaintiffs joined as interveners in asking the relief originally prayed. From a judgment adverse to them the plaintiffs have appealed.

The indebtedness to the several plaintiffs was contracted by C. M. Schneider & Co. previous to the rendition of the judgment in favor of the Commercial National Bank against said C. M. Schneider & Co. by said district court at its May term, 1892. The amount for which this judgment was rendered was $20,050, and this indebtedness had been in existence since June, 1891, and evidenced during its existence by successive renewal notes. It was shown on the trial that while a portion of the capital stock of the C. M. Schneider & Co. corporation at one time had been owned by other parties, the whole of

it at the time of the rendition of the judgment in favor of the bank was owned by C. M. Schneider. This judgment was rendered upon two notes, each of which was for $10,000 and both were signed by said corporation by its president, C. M. Schneider, and by C. M. Schneider individually. There was no evidence of any fraudulent intent on the part of the bank in obtaining the judgment aforesaid and in levying upon the goods and merchandise of the C. M. Schneider & Co. corporation for the satisfaction of said judgment.

It is, however, insisted by appellants that the judgment was upon a voluntary confession, and that a corporation has no power to confess judgment. The petition of the Commercial National Bank was filed June 11, 1892, contemporaneously with the filing of which there was filed a power of attorney whereby Charles V. Miles was constituted the attorney in fact for the C. M. Schneider & Co. corporation to file an answer admitting the existence of the indebtedness from the said corporation to the bank and to confess and allow judgment thereon to be rendered as prayed. On the same day Miles, as attorney for defendant, answered, admitting the indebtedness to be due and consenting to judgment as prayed, and contemporaneously with the filing of this answer the bank filed its consent to the confession of judgment. There is a copy of the judgment entry in the record, but it is not dated. It seems to be conceded on all hands, however, that the judgment was rendered on the same day the above described papers were filed. It is provided by section 124, chapter 16, Compiled Statutes, that every corporation as such has power "to sue and be sued, to complain and defend in courts of law and equity," and we think that the provisions of sections 433-437 of the Code of Civil Procedure, authorizing a confession of judgment by any person, are therefore applicable to corporations for pecuniary profit when such judgment is rendered as above described.

It is urged that as C. M. Schneider was the sole owner

of the capital stock of the corporation which bore his name the confession was for his benefit, since he was a surety upon the notes upon which judgment was taken. There is nothing in the evidence showing that the judgment was taken in his interest or for his benefit; indeed, the testimony, without contradiction, was that he was averse to the rendition of such a judgment. The act of confession was not that of C. M. Schneider individually, though he was the sole stockholder. The bank had a just claim against the corporation, and for the collection of that claim resorted to legal proceedings, which it had a clear right to do, even though the C. M. Schneider & Co. corporation and C. M. Schneider were incidentally affected in the same degree. It was agreed between the bank as one party and Mr. Moss and Mr. Taylor as the other party that the goods which the bank had then already purchased in satisfaction of its judgment should be disposed of by C. M. Schneider and that Mr. Moss and Mr. Taylor should be answerable as guarantors for the faithful performance of this undertaking by Schneider, and that the bank would be satisfied with receiving the amount of its debt. It seems that under this arrangement Mr. Taylor or Mr. Moss paid $4,500, which was advanced by Schneider, as he testified, of his wife's money. The bank, however, had no knowledge that Schneider advanced this money and supposed it was put up by the party by whom it was paid to the bank. The bank received the full amount of its claim ultimately, and this action was to subject it to liability as a trustee in its own wrong to the extent of the amount so received. When the bank had acquired indisputable title, it had an unquestionable right to dispose of the goods as it saw fit, even, if it so elected, to donate them to Schneider. This sort of title is possessed and none of the evidence tended to cast even a shadow upon that title. The judgment of the district court was right and is

AFFIRMED.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY v. GEORGE P. DAVIS.

FILED NOVEMBER 17, 1898. No. 8392.

Insurance: MISREPRESENTATION AS TO TITLE: RIGHTS OF MORTGAGEE. Upon the expiration of an insurance on real property assigned to a mortgagee of such property, his agent, for his benefit alone, applied and paid for new insurance. At the instance of the agent of the insurance company the new policy was by said last described agent so drawn as to describe the mortgagor as owner, and by a separate slip the loss, if any, was made payable to the mortgagee as his interest should appear. The mortgagor, without the knowledge of the mortgagee or his agent, had, meantime, conveyed the mortgaged premises to a third party, but the deed of conveyance had never been recorded. In a suit by the mortgagee on account of a loss by fire, subsequently sustained, the insurance company, under a clause in its policy, defended because of an alleged misrepresentation as to the ownership of the property insured at the time of the issue of the policy, though the alleged misrepresentation in fact was merely a statement of the facts shown by the records. *Held*, That the clause providing for forfeiture of the policy in case of a false statement as to the condition of the title of the insured, under the circumstances of this case, should not be so construed as to defeat a recovery by the mortgagee.

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

The opinion contains a statement of the case.

Greene & Breckenridge, for plaintiff in error:

The company is not liable, for the reason that the person to whom the policy was issued had previously sold and transferred the property. (*Tallman v. Atlantic Fire & Marine Ins. Co.*, 29 How. Pr. [N. Y.] 86; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 392; *Bidwell v. Northwestern Ins. Co.*, 19 N. Y. 179; *Davis v. Home Ins. Co.*, 24 U. C. Q. B. 364; *Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann. 663; *Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn. 440; *Balow v. Teutonia Farmers Mutual Fire Ins. Co.*, 77 Mich.

540; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N. Dak. 167; *Smith v. Cash Mutual Fire Ins. Co.*, 24 Pa. St., 324; *Centennial Mutual Life Ass'n v. Parham*, 80 Tex. 518.)

W. W. Morsman, contra:

The person in whose name the policy was issued had an insurable interest in the property. The company accepted the premium and retained it until after the loss. It will be presumed that such interest was insured. The company will not be permitted to defend on the ground that insured's interest was less than that stated in the policy. (*Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816; *Phenix Ins. Co. v. Fuller*, 53 Neb. 811; *Warren v. Davenport Fire Ins. Co.*, 31 Ia. 464; *Waring v. Loder*, 53 N. Y. 581; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47; *Creed v. Sun Fire Office of London*, 101 Ala. 522; *Germania Fire Ins. Co. v. Thompson*, 95 U. S. 547; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743; *German Ins. Co. v. Hyman*, 34 Neb. 704; *Merrett v. Farmers Ins. Co.*, 42 Ia. 11; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537.)

The mortgage clause created an independent contract between insurer and mortgagee, which is not subject to conditions imposed by the policy, nor affected by neglect of mortgagor. (*Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141; *Phenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb. 834; *Westchester Fire Ins. Co. v. Coverdale*, 48 Kan. 446; *Syndicate Ins. Co. v. Bohn*, 65 Fed. Rep. 165; *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439; *German-American Ins. Co. v. Hart*, 43 Neb. 441.)

RYAN, C.

There was a trial of the issues involved in this case in the district court of Douglas county, which trial resulted in findings and a judgment in favor of George P. Davis, the plaintiff in that court, for the amount for which he sued. There was substantially no dispute with respect

to the facts, and we shall therefore consider them without attempting to describe the pleadings filed or to review all the evidence adduced. On October 17, 1888, Isaac Reichenberg and Mary Reichenberg executed their note for $1,500 and a mortgage securing payment of the same to be made to Daniel H. Smith October 17, 1893. There was a policy of insurance in existence during the interim above indicated. This policy expired December 8, 1893, and covered the property of Mr. Reichenberg. This policy had been assigned before its expiration, with the said note and mortgage, to George P. Davis. At the expiration of the policy C. E. Bates, as agent for Davis, went to the office of the firm of Webster, Howard & Co., the local agency for the insurance company, and of that firm asked a renewal of the policy, as the amount secured by the mortgage had not been paid. His request was for an insurance to cover the interest of Mr. Davis. In respect to what transpired when this request was made, Mr. Hitchcock, the member of the firm of Webster, Howard & Co. who transacted the business on behalf of that firm, testified as follows: "Mr. Bates said there was some little question regarding the present owner of the property at that time. He said that he had heard, in a roundabout way, that Mary Reichenberg had disposed of her interest to some other party, but that it was a rumor, and he could not confirm it, but he would send to the court-house and see in whose name the title stood of record. He did so and reported that the title stood in the name of Mary Reichenberg. I asked him if he could show in any way if the property had been transferred, or if he knew of his own knowledge or had any way of finding out; and he said he had not, and so far as he knew, and so far as the records showed, Mary Reichenberg still owned the property. I told him, under the circumstances, I thought the best way would be to write the policy in the name of the party in whose name the property stood of record. He was doing his utmost to find out the owner. That was as far as we could go, as

far as I could see." This witness further said that Mr. Bates told him that he was making the insurance to protect the interest of the mortgagee, and explained that he himself would pay the premium, which he did. The policy was made out in the ordinary form in favor of Mary Reichenberg. To this policy there was attached a printed mortgage slip reciting that any loss or damage should be held payable for the account of the assured to George P. Davis, mortgagee, and beneficiaries or his assigns. It is argued that the words "for the account of the assured" implied that the loss, if any occurred, should be due to Mary Reichenberg. This is a strained construction which ignores the recitation that loss should be payable to George P. Davis. The purport of the clause defining the person to whom payment of any loss should be made was that it was to George P. Davis, to be applied on the mortgage indebtedness due him from Mary Reichenberg.

It is, however, insisted that the policy was void because Mary Reichenberg and her husband, by a quitclaim deed of date some months prior to the date of the policy, had conveyed all their interest in the insured property to Mary B. Homan. This deed was not recorded, however, and neither the mortgagee nor his agents had any knowledge of its existence. The clause of the policy relied upon to defeat its operation is as follows: "The entire policy shall be void if the insured has concealed or misrepresented in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss." On the assumption that the words "the insured" refers to Mary Reichenberg it is insisted that the policy is void because at the time it was issued she did not disclose the fact that she had conveyed her interest in the property about to be insured. The agent

of the insurance company understood, when he was dealing with Mr. Bates, that Mr. Bates claimed to be representing and acting in the interest of no one but Mr. Davis. He also knew that Mr. Bates paid the premium solely for the protection of the mortgagee, and Mr. Hitchcock himself suggested the form in which the policy should be made out. Mr. Bates told him of a rumor that Mrs. Reichenberg had ceased to be the owner of the property, and ascertained that this rumor was not justified by the records. Mr. Bates was known to possess no knowledge except from the record, and the condition of that record was as accurately known by Mr. Hitchcock, who drew up the policy, as by Mr. Bates. During the term covered by the policy the building insured was totally destroyed by fire, and until after this loss the insurance company made no offer to return the premium and to cancel the policy. Under these circumstances no wrong is done if we accept the words "the insured" in the sense in which they were understood by the immediate parties to the contract whereby the insurance was effected. As between them the protection of a policy was applied and paid for, solely on behalf of the mortgagee, and this construction does no violence to the sense of the words "the insured" as used in the policy. This disposes of all the questions discussed in the brief of plaintiff in error and the judgment of the district court is

AFFIRMED.

IN RE OSCAR CHENOWETH ET AL.

FILED NOVEMBER 17, 1898. No. 10270.

1. **Unlawful Sale of Intoxicating Liquors:** JURISDICTION OF COURTS. Neither a justice of the peace nor a county judge has jurisdiction to try one charged with selling intoxicating liquors contrary to section 11, chapter 50, Compiled Statutes.

2. **County Court:** JURISDICTION: CRIMES. The criminal jurisdiction of a county court or county judge is the same as that of a justice of the peace.

3. ———: ———: ———. Section 16, article 6, of the constitution does not invest the county courts of the state with any criminal jurisdiction whatsoever, but authorizes the legislature to define the criminal jurisdiction of such courts within certain limitations.

4. ———: ———: ———. The county courts of the state have not by the legislature been invested with any criminal jurisdiction, except as above stated.

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

William M. Clark, for petitioners.

Ambrose C. Epperson, contra.

RAGAN, C.

Oscar Chenoweth and John Chenoweth were charged before the county judge of Clay county with having sold intoxicating liquors contrary to the provisions of section 11, chapter 50, Compiled Statutes. On being arrested and brought before the county judge they demanded that he proceed as county judge or as county court to call a jury and try them for the offense with which they were charged. This the county judge refused to do, but as an examining magistrate did conduct a preliminary examination, recognized the accused to appear at the first day of the next term of the district court, admitted them to bail, which being unable to give, the accused were committed to jail. They then made application to the judge of the district court for a writ of habeas corpus, which was denied, and they have brought that judgment here for review on error.

1. Section 11 of the bill of rights (Constitution, art. 1, sec. 11) provides that in all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. If, therefore, the county judge or county court had jurisdiction to try the accused for the offense with which they stood charged, they are

unlawfully restrained of their liberty and the writ must issue. The questions then presented by the record are:

Has the county judge or the county court jurisdiction to try a person for the offense of selling intoxicating liquors without a license contrary to the provisions of section 11, chapter 50, Compiled Statutes? Section 2, chapter 20, Compiled Statutes, confers upon county judges in their respective counties the ordinary powers and jurisdiction of a justice of the peace. If, therefore, a justice of the peace would have had jurisdiction to try the accused for the offense with which they were charged, the county judge had such jurisdiction. But section 314 of the Criminal Code limits the jurisdiction of a justice of the peace in criminal misdemeanors to cases in which the fine cannot exceed $100 or the imprisonment three months. The punishment for violating section 11, chapter 50, Compiled Statutes, is fixed at a fine of not less than $100 nor more than $500, or imprisonment not to exceed a month. Since the accused, if tried and found guilty, might have been fined more than $100, neither a justice of the peace nor the county judge had jurisdiction to try them.

2. Had the county court jurisdiction to try the accused? Section 16, article 6, of the constitution provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts; in all matters relating to apprentices; and such other jurisdiction as may be given by general law. But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months imprisonment, or a fine of over five hundred dollars." The petitioners insist that by this section of the constitution the county courts of the state are invested with jurisdiction to try persons accused of violating section 11, chapter 50, Compiled Statutes, since the punishment for the violation of that statute does not exceed a fine of $500 or an imprisonment

of more than one month. But this section of the constitution does not of itself confer upon the county courts of the state any criminal jurisdiction whatever. It leaves it to the legislature to define the criminal jurisdiction of the county courts within certain limitations. The legislature has never conferred upon the county courts of this state any criminal jurisdiction, except such as that possessed by justices of the peace. The judgment of the district court is right and is

AFFIRMED.

CHARLES W. CUNNINGHAM v. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1898. No. 10183.

1. **Criminal Law:** SEPARATE TRIALS: PRESENCE OF ACCUSED. Where two parties jointly indicted are tried separately, it is not error for the court to require the presence of one of them in the court room during the trial of the other.

2. **Indictment:** DIFFERENT CRIMINAL ACTS: LARCENY. Different criminal acts which constitute part of the same transaction, such as burglary with intent to steal particular property and larceny of the property described, may be charged in the same indictment or count thereof. *Lawhead v. State*, 46 Neb. 607, followed.

3. **Burglary:** LARCENY: CIRCUMSTANTIAL EVIDENCE: INSTRUCTIONS. On the trial of a prisoner for burglary and larceny, where the evidence against the accused was circumstantial, the court instructed the jury: "Circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is sufficient to authorize a conviction." Instruction approved.

4. ———: ———: ———: ———. On such trial the court also instructed the jury: "What is meant by circumstantial evidence, in criminal cases, is the proof of such facts or circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty." Instruction approved.

5. **New Trial:** NEWLY-DISCOVERED EVIDENCE. A new trial should not

be granted a party on the ground of newly-discovered evidence, unless he makes it appear that the newly-discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial.

ERROR to the district court for Dodge county. Tried below before MARSHALL, J. *Affirmed.*

W. S. Shoemaker, for plaintiff in error.

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

RAGAN, C.

Charles W. Cunningham and George Evans were jointly indicted in the district court of Dodge county for having on the night of January 30, 1898, forcibly, feloniously, and burglariously broken into and entered the dwelling-house of one Edward D. Pearcy, and then and there having stolen, taken, and carried away certain personal property belonging to Pearcy and his wife. It appears that Evans and Cunningham were separately tried, Evans having been tried first. Cunningham upon his trial was found guilty, and he brings the judgment pronounced on that conviction here for review. We have carefully examined and considered each of the thirty-two assignments of error argued by Cunningham's counsel in his brief, but deem it necessary to notice here only the following:

1. During the trial of Cunningham Evans was brought into and kept in the court room by order of the court. It is now insisted by Cunningham that this was a practical retrial of Evans, and that since separate trials had been awarded Cunningham and Evans, the action of the district court was erroneous. We do not think it was. The fact that Evans was permitted or compelled to remain in the court room during the trial of Cunningham was in no sense a retrial of Evans.

2. Complaint is made of the courts giving the fourth and fifth paragraphs of his charge. In the fourth in-

struction the court defined the material allegations of the information in regard to the charge of larceny included therein; and by the fifth instruction informed the jury that the burden of proof rested upon the state to prove the charge of larceny, included in the information, beyond a reasonable doubt. The objection urged to these instructions is that they include the crime of larceny with the crime of burglary, and counsel contends that this cannot be done. "Different criminal acts which constitute part of the same transaction, such as burglary with intent to steal particular property and larceny of the property described, may be charged in the same indictment or count thereof." (*Aiken v. State*, 41 Neb. 263; *Lawhead v. State*, 46 Neb. 607.) The court did not err in giving the instructions complained of.

3. Complaint is made of the giving by the court of the tenth paragraph of its charge. It is as follows: "The court instructs the jury that circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is sufficient to authorize a conviction." This instruction was correct. (*Davis v. State*, 51 Neb. 301; *Morgan v. State*, 51 Neb. 672; *Johnson v. State*, 53 Neb. 103.)

4. Complaint is also made of the giving by the court of the eleventh paragraph of its charge, which was as follows: "The court further instructs the jury that what is meant by circumstantial evidence, in criminal cases, is the proof of such facts or circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty." We see nothing wrong with this instruction. (*Law v. State*, 33 Tex. 37.)

5. Among the grounds insisted upon by the prisoner

for a new trial was that while his counsel was absent from the court room the prosecuting attorney, in his closing argument, said to the jury: "Why did not Mr. Shoemaker, from Omaha, bring the defendant and his co-defendant on the stand and explain why these things were found on them? He did not even bring him on [turning to defendant and shaking his finger]. He did not dare to bring him on. No, he sits there mute and silent." It is now insisted that this language of the prosecuting attorney was improper and prejudicial to the prisoner, and that the court erred in not granting the prisoner a new trial because thereof. If this language was used by the prosecuting attorney it was improper, and it was prejudicial to the prisoner on trial. But on the hearing of the motion for a new trial the prosecuting attorney denied on oath having used this language, or anything like it, and he is corroborated by the testimony of several others who heard his final address to the jury. The district court found on conflicting evidence that the prosecuting attorney was not guilty of the conduct attributed to him, and we cannot say that that finding is wrong. Indeed we think the finding correct.

6. Sixteen days after the verdict of the jury was returned which found the plaintiff in error guilty he filed an amendment to his motion for a new trial. In this amendment he moves for a new trial on the ground of newly-discovered evidence material to his defense, and which he alleges in the amendment he was unable with reasonable diligence to discover and produce at the trial. In support of this amendment he introduced the affidavit of Evans, with whom he was indicted. In this affidavit Evans swears that Cunningham was not with him, Evans, at the time he, Evans, broke and entered the dwelling-house of Percy. Cunningham made affidavit that Evans had refused to be a witness for him, Cunningham, on the trial of the latter's case, and refused to be a witness for him until after his own case was finally disposed of. The prisoner's counsel now insists that the court erred

in overruling or disregarding this amendment to the motion for a new trial and in not sustaining it. But it is to be observed that one of the alleged errors assigned here by Cunningham is that Evans was present in the court room during the time Cunningham was on trial. He did not subpœna or call Evans as a witness in his behalf. Had he done so and had Evans refused to testify, his position here might be different. If Cunningham was not present and did not participate in the burglary which Evans admits he committed, Cunningham was aware of that fact when he was on trial, and in failing to call Evans, who was present, as a witness for him and attempting at least to prove by him that he, Cunningham, was not present when that burglary was committed, he failed to exercise diligence to produce at the trial the testimony which he now insists should furnish him a new trial. Furthermore, it does not appear from the showing made by Cunningham but that he had all the knowledge as to what Evans would testify to when he filed his motion for a new trial on February 28 that he had on March 14. A new trial is not to be granted a party on the ground of newly-discovered evidence, except he makes it appear that the newly-discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial. Cunningham failed to bring himself within this rule, and the court committed no error in disregarding the amendment to the motion for a new trial.

7. It is not claimed that the verdict of the jury in this case is not supported by sufficient evidence. But among the assignments argued by counsel numerous ones are directed to the action of the court in the admission and rejection of evidence. All these we have carefully examined and not one of the assignments presents a debatable question of law, and it would subserve no useful purpose to set them out at length here and our reasons for overruling them. The prisoner has had a fair and impartial trial and there is, we are persuaded, in the

record not one error prejudicial to his rights. The judgment of the district court is

AFFIRMED.

A. L. MORGAN V. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1898. No. 10127.

1. **Criminal Law**: EVIDENCE OF CRIME OTHER THAN THAT CHARGED. Except in cases where it is necessary to show guilty knowledge on the part of the prisoner, it is not competent for the state to prove that at another time and place he committed, or attempted to commit, a crime similar to that for which he is on trial.

2. ———: FALSE REPRESENTATIONS. On the trial of a prisoner for having obtained by false representations the indorsement of one Watson to a draft the state was permitted to show that the prisoner, a short time before, by similar false representations obtained the indorsement of one Yeast to a similar draft. *Held*, (1) That the evidence was not *res gestæ;* (2) that it did not tend to prove the intent with which the prisoner made the false representations to Watson; (3) that its admission was reversible error.

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

J. H. Broady and *C. E. Tefft*, for plaintiff in error.

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

RAGAN, C.

A. L. Morgan was convicted in the district court of Cherry county of having on April 19, 1897, feloniously, fraudulently, and by false representations obtained the indorsement of Charles R. Watson to a certain draft for the sum of $50, contrary to section 125 of the Criminal Code. Morgan brings the judgment pronounced against him on that conviction here for review. On the trial of this case the state introduced evidence which tended to show that Morgan on April 19, 1897, represented to one

Charles R. Watson that he, Morgan, was a member of the firm of Morgan & Co., engaged in the cattle business at or near Billings, Montana; that he wished to go to Long Pine, Nebraska, for the purpose of buying cattle for himself, or the firm; that he, Morgan, had money in the Yellow Stone National Bank of Billings, Montana; and also that he had money in the possession of his firm, and that he drew a draft on his firm in Billings, payable to his own order, and by the representations alluded to induced Watson to indorse the same and procured a bank at Valentine, Nebraska, to pay it, and that all these representations were false.

The state also, over objection of the prisoner, was permitted to prove by a man named Yeast that on April 17, 1897, Morgan was in his, Yeast's place of business at Valentine, Nebraska, and made similar representations to him as to his being a member of the firm of Morgan Bros. and engaged in the cattle business at Billings; and at said time and place induced him, Yeast, to honor a draft drawn by Morgan, payable to himself, on the Yellowstone National Bank at Billings, Montana, by giving Morgan therefor two saddles of the value of $75, and $25 in money. We presume the district court permitted the testimony of Yeast to be given upon the theory that it tended to show the intent with which Morgan made the misrepresentations to Watson. It is the rule in some jurisdictions that the making of other false representations of a similar character may be shown as tending to indicate the fraudulent intent with which the representations in question were made. (*State v. Rivers*, 58 Ia. 102; *State v. Jackson*, 112 Mo. 585; *State v. Walton*, 114 N. Car. 783; *Rafferty v. State*, 91 Tenn. 655.) Of course this testimony was not admissible as *res gestæ;* and though the misrepresentations made to Yeast were similar to those made to Watson, they were nevertheless made at different times and to different persons. Assuming that the misrepresentations made by Morgan to Yeast were made with intent to defraud him, we do not

see how these misrepresentations tended to prove the intent with which Morgan made the misrepresentations to Watson. There are cases, such as prosecutions for receiving stolen goods, knowing them to be such, in which other acts of a like character are so connected with that which is the subject of the prosecution, either by some connection of time or place or as furnishing a clue to the motive on the part of the accused, as renders these similar acts competent evidence; but these cases rest upon the principle that the guilty knowledge of the accused is an essential ingredient of the offense. But the case on trial does not fall within that class of cases. The doctrine of this court is that, except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time and place the accused committed, or attempted to commit, a crime similar to that for which he is on trial. (*Smith v. State*, 17 Neb. 358; *Cowan v. State*, 22 Neb. 519; *Berghoff v. State*, 25 Neb. 213; *Palin v. State*, 38 Neb. 862; *Davis v. State*, 54 Neb. 177.) The court erred in admitting the evidence of Yeast. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM BARR V. MARTHA A. POST.

FILED NOVEMBER 17, 1898. No. 8472.

1. **Recaption.** It seems that the right of recaption of personal property exists in this state.

2. **Assault and Battery:** DAMAGES: JUSTIFICATION: PLEADING. In a civil suit for assault and battery, where the answer is a general denial, evidence of justification is inadmissible.

3. ———: ———: EVIDENCE. *Held*, That the direction of the district court to the jury to take into consideration "any permanent internal injury" sustained by plaintiff, was justified by the evidence.

4. **New Trial:** MISCONDUCT OF COUNSEL. The refusal of the district

court to grant plaintiff in error a new trial because of alleged misconduct of defendant in error's counsel *held*, under the circumstances, not erroneous.

5. **Erroneous Admission of Evidence:** HARMLESS ERROR. A judgment will not be reversed for the erroneous admission of evidence, if the facts have already been testified to without objection.

6. **Assault and Battery:** DAMAGES: EVIDENCE: SERVICES OF PHYSICIAN. In a civil suit for damages for assault and battery, where the plaintiff offers no evidence that he has paid or become liable for services rendered him by a physician who is his witness, it is not error to refuse to permit the witness to be asked on his cross-examination "whether he has rendered plaintiff a bill for his services" and "whether he has been paid for such services."

7. **Cumulative Evidence:** HARMLESS ERROR. The rejection of evidence, cumulative in its nature and which tends to prove a fact already established and not in issue in the case, if error, is without prejudice.

8. **Rejection of Evidence:** HARMLESS ERROR. It is not error to reject an offer of proof not within the limits of the question on which the offer is based.

9. **Cross-Examination.** The latitude which a cross-examination may take is a matter resting largely in the discretion of the trial court, and error is more likely to be committed by undue restriction than by extension of it.

10. **Trial:** HYPOTHETICAL QUESTIONS. *Held*, That the court committed no prejudicial error in refusing to permit plaintiff in error's witness, on his re-direct examination, to answer a certain hypothetical question.

11. **Assault and Battery:** ACTION FOR DAMAGES: REPUTATION OF DEFENDANT: EVIDENCE. In a civil suit for damages for assault and battery the defendant's reputation is not an issue. Accordingly, *held* not error for the court to exclude an offer of proof by defendant that he had never used profane language.

12. ———: ———: ———. In such a case also *held* not error to exclude an offer of proof made by defendant that he had never been arrested and prosecuted criminally for the alleged assault and battery, as such evidence did not tend to prove or disprove any issue on trial.

13. ———: WITNESSES: OPINIONS. Certain evidence of defendant in error set out in the opinion *held* not objectionable as being the opinion of the witness.

14. **Counter-Claim.** For facts to constitute a counter-claim, they must arise out of the transaction set forth in the petition as the foundation of the plaintiff's action, or be connected with the subject-matter of that action. (Code of Civil Procedure, sec 101.)

15. **Assault and Battery:** VERDICT FOR PLAINTIFF FOR DAMAGES. The evidence examined, and, although unsatisfactory, *held* to sustain the verdict of the jury.

16. **Damages for Assault and Battery.** Damages of $2,000 awarded by the jury *held*, in view of the evidence, not excessive.

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

Morning & Berge, for plaintiff in error

Thomas Darnall, J. S. Kirkpatrick, and *Stewart & Munger*, *contra.*

RAGAN, C.

Prior to September, 1893, William Barr owned a brick block in the city of Lincoln. In the upper story of this block were a number of lodging rooms. Barr employed Mrs. Martha A. Post to attend to these rooms and keep them in order. She and her family, it appears, occupied a room in the block. She was intrusted with the keys to the various lodging rooms. For some reason her services became unsatisfactory to Barr, and he discharged her. She, however, refused to surrender to Barr, on his demand, the keys for the various lodging rooms. On September 6, of said year, Barr attempted to take his keys out of the hands of Mrs. Post. This, however, it seems he failed to accomplish. Mrs. Post brought the present action in the district court of Lancaster county against Barr to recover damages for an alleged assault and battery inflicted upon her by Barr at the time he attempted to take from her possession the lodging keys. She had judgment, and Barr has brought the same here for review on error.

1. On the trial the district court refused to instruct the jury at the request of Barr that he had the right to take possession of these keys from Mrs. Post, provided in doing so he did not use any more force than was actually necessary for that purpose, nor thereby commit a breach

of the peace. This action of the court, it is insisted, was erroneous. The ruling of the court involves the right of a citizen, without recourse to law, to seize and take possession of his personal property wrongfully in the possession of another, provided in so doing he does not commit a breach of the peace, nor use any greater force than is actually necessary for the purpose of recaption. It seems that this right of recaption of personal property exists. (*Mussey v. Scott*, 32 Vt. 84; *Cross v. Marsten*, 44 Am. Dec. [Vt.] 353; *Manning v. Brown*, 47 Md. 506; *Stearns v. Sampson*, 8 Am. Rep. [Me.] 442; *Sterling v. Warden*, 51 N. H. 217; *Hite v. Long*, 18 Am. Dec. [Va.] 719.) But the record here does not present for decision the question whether it does. Barr's answer to the charge of assault and battery was a general denial, and under this issue evidence which tended to justify the assault and battery was inadmissible. (*Levi v. Brooks*, 121 Mass. 501; *Cooper v. McKenna*, 124 Mass. 284.) The court therefore did not err in refusing the instruction asked.

2. The next complaint relates to instruction number 6 given by the court. It is as follows: "You should take into consideration the pain and suffering, bodily and mentally, endured by the plaintiff; also any permanent internal injury, if any such has been shown by the evidence, such pain or injury being caused by the wrongful act of the defendant." Counsel for the plaintiff in error insist that the giving of this instruction was erroneous, because the record contains no evidence that Mrs. Post had sustained any permanent internal injury as the result of the alleged assault and battery. The evidence on behalf of Mrs. Post tended to show that soon after this alleged assault and battery she suffered a miscarriage, and that this was the result of the battery inflicted upon her by Barr; that about a year after this time she was in a condition of "tubal pregnancy" or "extra-uterine pregnancy;" that an operation was performed upon her at this time and a fœtus removed. Physicians called

as experts in her behalf testified that a miscarriage was sure to unfit a woman for labor; that very few women ever afterwards regained their strength; that Mrs. Post could never completely recover; that Mrs. Post had retroverted uterus; that this produced constipation and caused, and would continue to cause, suffering and pain. To the question, "Was this condition temporary or permanent in this injury?" the physician answered: "You mean in this particular case? Q. Yes, sir. A. Why, so far as my knowledge goes, it was continuous in this case." This is not very satisfactory evidence; but we think it is evidence which tends, at least, to show that Mrs. Post was suffering from an internal permanent injury, and we cannot therefore say that the court erred in instructing the jury as it did.

3. On the trial of the case counsel for Mrs. Post called her husband as a witness, and at the time of doing so stated to the court that he was about to call plaintiff's husband as a witness; that the witness had been very sick and was at that time in a critical condition, and that he made this announcement to the court because he did not know what might happen while the witness was on the stand. To this statement by counsel, in the presence of the jury, counsel for Barr excepted, and requested the court to instruct the jury that the statement made by the counsel should not be considered by them, which the court did. It is now insisted that the action of counsel was uncalled for and improper; that the statement was made for the purpose of arousing the sympathies of the jury, as Post and his wife were poor people, and Mrs. Post was compelled to labor for the support of herself and family. We cannot conceive of any reason for counsel making the statement to the court that he did before calling this witness, and if we thought this conduct of counsel influenced the action of this jury in the slightest degree, we would then be prepared to hold that the district court erred in not granting Barr a new trial because thereof. But we do not think it possible

that the verdict of the jury was in the least influenced by the statement made by Mrs. Post's counsel. The court at once told the jury that they should not consider the remarks made by counsel, and we cannot therefore say that the court erred in refusing to grant Barr a new trial because of the statement made by Mrs. Post's attorney.

4. The next complaint is of the action of the district court in permitting Mrs. Post on her redirect examination to answer the following question:

Q. What was the condition of Mr. Post at that time?

A. He was sick, very weak; he had had what the doctors call ——— "hemorrhage of the brain," on the 9th of January, and it left him in a very weak condition; and it was a case of necessity that I should try to get something for my little ones to get bread and butter.

It is insisted that this evidence was not only incompetent, but was highly prejudicial, as the record showed that Barr was a man of some means and that Mrs. Post was a poor woman, and therefore it was calculated to prejudice the jury. But the answer to the argument is that the jury were already in possession of the very facts testified to by Mrs. Post in answer to the question made the subject of this assignment. She had already testified to this same state of facts in her examination in chief without any objection being interposed by Barr. It may be conceded that the admission of this evidence was error, but a judgment will not be reversed for the erroneous admission of evidence if the same or similar testimony has already been admitted without objection. (*Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745; *Lamb v. State*, 40 Neb. 312.)

5. One Dr. Holyoke was called as a witness in behalf of Mrs. Post and testified to having treated her for some time immediately after the alleged assault and battery. On his cross-examination counsel for Mr. Barr asked him the following questions:

Q. You have not been paid for your services yet down there, have you, doctor?

Q. Now, doctor, did you ever present a bill for your services in this matter of Mrs. Post's sickness?

The district court sustained objections to these questions, and its action in that respect is the next complaint made here. Mrs. Post had offered no evidence that she had either paid or become liable to pay for any services rendered by this physician. We think, therefore, that the court was right in ruling out this proffered testimony as immaterial.

6. As already stated, the testimony introduced in behalf of Mrs. Post tended to show that an operation was performed on her something like a year after the occurrence of the alleged assault and battery and at that time a fœtus was removed from her. Barr called Dr. Beachley as a witness in his behalf; and after proving by him that he was a practicing physician, and had been for some years, and was somewhat acquainted with Mrs. Post, and that he was present at the time the operation was performed, and that he went there at the request and to assist one Dr. Crim, Barr's counsel asked him this question: "I will ask you to state what conclusion was reached by the physicians there as to the nature of the ailment of the difficulty that necessitated that operation." The court refused to permit the witness to answer the question, and this ruling is now complained of. We will assume for the purposes of this case that the testimony was competent; that the witness was competent to testify, and that the exclusion of the evidence was error. But another physician for Barr was permitted to testify that he was present when the operation was performed upon Mrs. Post and testify to the conclusions reached by the physicians as to the nature of the ailment that necessitated the operation. This testimony was not attempted to be disputed by Mrs. Post. Counsel for Barr offered to prove by the witness that Mrs. Post's ailment was "tubal" or "extra-uterine pregnancy;" and the other witness for Barr testified that this was the ailment of Mrs. Post. The rejection then by the court of the testi-

mony offered, though erroneous, was without prejudice, as it would have been cumulative in its nature toward the establishment of a fact which stood undisputed in the record. In the offer of proof made by counsel he also offered to show that the witness on the stand, if permitted, would testify that the extra-uterine pregnancy of Mrs. Post could not have been caused by the result of such an assault and battery of her as that to which she testified; but this offer was not within the limits of the question which the court refused to permit the witness to answer. If counsel desired to have his witness testify that the condition of Mrs. Post could not have been the result of an assault and battery upon her, he should have asked the witness that question, and then, had the court refused to permit it to be answered, made his offer of proof.

7. The next complaint is that the court permitted a physician called as an expert witness by Barr to be unduly cross-examined. It would subserve no useful purpose to set out the questions which the court permitted to be propounded to this witness. The latitude which a cross-examination may take is a matter which rests largely in the discretion of the trial court, and generally a court is more likely to commit an error by unduly restricting a cross-examination than by extending it. It must suffice to say that we do not think the court abused its discretion in permitting this witness to be cross-examined.

8. On the trial Barr called as an expert witness in his behalf a physician named Stevens, who testified to an acquaintance with Mrs. Post, to having been present when the operation was performed upon her about a year after the alleged assault and battery, and that the operation was performed for "extra-uterine pregnancy." He was then cross-examined at length by counsel for Mrs. Post and re-examined by counsel for Barr and excused. Subsequently he was recalled by counsel for Barr and asked:

Q. Now, vomiting of blood, if caused by a blow, is caused by a rupture of a blood-vessel in the stomach, is it not?

A. Yes, sir.

Q. How soon after would the bleeding begin?

A. Immediately.

Q. Then the vomiting of blood would necessarily follow the bleeding?

A. Yes, sir.

Q. Now I will ask you, doctor, if you know whether or not vomiting can be produced by excitement?

A. Yes, sir.

Q. By fits of anger?

A. I should call that excitement.

Q. Do you know whether or not the plaintiff is so constituted as that excitement would readily cause vomiting?

The last question the district court refused to permit the witness to answer, and this action of the court is now assigned for error. We assume that the offered evidence was competent and that the physician was competent to give it. But under no view of the case that we are able to take can we see that the exclusion of the evidence by the court was prejudicially erroneous to the plaintiff in error.

9. On the trial Mrs. Post testified that Barr, at the time of the assault and battery upon her, used certain profane language. Barr in his examination denied the use of this language. He was then asked by his counsel, "I will ask you to state whether or not you are a man given to the use of profane language." The objection to this question was sustained and Barr's counsel offered to prove that he never used profane language in any way. The court excluded the offer. We do not think it would have been error for the court to have admitted this evidence. (*Beakes v. Da Cunha*, 27 N. E. Rep. [N. Y.] 251; *Blumgren v. Anderson*, 48 Neb. 240.) And we are quite clear that the court did not commit any reversible error

in excluding it. This is a civil action for damages for assault and battery, and the defendant's reputation is not an issue in the case.

10. Barr also offered to testify, while upon the witness stand, that he had never been arrested or prosecuted criminally for the assault and battery for which he was sued. The court excluded this offered evidence, as immaterial and incompetent. In this ruling we think the court was correct. The evidence offered did not tend to prove any issue on trial. The fact that Barr had not been arrested and prosecuted criminally for assault and battery was not evidence which even tended to prove that he was not guilty thereof.

11. On the trial a man named Van Atta testified that he was on the upper floor of the Barr block at the time the trouble occurred between Mrs. Post and Mr. Barr, and that Barr did not strike Mrs. Post, but that she struck him; and, in effect, he testified to having seen the whole transaction. In rebuttal Mrs. Post was questioned on the subject of Van Atta's presence as follows:

Q. You may state if any person, any man, was standing there at that time.

A. No, sir; there could not have been, because I would have run right into him.

Q. You may state if James H. Van Atta was in the sideway or standing up there at that time. Could he have been there and you not have seen him?

This question was objected to, as calling for a conclusion and opinion of the witness. The court overruled the objection and the witness answered: "No, sir; he could not." Counsel for Barr complains that by this ruling the court permitted Mrs. Post to state her opinion. We do not think so. We think that she stated what she did as a matter of knowledge. She was not asked for her opinion and she did not give it. She simply said Van Atta could not have been present and she not have seen him.

12. Another complaint relates to the action of the dis-

trict court in striking out of Barr's answer what is denominated therein a "second defense" pleaded by way of counter-claim. In this counter-claim Barr alleged in substance his ownership of a brick block in the city of Lincoln in the winter of 1893; that he employed Mrs. Post as housekeeper and chambermaid for the block; that she was to remain in his employ so long as she should prove satisfactory; that she did not prove satisfactory, and that he discharged her; notified and requested her to leave the building, but that she disregarded such notice and request, and continued forcibly and unlawfully to remain in the building for nearly four months, during which time she deprived Barr of the keys to the various rooms of the building and discouraged tenants from renting and occupying the same; that she gave the building a bad reputation, which rendered it almost impossible for Barr to procure tenants for the same, although during the time many tenants were seeking rooms; and that by reason of Mrs. Post's conduct the building was vacant and unoccupied during the winter of 1893-'94; and that but for her conduct and slanderous remarks in reference to him, Barr, he could have procured tenants for all the rooms in said building, and that by reason of the conduct of Mrs. Post in the premises he had been damaged. The court did not err in striking out this defense. It did not arise out of the transaction set forth in the petition as the foundation of Mrs. Post's action, nor was it connected with the subject-matter of that action within the meaning of section 101 of the Code of Civil Procedure.

13. A final argument is that the verdict of the jury is excessive, and appears to have been rendered under the influence of passion and prejudice. The verdict is for $2,000, and if the testimony of Mrs. Post is true, the verdict is not too large; and perhaps it is only fair to say that her testimony is corroborated. She testified that Barr knocked her down and pushed her against a stair banister; that her arm, shoulder, and thigh and side were badly bruised; that she was injured by being

knocked down and pushed against the banister, became sick, and was for a week or ten days immediately thereafter confined to her bed, during part of which time she vomited blood and suffered pain; that this assault and battery inflicted upon her by Barr caused her to suffer a miscarriage; that she was in bed much of her time after the assault and battery for two years; that she has never been able to work since that time, never regained her strength, while before that time she was well and strong; that much of the time since the assault and battery she has been compelled to walk with crutches. Barr himself emphatically denies that he ever struck this woman, or kicked her, and the testimony on his behalf tends to corroborate his story. The testimony is conflicting. We cannot reconcile it. That is just what juries are for; and, the jury by its verdict has said that they believed the story of Mrs. Post and her witnesses. In addition to this a district judge presided at this trial, heard these witnesses testify, observed their conduct, and he has put the seal of approval upon this finding of the jury by overruling the motion for a new trial. To our minds the testimony is unsatisfactory in many respects. It is a somewhat startling proposition that Barr should have knocked this woman down, kicked her, and bruised her, and yet not have been able to take the lodging keys from her, the attempt to do which caused the trouble. Still the evidence sustains the jury's finding that Barr did assault and beat this woman, and it sustains her theory that she was injured thereby, and that she suffered weeks of pain; that she was confined to her bed by sickness; that she had at least two miscarriages which were caused by the beating and bruising inflicted upon her by the plaintiff in error. We cannot say then that the verdict is excessive; and since the record contains no error which is prejudicially erroneous to the plaintiff in error, the only thing that is left for us to do is to affirm the judgment of the district court, and it is so ordered.

AFFIRMED.

STATE BANK OF CERESCO V. WILLIAM BELK.

FILED NOVEMBER 17, 1898. No. 8384

1. **Contracts:** PAROL 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, and 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.
2. **Action on Note:** DEFENSE: PLEADING. The answer set out in the opinion and *held* not to state a defense.

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

See opinion for references to cases.

Lambertson & Hall and *A. G. Greenlee,* for plaintiff in error.

Burr & Burr, contra.

RAGAN, C.

The State Bank of Ceresco, Nebraska, brought this suit in the district court of Lancaster county against William Belk on a promissory note. Belk had judgment, to review which the bank has filed here a petition in error.

The note declared upon by the bank was in words and figures as follows:

"$300.00. CERESCO, NEB., Sept. 30, 1889.

"On demand after date, for value received, we jointly and severally promise to pay to the order of the State Bank of Ceresco, Nebraska, three hundred dollars, with interest at the rate of ten per cent per anum from maturity until paid. This note is given as security for a note of even date and amount of Thomas Stretch in favor of State Bank of Ceresco, and the maker hereby waives

protest and notice of non-payment and guaranties the payment of said note or any renewal of the same.

"WM. BELK."

In his answer Belk admitted the execution and delivery of the note sued on and then pleaded: "Further answering, the defendant alleges that prior to the date of said note Thomas Stretch, therein named, had executed a note of like amount to the plaintiff with the defendant as surety; that when said note became due the defendant refused to sign a renewal thereof; that in consequence thereof it was agreed by and between the defendant and the plaintiff that the defendant should execute the note sued on, and deliver the same to the plaintiff, and the plaintiff should hold it until he should secure other sureties upon the note of said Stretch, then that the note sued on should be returned to the defendant and he should not be held thereon. And the defendant alleges that thereafter the plaintiff did secure other, to-wit, three, sureties upon said new note of said Stretch, being the note referred to in the note sued on, and surrendered the original note and took and accepted the new note of said Stretch with said three sureties, by reason whereof, and by reason of said agreement, it became the duty of the plaintiff to return the note sued on to the defendant, and the defendant was relieved of liability thereon, and the same was fully paid, discharged, and satisfied." On the trial Belk was permitted to introduce evidence which sustained the averments of his answer; and the question presented by the record is the correctness of the ruling of the court in admitting this testimony; or what is the same thing, does this answer state a defense?

The contract in suit recites that it was executed as security for a note signed by Thomas Stretch, dated September 30, 1889. The answer avers that the note in suit was executed as security for a note signed by Thomas Stretch and William Belk, dated prior to September 30, 1889. The note in suit by its terms is payable on de-

mand. The answer avers that the note was never to be paid if the bank obtained sureties upon the note of Stretch. It is obvious that any evidence which would sustain the averments of this answer would vary and contradict the express recitals of the written contract in suit.

In *Hamilton v. Thrall*, 7 Neb. 210, this court decided that when parties have reduced their contract to writing the law presumes that all the previous and contemporaneous negotiations and conversations leading to the contract are merged in it and that such a contract could not be varied by parol testimony.

Van Etten v. Howell, 40 Neb., 850, was a suit upon a promissory note. One of the defenses interposed was an oral agreement between the maker and payee that the note was not to become due until a certain case then pending in this court should be decided, and the court, speaking to this defense by RYAN, C., said: "The trial court properly ruled that no evidence was admissible when offered, and instructed the jury that none should be considered which tended to vary or contradict the terms of the several notes by showing that contemporaneously with making each an oral agreement was entered into by the makers and payee contradictory of the terms of such note."

In *Waddle v. Owen*, 43 Neb. 489, Owen gave Waddle a demand draft payable to his order for $51, and as collateral security for the same indorsed and delivered to Waddle two promissory notes then the property of Owen and payable to his order. Waddle negotiated and transferred the draft and the notes which he held as security therefor, and thereupon Owen sued Waddle for conversion of the notes. Waddle defended by establishing the facts just stated, and Owen attempted to counteract this defense by showing by parol that the agreement between himself and Waddle at the time of the execution and delivery of the draft and the delivery of the notes was that this draft was to be non-negotiable. But the court held

that this parol evidence was inadmissible to establish such an oral agreement. The court, speaking through IRVINE, C., said: "The bill of exchange in evidence was clearly negotiable, and parol evidence was inadmissible for the purpose of showing an oral agreement contemporaneous with the drawing of the bill that it should not be negotiated. To permit such evidence would infringe upon one of the best settled rules of evidence."

In *Western Mfg. Co. v. Rogers*, 54 Neb. 241, it was ruled that a promissory note or contract could not be varied, qualified, or contradicted by evidence of a prior or contemporaneous agreement resting in parol.

In *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621, it was said: "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, and 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."

We think these cases control the case at bar. Human memories at best are fallible, and people reduce their contracts to writing in order that there may be no mistake or uncertainty as to what their agreements are; and in the absence of fraud or mistake the recitals of a written contract are the best and only competent evidence of the agreements of the parties thereto.

Counsel for Belk, in support of their contention that this answer states a defense and that the court did not err in admitting evidence in support of its averments, have cited us among others to the following cases:

Ruggles v. Swanwick, 6 Minn. 365; but that case only holds that while a promissory note is in the hands of the original payee it may be shown in a suit thereon that it was in fact never delivered.

Another case is *Wilson v. Powers*, 131 Mass. 539. This was a suit against a surety upon a promissory note. His

defense was that the time of payment of the note had been, by written agreement entered into between the holder and the maker, extended without the surety's knowledge or consent. The holder of the note was permitted to meet this defense by showing by parol that the alleged written agreement of extension was a mere proposition of extension to become binding only when assented to by the surety. The case rests upon the principle that the oral testimony did not tend to modify, contradict, or vary the written agreement, but simply showed that the written agreement had never become operative.

Another case is *Belleville Savings Bank v. Bornman*, 16 N. E. Rep [Ill.] 210. In that case the Belleville Nail-Mill Company drew its draft on its treasurer for $10,000, payable to the order of the Belleville Savings Bank. Bornman, the president of the nail-mill company, then put his guaranty on the back of the draft, handed it to the treasurer of his company, and instructed him to take it to the bank and inform the bank of his guaranty on the draft, but that it was not to be delivered to the bank or be in force unless one Abend, the president of the bank, should also guaranty the draft. The treasurer of the mill company took the draft as directed to the bank, gave it the information which he had been directed to give, but nevertheless the bank took possession of the draft and kept it without Abend's indorsement thereon, and sued Bornman thereon; and the court held that he might show by parol the facts just narrated. The decision in this case rests upon the same principle as the Massachusetts case just cited, namely, that the parol testimony did not tend to contradict or vary the terms of the draft, but simply showed that it had never become operative as a draft. To the same effect is *Dodd v. Dunne*, 71 Wis. 578.

Another case cited by counsel is *Ware v. Allen*, 128 U. S. 590. In that case W. P. Ware was agent for his brother, T. P. Ware, and conducted for him a mercantile

business. W. P. had in his possession two notes payable to his order which had been given to him by his brother T. P. These notes were for $5,000 each. T. P. Ware was largely indebted to Allen, West & Bush, wholesale dealers in New Orleans. W. P. Ware went to New Orleans and requested Allen, West & Bush to take from him an assignment of the two notes of his brother and to use these notes as the basis of an attachment suit against his brother for the purpose of collecting his debt to them. In furtherance of this scheme W. P. Ware also requested Allen, West & Bush to execute and deliver to him a note for $10,000, due in ninety days, in consideration of the two notes of his brother which he had assigned or would assign to them. Allen, West & Bush took an assignment of the two T. P. Ware notes from W. P. Ware, and executed to W. P. Ware a note payable to his order, due in ninety days, for $10,000, and delivered it to him under a verbal agreement between them that the delivery should be of no effect unless Judge Harris or J. M. Allen, one or both of them, on being requested should advise them, Allen, West & Bush, that the transaction was legal and also advise them to pursue the method pointed out to them by W. P. Ware for collecting their debts from T. P. Ware. Judge Harris refused to give any advice on the subject, and J. M. Allen disapproved of the scheme and advised Allen, West & Bush to have nothing to do with it. Allen, West & Bush then returned, or offered to return, to W. P. Ware the two notes which he had assigned to them, and notified him that the contract evidenced by the note was at an end. Ware then sued the note in a court of chancery in the state of Mississippi, from which it was removed to the federal court, in which a judgment was rendered in favor of Allen, West & Bush, and an appeal was taken to the supreme court of the United States, which affirmed the judgment. The only point in the case was whether Allen, West & Bush could show by parol the agreement between them and W. P. Ware that

the note was not to take effect unless the scheme which led to its execution should be approved by Judge Harris or Mr. Allen. The opinion of the supreme court was written by Mr. Justice Miller, who said: "We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of course, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter." This case also rests upon the principle that there never was any complete final delivery of the writing as the promissory note of the makers payable at all events and according to its terms. To the same effect is *Burke v. Dulaney*, 153 U. S. 228.

These cases, and all of them, we think are distinguishable from the case at bar. In no one of those cases was it sought to contradict or vary the express terms of the written instrument sued upon by parol testimony. The judgment of the district court is reversed.

REVERSED AND REMANDED.

HENRY B. SHULL, CORONER, ET AL. V. JOHN BARTON, SHERIFF, ET AL.

FILED NOVEMBER 17, 1898. No. 8377.

1. **Officers:** CORONER: APPROVAL OF REPLEVIN BOND: JUSTIFICATION: NEGLIGENCE. The failure of a coroner to cause the surety on a replevin bond to justify as "bail on arrest," in accordance with section 189 of the Code of Civil Procedure, is not conclusive evidence of the coroner's negligence in approving such replevin bond, nor of his failure to perform an official duty. That pro-

vision of said section was rendered inoperative by the repeal of chapter 1, title 8, Code of Civil Procedure. (Session Laws 1887, p. 654, ch. 99.)

2. ———: ———: ———: ———: ———. A coroner's causing the surety on a replevin bond to justify according to the provisions of such repealed statute is not of itself a protection to him from liability for negligently approving an insufficient replevin bond.

3. ———: APPROVAL OF REPLEVIN BOND: DAMAGES. Since no statute exists prescribing before whom the surety on a replevin bond shall justify, nor what facts shall be made to appear to protect the officer in approving the bond, it follows that, when the sureties on a replevin bond are excepted to, the officer approves the replevin bond at his peril.

4. ———: ———: ———. That an officer acts in good faith in approving a replevin bond will not of itself protect him from liability for negligence in the premises.

5. ———: ———: ———. If an officer negligently approve a replevin bond signed by insolvent or insufficient sureties, and damages result, he is liable.

6. ———: ———: ———. If the bond when approved is good, subsequent insolvency of the surety will not render the officer liable.

7. ———: ———: ———. The mere taking by an officer of the affidavit of the surety on a replevin bond that he is the owner of real estate situate in the county where the replevin action is pending, not exempt from execution, and of twice the value of the replevied property, will of itself not protect the officer from liability if the bond proves insufficient.

8. ———: ———: ———. The officer, before approving a replevin bond, in the absence of his own knowledge, should make such investigation and inquiry concerning the financial standing and solvency of the surety as a reasonably prudent man would make before extending credit to the surety to the amount of the bond.

9. **Coroner:** APPROVAL OF INSUFFICIENT REPLEVIN BOND. Evidence examined, and *held* to establish that a coroner was guilty of negligence in approving an insufficient replevin bond.

10. ———: ———: ACTION FOR DAMAGES: DEFENSE. Where a creditor attaches personal property as that of his debtor, and it is taken in replevin from the sheriff and delivered to the claimant, the statutory bond being given and approved, and the creditor, pending the replevin suit, causes the same property to be taken on execution for the same debt for which he had attached it, such seizure of the property on execution is a defense for the coroner in a suit against him by the creditor for negligently approving an insufficient replevin bond.

11. ———: ———: ———: ESTOPPEL. In such a suit the creditor cannot be heard to say that the seizure of the property on execution was void.

12. **Attachment:** EXECUTION: SEIZURE OF PROPERTY IN CUSTODIA LEGIS. When attached property is replevied and delivered to the claimant, and the replevin bond required by statute is given and approved, then that property, pending that replevin action, cannot be lawfully taken by attachment or execution at the suit of the plaintiff who has attached it.

13. ———: ———: REPLEVIN BOND: APPROVAL: LIABILITY OF OFFICER. In such a case the replevin bond takes the place of the property, and the party who has attached it must follow the replevin action to final judgment, and if successful, and the property be not returned, satisfy his judgment by execution, and, failing in this, look to the replevin bond for indemnity, and, if this proves worthless, to the official bond of the officer for negligently approving an insufficient replevin bond, if such was the fact.

14. **Approval of Insufficient Replevin Bond:** ACTION AGAINST OFFICER: PARTIES. A sheriff, from whom attached property has been replevied, on the termination of the replevin suit in his favor, and the return unsatisfied of an execution issued on the judgment, cannot maintain an action against the officer, who served the replevin writ, for negligently approving an insufficient replevin bond whereby the creditor for whom the sheriff acted lost his debt.

15. ———: ———: ———. In such case the creditor, and not the sheriff, is the real party in interest.

16. ———: ———: ———: SUIT ON BOND: SHERIFF. In such case the sheriff might maintain an action on the replevin bond, as he is the obligee named therein and trustee for the attaching creditor.

17. ———: ———: ———. Two or more creditors who have lost their several claims against a debtor and their attachment liens against his property, because a coroner negligently approved an insufficient bond in a replevin suit, by which the attached property was taken from the sheriff holding the writs of attachment, cannot join as plaintiffs in a suit against such coroner for damages for negligently approving such replevin bond.

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

The facts are stated by the commissioner.

W. H. Morris, for plaintiffs in error:

In arguing the point that the coroner is not liable for

negligence in approving the replevin bond, and that he is protected by the justification of the sureties, references were made to the following cases: *Wilson v. Williams*, 18 Wend. [N. Y.] 585; *Westervelt v. Bell*, 19 Wend. [N. Y.] 531; *Thomas v. Edgerton*, 36 Neb. 254; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Sika v. Chicago & N. W. R. Co.*, 21 Wis. 370; *Turney v. Wilton*, 36 Ill. 385; *People v. Clunic*, 70 Cal. 504; *Kugler's Appeal*, 55 Pa. St. 123; *McKnight v. Crinnion*, 22 Mo. 559; *Newman v. City of North Yakima*, 34 Pac. Rep. [Wash.] 921; *Northfield Knife Co. v. Shapleigh*, 24 Neb. 639; *Dennistown v. Draper*, 5 Blatch. [U. S.] 336; *Brock v. Hopkins*, 5 Neb. 231.

The sheriff repossessed himself of the property, and hence all conditions of the replevin bond, for a return of the property, had been complied with. The sureties on the replevin bond were released; hence, even if the coroner would have been otherwise liable, no cause of action existed against him. (*Caldwell v. Gans*, 1 Mont. 570; *Hunt v. Robinson*, 11 Cal. 262; *Kayser v. Bauer*, 5 Kan. 204; *Demers v. Clemens*, 2 Mont. 385; *Rinker v. Lee*, 29 Neb. 784; *Bowman v. First Nat. Bank*, 36 Neb. 117; *Nosser v. Corwin*, 36 How. Pr. [N. Y.] 540.)

The plaintiff in a replevin action becomes only a custodian of the property in place of the officer. The property is at all times until the final determination of the action in the custody of the law and subject to the proper control of the court under whose process the same has been taken, and the replevin changes only for the time being the manual possession of the same. (*Rhines v. Phelps*, 3 Gil. [Ill.] 455.)

An officer claiming title to property under a process in his hands must show a valid unpaid judgment. (*Beach v. Botsford*, 1 Doug. [Mich.] 199; *Adams v. Hubbard*, 30 Mich. 104.)

Hastings & Sands, contra:

An officer is responsible for the insufficiency of the sureties upon a replevin bond in case he does not have

the sureties justify in the method pointed out by the statute. (22 Am. & Eng. Ency. Law, 551; *Miner v. Coburn*, 4 Allen [Mass.] 136.)

When a statute directs the manner in which a thing is to be done, it shall not be done in any other manner. (*Commissioners of Shawnee County v. Carter*, 2 Kan. 115; *Morrill v. Taylor*, 6 Neb. 236.)

An officer is liable for negligence, where he does not execute a writ in the method provided by law. (*Miller v. Roby*, 9 Neb. 471; *Hubbard v. Elden*, 43 O. St. 380.)

If a sheriff wastes the property on which he levies, or it is lost or destroyed through his neglect or misconduct, or the neglect or misconduct of the plaintiff, the judgment will be satisfied. But if without the fault of the plaintiff or of the officer the levy does not produce a sum sufficient to satisfy the execution, the plaintiff is entitled to proceed for so much as remains unpaid, the same as though no levy had been made. (*Barret v. Thompson*, 5 Ind. 457; *Reynolds v. Cobb*, 15 Neb. 382; *Rickards v. Cunningham*, 10 Neb. 419; *Hicok v. Coates*, 2 Wend. [N. Y.] 419; *Vroman v. Thompson*, 16 N. W. Rep. [Mich.] 808; *Godman v. Boggs*, 12 Neb. 19.)

Where property is never taken from the possession of the defendants, or where, after being taken, it is restored to him at his request, or through any act for which he is responsible, or in which he acquiesces, the levy does not operate as a satisfaction. (2 Freeman, Executions sec. 269; *Ford v. Skinner*, 4 O. 378; 7 Am. & Eng. Ency. Law 157.)

So long only as the property levied on remains in the custody of the law, other remedies of a creditor are suspended. The mere levy neither gives anything to the creditor nor takes anything from the debtor. (*People v. Hopson*, 1 Den. [N. Y.] 574; 2 Freeman, Executions sec. 269.)

E. E. McGintie, also for defendants in error.

RAGAN, C.

Henry B. Shull and others have filed a petition in error

here to review a judgment of the district court of Saline county recovered against them by John Barton and others. To a proper understanding of the points decided here it is necessary to make a statement of some of the undisputed facts disclosed by the record. The plaintiff in error Shull is the coroner of Saline county. The other plaintiffs in error are the sureties on his official bond. In July, 1891, a copartnership under the name of Foster & Ayres was conducting a mercantile or drug business in De Witt, in said county. On that date Coe & Co., Brittain-Smith & Co., Midland Coffee & Spice Company, Funke & Ogden, Raymond Bros., The American Hand-Sewed Shoe Company, and one Warren E. Ayres, all of which parties will hereinafter be denominated the seven creditors, each brought a suit against Foster & Ayres in the county court of said county, and each caused a writ of attachment to be issued and placed in the hands of the sheriff of said county. The sheriff, by virtue of these several writs of attachment, seized the mercantile stock of Foster & Ayres. Thereupon Lafayette M. Foster and Jennie A. Foster, his wife, doing business as Foster & Co., brought a replevin action against the sheriff for the goods which he held under the attachment writs, and by the process issued in that action all the goods held by the sheriff were taken and delivered to Foster & Co. The coroner, plaintiff in error here, executed the replevin writ. The sheriff, who was made sole defendant in the replevin suit, gave notice to the coroner of exceptions to the sufficiency of the sureties who had signed the replevin bond of Foster & Co.; and thereupon the surety who had signed the replevin bond made affidavit that she was a resident of Saline county; that she owned real estate therein not exempt from execution of the value of $2,500. This affidavit the surety delivered to the coroner. Indeed it was sworn to before him, and he at once approved the bond or undertaking in replevin. About August 1 of said year the seven creditors obtained judgments in the county court on their claims against Foster

& Ayres. The county judge issued executions upon these judgments, or some of them, and they came into the hands of the sheriff, and he at once levied them upon the same property which he had attached and which had been replevied, and delivered to Foster & Co.; and by virtue of said executions he again took into his possession said mercantile stock. The goods were again by an action of replevin taken from the possession of the sheriff. When the sheriff levied the execution upon the mercantile stock the replevin action brought by Foster & Co. was pending and undecided. This replevin action proceeded to trial and the sheriff had judgment for a return of the replevied property or its value in money. The replevied property was not returned. The sheriff caused an execution to be issued upon his judgment, and this was returned wholly unsatisfied. The sheriff and the seven creditors then brought this action in the district court of Saline county against the coroner and the sureties on his official bond. For cause of action they set out the claims of the seven creditors against Foster & Ayres; the seizing of the latter's property by writs of attachment; its having been taken from the sheriff on the writ of replevin in favor of Foster & Co.; the approval of the undertaking in replevin by the coroner; the reduction of the claims of the seven creditors against Foster & Ayres to judgment; that the judgments were wholly unpaid; the prosecution of the replevin action to judgment in favor of the sheriff; the return of an execution issued on such judgment unsatisfied; the insolvency of Foster & Co. and the surety on their replevin bond as a reason why they had not brought suit on said bond, and averred that at the time the coroner approved of the replevin bond the surety thereon was then and there insolvent; and that the coroner negligently approved said bond, by reason whereof the said seven creditors had lost their liens upon the attached property, and lost the full amount of their claims against Foster & Ayres. On the trial in the district court the coroner and his sureties de-

murred to the petition of the sheriff and the seven creditors on the ground that there was a defect of parties plaintiff and that several causes of action were improperly joined in the petition. This demurrer was overruled and the coroner and his sureties then filed an answer to the petition, in which, among other things, they averred that there were several causes of action improperly joined in the petition and that there was a misjoinder of parties plaintiff. On the trial the coroner and the sureties offered in evidence the executions already alluded to, which had been issued by the county court in favor of the seven creditors against Foster & Ayres, and offered to show that the sheriff had by virtue of these executions seized the same property which the seven creditors had formerly attached as the property of Foster & Ayres, and which had been taken from the possession of the sheriff in the replevin action. The record presents but three questions which we deem it absolutely necessary to notice.

1. It is contended first in behalf of the coroner that the uncontradicted evidence shows that he acted in good faith in approving the replevin bond, and that he is not liable simply for negligence. The evidence is undisputed that the sheriff duly notified the coroner that he objected to the sufficiency of the surety on the undertaking in replevin; that the only inquiry or effort which the coroner made to ascertain if that surety was sufficient was that he took and relied upon the surety's affidavit, filed with him, in which the surety stated that he was the owner of real estate in the county not exempt from execution of the value of $2,500; that the averments of this affidavit were absolutely and unqualifiedly false; but the evidence does not show that the coroner acted in bad faith in approving this undertaking. It does show beyond peradventure that he was guilty of negligence in the premises. Section 189 of the Code of Civil Procedure provides that when an officer is notified by a defendant in replevin that he excepts to the sufficiency of the sure-

ties on a replevin bond, then the surety must justify in the same manner as "bail on arrest." At the time this provision of the Code was adopted there was in force in this state a statute which permitted the arrest of a defendant in a civil action for debt; that the defendant so arrested might, at any time before judgment, be released by causing one or more sufficient bail to execute an undertaking to the plaintiff to the effect that if the judgment should be rendered in the action against the defendant he would render himself amenable to the process of the court. The statute further provided that the plaintiff might object to the sufficiency of the bail given, and that if he did so the sheriff should require the bail to justify. The statute further provided that the bail should justify by appearing before a proper officer at a time and place mentioned for examination by him under oath, touching his sufficiency as bail, in such manner as such officer might think proper. It seems to have been the purpose and intention of this statute that the sheriff should not be liable for having taken an insufficient bail, provided it justified as required by the statute. In other words, if the officer before whom the bail appeared for justification approved it, this was a protection to the officer. (See General Statutes 1873, p. 547.) But this statute was repealed by the legislature of 1887. (See Session Laws 1887, p. 654.) Since no statute exists in this state authorizing the arrest of a defendant in a civil action for debt, the provision of section 189 of the Code, which provides that the surety in a replevin bond must justify in the same manner as bail on arrest, is meaningless. Neither the common law nor the old English statutes permitted a sheriff to admit to bail one arrested in a civil action for debt, and exonerate himself from liability to the plaintiff for the escape of the defendant by having the bail for the defendant justify. But the rule at common law was that if the defendant, after being arrested, was admitted to bail by the sheriff, and then failed to appear, the sheriff and the sureties on his official bond

were liable to the plaintiff for his debt. (3 Blackstone, Commentaries [Chitty's ed.] 290.) We conclude, therefore, that, where exceptions are taken to the sureties on a replevin bond, the officer is not obliged to cause the sureties to justify in the manner which the old statute required bail on arrest to justify; and the officer's failure to cause the sureties to so justify does not necessarily and of itself render him liable to the defendant in the replevin action. Nor do we think that if the officer should require the sureties on the replevin bond to justify in the same manner as the old law required "bail on arrest" to justify, he would thereby unconditionally release himself from liability by reason of the insufficient surety on the replevin bond. Section 189 of the Code of Civil Procedure provides that the sheriff or other officer shall be responsible for the sufficiency of the sureties, if excepted to, until they justify; and since no statute exists which prescribes before whom the surety shall justify, nor what facts shall be made to appear to protect the officer, it follows that when the sureties on the replevin bond are excepted to the officer approves the replevin bond at his peril. He must of course always and at all times act in good faith. But good faith alone will not protect him. (*People v. Core*, 85 Ill. 248.) If the surety on the replevin bond, when approved, is then good, solvent, and sufficient, subsequent insolvency of the surety would not render the officer liable. But to escape liability for an insufficient surety on a replevin bond after it has been excepted to, and the officer had notice thereof, he must not be guilty of negligence; and if he negligently approve a replevin bond which is signed by insolvent or insufficient sureties he is answerable for the consequences. (*People v. Core*, 85 Ill. 248; *Sparhawk v. Bartlet*, 2 Mass. 188; *Young v. Hosmer*, 11 Mass. 88; *Rayner v. Bell*, 15 Mass. 377.) The mere taking by the officer of the affidavit of the surety that he, the surety, is the owner of real estate situate in the county where the replevin action is pending, not exempt from execution, of twice the

value of the replevied property, is of itself not enough to justify the officer in approving the replevin bond, and such affidavit will not of itself protect the officer from liability for an insufficient bond. In such a case it would seem that the officer should make inquiries of persons likely to know as to the financial standing, solvency, and property of the surety. He might require the surety to schedule his assets and liabilities, and with this in hand he should make such examination of public records and investigations and inquiries as a reasonably prudent man would make before extending credit to the surety to the amount of the bond. In the case at bar the coroner did nothing,—made no inquiries, instituted no search,—to ascertain the financial standing and worth of the surety on the replevin bond. He did not require the surety to furnish him a schedule of his assets and liabilities. He simply rested satisfied with the voluntary affidavit of the surety as to the worth of the property which he owned. This was not enough to protect the coroner from liability. He was guilty of negligence.

2. But we think the district court erred in refusing to permit the coroner to introduce in evidence the executions issued by the county court based on the judgments rendered in favor of the seven creditors against Foster & Ayres. These executions and the return of the officer thereon tended to show that the seven creditors, or some of them, had by virtue thereof seized the identical property which they had previously attached. If the seven creditors who brought this action, by virtue of the executions from the county court, took the identical and all the property which they had previously attached, then they have no cause of action against the coroner for approving an insufficient bond. How can it be said that they have lost the property which they attached because of the coroner's approving an insufficient replevin bond therefor when by another legal process, namely, an execution, they subsequently became possessed of the same property for the satisfaction of the same debt for which

they had attached it? It is true that the levy of this execution by the sheriff and the seven creditors upon this property which had been attached and then replevied was void; that they and each of them were trespassers and, probably, in contempt of court because thereof. But they are in no position here to take advantage of their wrongful act. There is no conflict of authority upon the proposition that when property has been attached and then replevied, the plaintiff in the attachment, while the replevin suit is pending, cannot levy an execution or attachment thereon. Indeed, some authorities go so far as to say that property attached and then replevied is in custody of the law, and while the replevin action is pending cannot be seized on attachment or execution at the suit of any person. (*Bates County Nat. Bank v. Owen*, 79 Mo. 429.) But every court to which the question has been presented, we think, has denied the right of a plaintiff who has attached property after it had been replevied from him, and while the replevin action was pending, to levy another attachment or execution upon it. We cite a few of the cases: *Goodheart v. Bowen*, 2 Ill. App. 578; *Rhines v. Phelps*, 3 Gil. [Ill.] 455; *Hagan v. Lucas*, 10 Pet. [U. S.] 399; *Pipher v. Fordyce*, 88 Ind. 436; *Acker v. White*, 25 Wend. [N. Y.] 614; *Selleck v. Phelps*, 11 Wis. 398; *Metzner v. Graham*, 57 Mo. 405; *Bates County Nat. Bank v. Owen*, 79 Mo. 429. Under our statute, when attached property is replevied and delivered to the plaintiff in the replevin suit, and the replevin bond required by statute is given and approved, then that property, pending that replevin action, cannot be taken in attachment or execution at the suit of the plaintiff who has attached it. The reason is that the statute makes the bond take the place of the property. Many courts give as a reason for this that the property is in custody of the law. We do not know whether this is the correct reason, but certainly, under our statute, the bond takes the place of the property. The conditions of the bond are that the plaintiff in the replevin suit will make

return of the property or pay its value in money if the judgment go against him. The party then who has attached property, if it be replevied from him or from the officer who executed his writ of attachment, must follow the replevin action to final judgment, and if successful satisfy his claim by an execution upon the judgment and, failing in that, look to the replevin bond, and, failing in this, to the negligence or bad faith of the officer in taking an insufficient replevin bond, if such were the facts.

3. As already stated, the plaintiffs below in this action were the sheriff of Saline county and the seven creditors who had attached the property of Foster & Ayres. The sheriff is not a proper party plaintiff in this action. He was the defendant in the replevin action, obtained a judgment in that action, and caused an execution to be issued thereon which was returned, "No property found." As the defendant in the replevin action he represented the seven creditors and was the proper defendant to that action. Doubtless he might have maintained a suit on the replevin bond for the satisfaction of the judgment which he obtained against the plaintiff in replevin, as he was the obligee in that bond, but that he did not do, because, as stated in the record, that bond is worthless. The replevin bond being worthless, and the execution issued on the judgment rendered in the replevin action having been returned "No property found," the sheriff had no further connection with the controversy. He had discharged his duties, and all of his duties, in the premises. He cannot maintain an action against the coroner for damages for approving an insufficient replevin bond. He is not the real party in interest. The seven creditors have not a joint action against the coroner for approving an insufficient replevin bond, and they cannot unite as plaintiffs in such an action. If the coroner approved an insufficient replevin bond and any one of the seven creditors sustained damage thereby, then a cause of action arose in favor of such creditor against the coroner and the sureties on his official bond. But these creditors are

not agents, one for the other, so that one may bring an action for all; nor may all of them jointly bring such an action. The judgment of the district court is reversed and the cause remanded with instructions to dismiss the action so far as the sheriff of Saline county is concerned, and with permission to each of the seven creditors to docket a separate action against the coroner and his sureties, and for such other proceedings as are according to law.

REVERSED AND REMANDED.

LARS SORENSEN ET AL. V. ELLEN SORENSEN.

FILED NOVEMBER 17, 1898. No. 8398.

1. **Competency of Witnesses.** Under our system of jurisprudence every person is *prima facie* a competent witness in all cases, both civil and criminal.
2. ———: EVIDENCE. The incompetency of one as a witness, or the incompetency of his evidence, must be found in express law and not based on strict or technical construction. If there is reasonable doubt, the witness and the evidence are competent.
3. ———: ———: TRANSACTIONS WITH PERSON DECEASED. In a probate contest in the district court between an alleged widow and a nephew—an alleged heir at law—of an intestate for the right to nominate his administrator, such widow was permitted to testify to a conversation between herself and the deceased, constituting a present verbal contract of marriage, or common-law marriage between them. *Held*, That such evidence in said proceeding, the nature and the effects of the judgment thereof considered, is made incompetent by the express provision of section 329 of the Code of Civil Procedure.

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

The opinion contains a statement of the case.

A. M. Robbins, J. W. Deweese, and *Herman Westover*, for plaintiffs in error:

Defendant in error is not a competent witness to tes-

tify to a verbal contract of marriage between herself and Hans C. Sorensen, deceased. (Code of Civil Procedure, sec. 329; *Wylie v. Charlton*, 43 Neb. 840; *Denison v. Denison*, 35 Md. 361; *Redgrave v. Redgrave*, 38 Md. 93; *Kimball v. Kimball*, 16 Mich. 211; *Powell v. Powell*, 114 Ill. 329; *Cole v. Cole*, 153 Ill. 589; *Sharmer v. McIntosh*, 43 Neb. 516; *Ransom v. Schmela*, 13 Neb. 77; *Kroh v. Heins*, 48 Neb. 692; *Davis v. Davis*, 26 Cal. 37.)

The testimony of defendant in error was not sufficient to establish a common law marriage. (*Van Tuyl v. Van Tuyl*, 57 Barb. [N. Y.] 235; *Letters v. Cady*, 10 Cal. 533; *Clancy v. Clancy*, 33 N. W. Rep. [Mich.] 889; *State v. Walker*, 13 Pac. Rep. [Kan.] 282; *Stoltz v. Doering*, 112 Ill. 240; *Olson v. Peterson*, 33 Neb. 358; *Cross v. Cross*, 21 N. W. Rep. [Mich.] 310; *Kilburn v. Kilburn*, 89 Cal. 50; *Duncan v. Duncan*, 10 O. St. 181; *Cheney v. Arnold*, 15 N. Y. 345; *Terry v. White*, 59 N. W. Rep. [Minn.] 1013; *Williams v. Williams*, 46 Wis. 464; *Harbeck v. Harbeck*, 102 N. Y. 714; *Hebblethwaite v. Hepworth*, 98 Ill. 132; *Port v. Port*, 70 Ill. 484; *Cartwright v. McGown*, 121 Ill. 402; *Yardley's Estate*, 75 Pa. St. 207; *McKenna v. McKenna*, 73 Ill. App. 64; *Sharon v. Sharon*, 79 Cal. 670; *Commonwealth v. Stump*, 53 Pa. St. 136; *Peck v. Peck*, 12 R. I. 488; *Calef v. Calef*, 54 Me. 366; *Orme v. Orme*, 2 Add. Ecc. [Eng.] 382; *Foster v. Foster*, 1 Hag. Ecc. [Eng.] 144; *Cannon v. United States*, 116 U. S. 74.)

A. Norman, John Wall, Charles A. Munn, and *Munn & Hall, contra:*

Error cannot be predicated upon the admission of incompetent testimony received without objection, and in a case tried to the court without a jury the admission of incompetent testimony is not ground for reversing a judgment. The evidence admitted without objection was sufficient to sustain the verdict. (*Whipple v. Fowler*, 41 Neb. 681; *Willard v. Foster*, 24 Neb. 213; *Bilby v. Townsend*, 29 Neb. 220; *Western Union Telegraph Co. v. Lowrey*, 32 Neb. 738; *Wheeler v. Van Sickle*, 37 Neb. 651; *Catron*

v. Shepherd, 8 Neb. 317; *Clough v. State*, 7 Neb. 353; *Palmer v. Witcherly*, 15 Neb. 98; *Missouri P. R. Co. v. Vandeventer*, 26 Neb. 222; *Richardson v. Doty*, 25 Neb. 420; *Parish v. McNeal*, 36 Neb. 727; *Bartlett v. Bartlett*, 15 Neb. 593.)

Defendant in error's testimony as to her marriage was properly admitted in evidence. (*Wamsley v. Crook*, 3 Neb. 344; *Eisenlord v. Clum*, 126 N. Y. 552; *Hendricks v. Kelly*, 64 Ala. 391; *United States v. Dickson*, 15 Pet. [U. S.] 141; *Crimmins v. Crimmins*, 10 Atl. Rep. [N. J.] 801; *Greenawalt v. McEnelley*, 85 Pa. St. 352; *Smith v. Smith*, 19 Atl. Rep. [N. J.] 255; *Shaffer v. Richardson*, 27 Ind. 122; *Hamlyn v. Nesbit*, 37 Ind. 293; *Key v. Jones*, 52 Ala. 247; *Alabama Gold Life Ins. Co. v. Sledge*, 62 Ala. 569.)

The evidence was sufficient to establish a common law marriage. (1 Bishop, Marriage & Divorce [6th ed.] secs. 228, 249, 253, 283, 457; Stewart, Marriage & Divorce secs. 53, 84, 87; *Haggin v. Haggin*, 35 Neb. 379; *Gibson v. Gibson*, 24 Neb. 417; *Goodrich v. Cushman*, 34 Neb. 461; *Bailey v. State*, 36 Neb. 808.)

E. M. Coffin, also for defendant in error.

RAGAN, C.

Hans C. Sorensen died intestate February 3, 1895, leaving both real and personal property situate in Valley county, of which he was an inhabitant. Lars Sorensen and others, children of a deceased brother and sister of Hans C. Sorensen, made application to the county court for letters of administration of the estate of said Hans C. Sorensen, alleging that Hans had died intestate, leaving no widow nor issue, and that they, his nephews and nieces, were his next of kin and only heirs at law. A Mrs. Ellen Sorensen, or Ferguson, appeared in that proceeding and alleged that she was the widow of Hans C. Sorensen, deceased, and claimed the right to nominate an administrator. The result of the proceeding in the county court was a finding and judgment that Mrs. Ellen Sorensen, who will hereinafter be called Mrs. Fer-

guson, had never been married to Hans C. Sorensen, deceased, and therefore was not his widow. From this judgment Mrs. Ferguson prosecuted an appeal to the district court, where by consent a trial was had to the court without a jury, which resulted in a finding and judgment that Mrs. Ferguson had been lawfully married to Hans C. Sorensen in October previous to his death; that she was his widow and entitled to name an administrator for his estate. To review this judgment Lars Sorensen and others have filed in this court a petition in error.

1. It appears from the record that Hans C. Sorensen lived for a number of years prior to his death in Ord, Nebraska; that he was a bachelor,—lived alone, doing his own housekeeping. Mrs. Ferguson was a widow, and lived in the same town and, if not on the same block, very close to where Hans C. Sorensen lived. The two parties had been quite well acquainted for a number of years. Mrs. Ferguson was a poor woman, and, it seems, did Sorensen's laundry work, and occasionally cleaned house for him. On the trial in the district court she testified that about the middle of October, 1894, while she was at the house of Sorensen, he made a verbal proposition of marriage to her, which she then and there accepted; that she and Sorensen then and there agreed henceforth to be husband and wife to one another. Mrs. Ferguson also testified that after this verbal marriage contract between her and Sorensen, and in pursuance thereof, they had sexual intercourse, the result of which was a son born to her. She further testified that it was agreed between her and Sorensen at the time of their marriage that it should be kept secret for an indefinite time. The marriage was kept secret. The record contains no evidence of either Sorensen or Mrs. Ferguson having ever told or claimed to any one that they were married. At no time or place did either one of them introduce, speak of, or hold out the other as husband or wife. The parties did not cohabit together after their

marriage, but each continued to occupy their respective places of residence as before. No writing, note, memorandum, or verbal acknowledgment or statement of this marriage appears to have been made by either of the parties thereto. It will thus be seen that the finding and judgment of the district court, that Mrs. Ferguson and Hans C. Sorensen were lawfully married, that she was his widow, and that her child was his lawful heir, depend for support upon her testimony as to the verbal contract of marriage entered into between her and Sorensen in the middle of October, and the sexual intercourse of the parties subsequent to, and in pursuance of, such marriage contract. Was the evidence of Mrs. Ferguson in this respect competent for consideration by the district court in deciding the question of fact, of the marriage, presented to him? Section 328 of the Code of Civil Procedure, among other things, provides: "Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, civil and criminal, except as otherwise herein declared." The statute then enumerates what persons shall be incompetent to testify. Mrs. Ferguson does not belong to the class of persons rendered incompetent by this section of the statute. Section 329 of the Code provides that "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of the deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness unless," etc. From the section of the Code first quoted it is apparent that every person is *prima facie* a competent witness in any case, civil or criminal; and to disqualify a witness from testifying by reason of incompetency he must fall within some one or more of the exceptions expressly provided by statute. In other words, the reason for disqualifying the witness must be found in express provisions of law, and the witness is not to be disqualified by a strained or strict construction. (*Eisenlord v.*

Clum, 27 N. E. Rep. [N. Y.] 1024; *Roberts v. Yarboro*, 41 Tex. 449; *United States v. Dickson*, 15 Pet. [U. S.] 165; *Markham v. Carothers*, 47 Tex. 21. Mrs. Ferguson did not belong to either one of the five classes of persons declared incompetent to testify by the provisions of said section 328 of the Code. Was the testimony given by her rendered incompetent by said section 329? Let us analyze this section of the Code. To render her testimony incompetent she must have testified to a transaction or a conversation had between herself and the deceased, the testimony must have been given in a civil action or proceeding, the adverse party to this action or proceeding must have been the representative of the deceased, and the witness must have had a direct legal interest in the result of the action or proceeding. The proceeding in which Mrs. Ferguson was permitted to testify was perhaps, technically speaking, not a civil action, but a probate proceeding. It was, however, a civil, and not a criminal, proceeding, and recognized as a civil proceeding by section 17, article 6, of our constitution. The adverse party in the proceeding appeared in the record claiming to be the heir at law of the deceased. True, this alleged heir was not the legal representative of the deceased. He was neither the executor nor the administrator of the deceased. But the term "representative," in this section of the Code, is not limited to legal representatives, but applies to any person or party who has succeeded to the rights of the deceased, whether by purchase, descent, or operation of law. (*Wamsley v. Crook*, 3 Neb. 344; *Kroh v. Heins*, 48 Neb. 691.) The heir at law then in the proceeding in which Mrs. Ferguson testified appeared on the record as the representative of the deceased. The word "result," found in this section of the Code, means the judgment rendered or final order made in the proceeding.

Thus far it appears that Mrs. Ferguson testified to a transaction and conversation had between her and the deceased; gave this testimony in a civil proceeding in

which her adversary appeared of record as the representative of the deceased. The remaining question is, did she at the time she gave this testimony have a direct legal interest in the result of that proceeding? To render her testimony incompetent it is not enough that she was interested in the result, but such interest must have been an interest or a right or an obligation recognized by law, and such an interest or right as the final judgment in the proceeding would confirm to or deny her, or her interest must have been such as would enable this judgment to be used in another action in support of or against her alleged right or interest. (*Eisenlord v. Clum*, 27 N. E. Rep. [N. Y.] 1024, and cases there cited.) That the witness may be biased or prejudiced in favor of one litigant or the other does not invest her with an interest, within the meaning of this section of the Code. The true test is, as it was at common law, will the witness gain or lose by the direct legal operation and effect of the judgment or final order rendered in the proceeding in which the testimony is offered, or will the judgment pronounced in that proceeding be legal evidence for or against the witness in some other action? (1 Greenleaf, Evidence sec. 390.) If the direct effect of the judgment rendered in the proceeding would be to divest the decedent's representative of real estate and vest it in the husband of the witness, then her testimony would be incompetent. (*Wylie v. Charlton*, 43 Neb. 840), because the moment her husband became invested with the title to real estate the witness would become entitled to an inchoate right of dower therein. (*Butler v. Fitzgerald*, 43 Neb. 192.) If the effect of the judgment or final order would make her liable for the costs in the proceeding, then her testimony would be incompetent. (*Ransom v. Schmela*, 13 Neb. 73.) This right or interest must have been a direct and approximate one, not an uncertain or possible interest. For example, if the effect of the judgment might be to divest the decedent's representative of property and vest the title thereto in the child of the witness, then, though by

statute she might inherit from the child in case it died, her evidence would not be incompetent, as her interest there would be an indirect and not a direct present one. If Mrs. Ferguson was the widow of Hans C. Sorensen, then, by reason of the laws of this state, at the moment of his death she became entitled to dower in all the real estate of which he was seized at any time during coverture, and became entitled to the ownership and possession of a certain share of the personal property left by the deceased. This right to dower and personal property of the deceased gave her a direct legal interest in the result of the proceeding on trial. The only issue on trial in the district court was whether Mrs. Ferguson and Hans C. Sorensen were husband and wife,—whether she was his widow; and the judgment of the district court that she was his widow embraced a finding that she was lawfully married to him. This judgment then established Mrs. Ferguson's status as the widow of Hans C. Sorensen, and this status once established by operation of law, she became entitled to dower out of his estate, and the judgment rendered in this proceeding would be competent evidence for her in a suit for dower, where the defense of the nephews and nieces was that she was not his widow, as in the proceeding for dower the parties would be the same as here, and in that proceeding the only issue would be whether or not she was Sorensen's widow,—in other words, whether she was married to him, as she claimed, in October, 1894. We are therefore constrained to hold that the testimony given by Mrs. Ferguson as to her verbal contracts, conversations, and transactions with the deceased, which the district court held established a valid common law marriage between the witness and the deceased, was incompetent.

2. We have not been referred to, nor have we been able to find, any case where the precise question under consideration here has been decided, under a statute like ours, in such a proceeding as this. That the testimony of Mrs. Ferguson was competent has been ably and in-

dustriously contended for by her counsel, and in deference to them, and in view of the importance of the question presented, we have patiently examined all the cases cited by them which they claim sustain their contention, and in addition have examined a large number of others. Some of these cases we shall now briefly review, and endeavor to show that they do not conflict with the construction which we have placed upon section 329 of the Code.

Roberts v. Yarboro, 41 Tex. 449, was a suit for conversion against two copartners. Pending the suit one of the partners died, the action proceeding against the surviving partner only, and it was held that the plaintiff might testify to declarations of the deceased. The statute of Texas prohibited a party to the suit from testifying to a conversation or transaction with the deceased, where the adversary was the executor, administrator, or guardian of the deceased. The court gave the statute a literal and strict interpretation, and held the testimony of the plaintiff competent upon the ground that the deceased party was not a party to the suit nor represented in the suit by an administrator, executor, or guardian.

Markham v. Carothers, 47 Tex. 21, was an action of ejectment brought by Carothers' administrator against Rountree and Bowden. The parties made defendants disclaimed all title in themselves, and Bowden, as guardian for Irene Rountree, intervened in the action and claimed title to half the property sued for in behalf of his ward; and the court held that Rountree might testify to conversations and transactions between himself and Carothers' intestate. The decision was placed upon the ground that after Rountree's disclaimer he was no longer a party to the suit, and the statute only rendered the testimony of witnesses incompetent who were parties to the suit.

Eisenlord v. Clum, 27 N. E. Rep. [N. Y.] 1024, was an ejectment suit brought by an alleged forced heir of the deceased against persons who claimed to be the heirs at

law of the deceased, and it was held that the mother of the forced heir might testify to a common law marriage between herself and the plaintiff's father. The opinion is by Peckham, J., and is an able and exhaustive one; is a construction of section 829 of the Civil Code of New York, which is substantially section 329 of our Code, and the testimony of the mother was held admissible solely upon the ground that the judgment in the ejectment suit could not be used by the widow as evidence of her marriage with the deceased in a suit brought by her for dower in his lands. The case might be controlling and conclusive of the contention of Mrs. Ferguson's counsel here if their client had not been a party to the proceeding in which she testified.

Cole v. Cole, 38 N. E. Rep. [Ill.] 703, was a contest over the partition of real estate of which one George Cole had died seized. Cole was lawfully married to Emma Cole in England, lived with her for about a year, and then deserted her and came to Illinois, and there married Amelia Hahn, with whom he lived for about twelve years, until she obtained a divorce from him. Cole then went to Indiana, and there married Katherine Cole, and soon after died. Emma Cole, the English widow, claimed dower in his lands, and the Indiana widow also claimed to have been lawfully married to him and therefore entitled to dower in his lands. On the trial there was positive proof by other witnesses that Cole's English wife was living when he married Amelia Hahn, and the court held that Amelia Hahn was competent to testify that Cole admitted to her during the time she lived with him that he had not been divorced from his English wife. The case does not militate against the conclusion reached by us in the case at bar. If Cole's English widow was living when he married Amelia Hahn, then that marriage was absolutely void, and she had no interest, direct, legal, or otherwise, in the result of the suit on trial.

A statute of Missouri provided: "In actions where one of the original parties to the contract or cause of action in

issue and on trial is dead * * * the other party * * * shall not be admitted to testify in his own favor." (Revised Statutes of Missouri, sec. 8918.) William Green and Rebecca Green were married in Ireland. No children were born of the marriage. Green then deserted his wife, came to Missouri, and, representing himself to be single, was duly married to Victoria Rogers, by whom he had two children, and soon after died, leaving a will in and by which he devised to his Missouri widow a life interest in his real estate with the remainder over to his children. The Irish widow brought ejectment for the real estate against the Missouri widow and her children, and the court held that the Irish wife might testify to the marriage between herself and the testator. (*Green v. Green*, 28 S. W. Rep. [Mo.] 752, 1008.) The cause of action in issue and on trial in the ejectment suit was not the marriage contract to which the witness was permitted to testify. The decision of the court is an application of the rule of strict construction of a statute which renders a witness imcompetent to testify. Such also is the case of *Brandon v. Dawson*, 51 Mo. App. 237.

In *Re Drinkhouse's Estate*, 24 Atl. Rep. [Pa.] 1083, the holding was that on a claim of children to a share in the estate as grandchildren of the decedent their mother was a competent witness to prove the fact of her marriage to the decedent's son, the father of the grandchildren. The case was an appeal from an order of the orphan's court distributing the estate of William Drinkhouse, deceased. It does not appear that the witness who testified to a marriage with William's son, Joseph W., had any direct legal interest in the result of that proceeding.

A statute of New Jersey provided: "No party shall be sworn in any case when the opposite party * * * sues or is sued in a representative capacity." (Revised Statutes, p. 378, ch. 1, sec. 3.) In *Colfax v. Colfax*, 32 N. J. Eq. 206, a son filed a bill for specific performance of a contract which he alleged he had made with his father in his lifetime for the con-

veyance to the son of certain real estate. His brothers and sisters, as his father's heirs at law, were made defendants. The court held that the heirs made defendants were sued in a representative capacity within the meaning of the statute, and that the son was an incompetent witness to testify to the contract made between him and his deceased father. The New Jersey statute just quoted was amended by the legislature of that state in 1880 so as to read: "In all civil actions * * * any party thereto may be sworn and examined as a witness, notwithstanding any party thereto * * * may sue or be sued in a representative capacity, provided * * * that this supplement shall not extend so as to permit testimony to be given to any transaction with or statement made by any testator or intestate represented in such action." (General Statutes, vol. 2, p. 1407, sec. 1.)

In *Palmateer v. Tilton*, 40 N. J. Eq. 555, one William Harvey died, leaving a will in and by which he appointed one Abner Allen executor with power, it seems, to sell and dispose of the decedent's real estate. The executor made a contract with Palmateer in and by which he agreed to convey to him certain of the decedent's real estate, and died before the execution of the contract. Palmateer then brought suit for specific performance against Harvey's administrator with the will annexed, and the court held that Palmateer might testify to the contract between himself and the deceased executor of Harvey. The court based its decision upon the proposition that the statute only forbade the witness to testify to statements made by a "testator or intestate;" that the statement made by Allen, executor, was not clearly within the rule.

In *Hodge v. Coriell*, 44 N. J. L. 456, Hodge brought replevin against Coriell. The latter pleaded *non cepit*, and property in himself as administrator of J. T., deceased, and the court held, construing the statute of 1880 just quoted, that it was competent for Hodge to testify that J. T., deceased, admitted that the property in ques-

tion did not belong to him, but to a person from whom Hodge derived title. The court based its decision upon the proposition that Coriell was sued in his individual, not in his representative, capacity; that he did not change his status by pleading that he was entitled to the property in his character of administrator.

In *Crimmins v. Crimmins*, 10 Atl. Rep. [N. J.] 800, a widow brought suit against the heirs at law of her deceased husband to set aside a deed made by her husband in his lifetime and in the execution of which deed the widow alleged her husband had induced her to join by the practice of fraud and the exercise of undue influence; and the court held, construing this statute of New Jersey of 1880, quoted above, that the testimony of the widow as to the transactions and conversations between herself and husband was competent, basing its decision upon the ground that the heirs at law were not being sued as the representative of the deceased within the meaning of the statute.

In *Smith v. Smith*, 19 Atl. Rep. [N. J.] 255, it seems that Hezekiah B. Smith died testate, leaving a will in and by which he devised his property to certain trustees. Mrs. Smith, claiming to be his widow, brought an action against the devisees for dower. The defense was that Smith and Smith had never been married, and the court held that Mrs. Smith was competent to testify to the facts constituting a common law marriage between herself and Smith, deceased, and based its decision upon the ground that the defendants to the action were sued as devisees under the will of Smith, deceased, and not as executors and legal representatives.

Ingersol v. McWillie, 30 S. W. Rep. [Tex.] 56, was a contest between certain parties as to which had the right to administer upon the estate of a deceased, and the court held that the Texas statute relating to transactions with the decedent did not prohibit a woman from testifying to the fact of a marriage between herself and the deceased in such contest, none of the parties to the contest claiming to be heirs of the deceased.

Shaffer v. Richardson, 27 Ind. 122, was a suit by a widow against the administrator of her deceased husband to compel him to make distribution to her of her share of the decedent's personal estate. The administrator resisted the action on the ground that the widow had abandoned her husband during his lifetime, and at the time of his death was living in a state of adultery with another man. On this issue the court held that the widow was a competent witness to testify to the facts which tended to show that she did not abandon her husband and live in a state of adultery with another man, but that her husband deserted her, and believing him to be dead, she was publicly and formally married to another person. The statute in reference to the competency of this woman's testimony is not quoted in the opinion. But assuming it to be similar to our section 329 of the Code, we do not regard the case as an authority for the contention that Mrs. Ferguson was a competent witness in the case under consideration. In the Indiana case the marriage of the widow with Richardson was undisputed. The administrator resisted her claim to his property on the ground that she had abandoned her husband and at the time of his death was living in a state of adultery with another man. This defense was not admitted, and the burden was upon the administrator, of course, to show it, and when he introduced proof which tended to show those facts, then it was perfectly competent, by the express provisions of the statute, for the widow to testify in regard to the transactions between herself and husband about which the administrator had testified.

This concludes the review of all the cases cited by counsel for defendant in error in support of their contention that the testimony of Mrs. Ferguson to the fact of the marriage between herself and Hans C. Sorensen was competent, and our conclusion is that the authorities do not sustain the contention for which they are cited. We must not be understood as deciding in this case that

Mrs. Ferguson was not lawfully married to Hans C. Sorensen, for we make no such decision. What we decide, and all we decide, is that her testimony as to that marriage in this proceeding, she being a party thereto and having a direct legal interest in the result of such proceeding, was incompetent; and that since the finding and judgment of the court that Mrs. Ferguson and Hans C. Sorensen were married depend solely for support upon her testimony, the judgment must be and is reversed and the cause remanded to the district court.

REVERSED AND REMANDED.

NORVAL, J.

I concur in the judgment just rendered on the ground that the findings of the district court are not sustained by the evidence. I express no opinion upon the questions discussed in the foregoing opinion.

DORSEY B. HOUCK, CONSTABLE, V. SYLVESTER LINN ET AL.

FILED NOVEMBER 17, 1898. No. 10000.

1. **Replevin:** DISMISSAL. A plaintiff in replevin may not, after obtaining the property under the writ, dismiss the case without defendant's consent.

2. **Dismissal.** A case cannot be dismissed at the instance of a party who may be liable to a judgment therein, against the objection of his adversary, although the recovery might be only for nominal damages.

3. **Replevin:** JOINT PLAINTIFFS: DISMISSAL. Two persons joined as plaintiffs in an action of replevin and took the property under the writ. They claimed a concurrent right of possession, but by several titles. One recovered judgment. *Held*, That the other could not thereupon dismiss the case as to himself, without the consent of the defendant.

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

John T. Cathers and *T. J. Mahoney*, for plaintiff in error.

Gregory, Day & Day, contra.

IRVINE, C.

Linn and Barrie instituted this action in replevin for the purpose of recovering certain horses. The property was taken under the writ and delivered to the plaintiffs. They claimed under a chattel mortgage securing several notes, each claiming to own a part of the notes. In the district court there was a judgment for both plaintiffs. The case was brought to this court, where the judgment in favor of Barrie was affirmed and that in favor of Linn was reversed, and the cause remanded generally. (*Houck v. Linn*, 48 Neb. 227.) After the mandate reached the district court Linn moved to dismiss the case, and the motion was sustained. Defendant then asked for a trial of the right of possession as between him and Linn, and for an assessment of damages, which was refused. Defendant again brings the case here, assigning as error the dismissal against his objection, and the refusal to assess his damages against Linn.

It has been repeatedly held that a plaintiff in replevin who has taken the property under the writ may not then dismiss the case without defendant's consent. (*Aultman v. Reams*, 9 Neb. 487; *Moore v. Herron*, 17 Neb. 697; *Ahlman v. Meyer*, 19 Neb. 63; *Garber v. Palmer*, 47 Neb. 699; *Vose v. Müller*, 48 Neb. 602.) The present case is, however, complicated by the fact that the suit was by two plaintiffs claiming a common, or at least concurrent, right of possession, but by several titles; and on the face of the record, when the motion to dismiss was made, it stood adjudicated that Linn's co-plaintiff had the right of possession,—that he had rightfully taken the property. On the other hand, the plaintiff in replevin must recover on the strength of his own title, and this court had decided that under the evidence at the first trial Linn had not

shown in himself a right to recover. The record showed that both plaintiffs had taken the property. It follows logically that when the cause was remanded Linn stood in the attitude of a plaintiff with the property, and could not dismiss so as to preclude defendant from recovering, should Linn fail again to prove his own right, for the injury caused by the wrongful use of the writ. The Code of Civil Procedure (sec. 191*a*) provides that the judgment in such case shall be in the alternative, for a return of the property or its value if a return cannot be had. In addition to this there may be recovered damages for the wrongful detention. Here, it is true, the record shows that Linn's co-plaintiff was entitled to take the property, and as the two joined in causing the writ to be issued, it may be that the rightful claimant would be estopped by the record from asserting any claim against the defendant, even if, as is asserted, it was in fact Linn who actually received the property under the writ. Nevertheless, this and other interesting questions suggested by the peculiar facts of the case go rather to the measure of damages, in case on a new trial Linn fails to recover, than to the right of the defendant to have his claim adjudicated. Those questions are on this record speculative purely and cannot be considered. The bare fact is that a plaintiff in replevin who, singly or together with his co-plaintiff, obtained the property in controversy, was by the dismissal permitted to go free, without any opportunity on part of defendant to assert his right to the property or to damages. Possibly the defendant is only entitled to nominal damages should Linn's case again fail; but in that event he must be entitled to nominal damages at least, and the court cannot dismiss a case merely because substantial damages are not recoverable.

REVERSED AND REMANDED.

MISSOURI PACIFIC RAILWAY COMPANY v. WILLIAM K. FOX, ADMINISTRATOR.

FILED NOVEMBER 17, 1898. No. 10092.

1. **Revivor of Action:** RES JUDICATA. When a revivor of an action is sought by conditional order, the hearing in pursuance thereof is the proper occasion to try the right of the successor in whose name revivor is attempted. By the absolute order that matter becomes *res judicata* and cannot be retried with the case on its merits.

2. ———: SERVICE OF PROCESS: ATTORNEY OF RECORD. Service of a conditional order of revivor must be in the same manner as a summons, and it seems that service upon the attorney of record is insufficient unless a summons may be so served.

3. **Appearance:** AUTHORITY OF ATTORNEY. The authority of an attorney who actually enters an appearance will be presumed to justify him in so doing.

4. **Revivor:** WAIVER OF PROCESS. A failure to serve a conditional order of revivor goes only to the jurisdiction of the person, and is waived by a voluntary general appearance.

5. ———: NEW PARTY: PLEADING. When a cause has been revived by conditional order duly made absolute, it is not essential that amended or supplemental pleadings be filed alleging the capacity of the new party, as such averments would not be traversable and the fact already appears of record.

6. ———: ———: ———. For the same reason it is proper to refuse the adverse party leave by supplemental pleadings to tender an issue based on the matter of revivor.

7. **Comparative Negligence:** INSTRUCTIONS. The doctrine of comparative negligence has no place in the jurisprudence of this state. It is therefore error to instruct the jury that plaintiff may recover, although guilty of contributory negligence, provided the negligence of defendant was gross and that of plaintiff slight in comparison.

8. **Conflicting Instructions.** A positive misstatement of the law in an instruction is not cured by a further correct statement in conflict with the first.

9. **Expert Testimony:** COMPETENCY. Expert testimony is incompetent where the subject of inquiry is of such a character as to be within the knowledge of men of common education and experience and to call for no special skill, knowledge, or experience.

10. ———: HYPOTHETICAL QUESTIONS. A hypothetical question should not be permitted when it only in part calls for the exercise of special skill or knowledge, and for the rest asks the witness to base his opinion on matters within the ordinary experience of men.

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

B. P. Waggener, James W. Orr, A. N. Sullivan, and *C. S. Polk,* for plaintiff in error.

Matthew Gering, contra.

IRVINE, C.

This is an action against the Missouri Pacific Railway Company to recover damages for the death of Amos Thompson, alleged to have been caused by the negligence of defendant. The case was in this court once before, and a judgment for the defendant was reversed. (*Thompson v. Missouri P. R. Co.*, 51 Neb. 527.) A second trial resulted in a judgment for the plaintiff, and the defendant this time seeks a reversal.

Between the two trials the widow of the deceased, who, as administratrix, brought the action, remarried, and her powers as administratrix ceasing from that fact, Fox seems to have been appointed as her successor. On Fox's application a conditional order of revivor was entered, which in due time was made absolute. No amendment of the petition was made, nor was a supplemental petition filed, and the case was tried on the original petition, which avers that Mrs. Thompson is the personal representative and that she sues as such. This course of proceeding gives rise to certain assignments of error which, as they present questions *in limine*, should be disposed of before approaching the merits.

The defendant sought leave to file a supplemental answer alleging the cessation of Mrs. Thompson's powers as administratrix, and leave to do so was denied. It then, by objections to the evidence, sought to exclude

proof of Fox's authority and to deny his right. Under our system of practice, where a party dies or his authority as a representative ceases, two methods of revivor co-exist. A conditional order of revivor may issue and be served and the order made final, unless cause be shown against it, or the court may substitute the new party and supplemental pleadings may be filed and summons served. (*Fox v. Abbott*, 12 Neb. 328; *Rakes v. Brown*, 34 Neb. 312.) If the former method be pursued, the proper method of traversing the claim of the person in whose name revivor is attempted is by showing cause against the absolute order. An issue is thus tendered, and if the court make the order absolute, that order becomes *res judicata* as to the right of the person named to proceed with the action, and the issue cannot be again made and tried with the main case. (*Hendrix v. Rieman*, 6 Neb. 516.)

It is asserted, however, that there was here no proper service of the conditional order. The manner of service does not appear, unless by inference. The conditional order bears an indorsement of acceptance of service by A. N. Sullivan, attorney for defendant, reserving the right to interpose any objections to the manner of service. The conditional order should be served in the same manner as a summons. (Code of Civil Procedure, sec. 461.) It would seem, therefore, that service upon the attorney of record in the cause would be insufficient. But no one can doubt that an attorney may be authorized to enter a voluntary appearance for his client, and the authority of an attorney at law to appear, where he has actually done so, is presumed. After the absolute order was entered the defendant filed a motion entitled in the name of Fox as plaintiff and so recognized the validity of the order. The defect, if there were one, went only to the jurisdiction of the person of the defendant, and was cured by a general appearance without objection. The supplemental answer set up only a fact already determined by the order of revivor, and one no

longer issuable. While it would perhaps have been proper to have filed a supplemental petition showing on its face the change in plaintiffs, that fact appeared of record already, it was no longer traversable, and it was not necessary to do so. While the proof made of Fox's appointment was of a fact not in issue and was hence irrelevant, it could not possibly have been prejudicial to defendant.

The salient facts of the case appear in the former opinion and will not be repeated. The court gave the following instruction: "You are instructed that to entitle the plaintiff to recover the jury must believe from the evidence that the injury and death complained of was occasioned by the carelessness or negligence of defendant or its servants, in the manner charged in the petition. And if the jury believe from the evidence that the deceased was guilty of negligence, contributing to the injury, then to entitle plaintiff to recover the jury must further believe from the evidence that the negligence of defendant was gross, and that of the deceased was but slight in comparison with each other; and if the jury believe from the evidence that the negligent conduct of the deceased contributed as much, or nearly as much, to produce the injury and death as that of defendant, or that he was not at the time exercising ordinary care, then the plaintiff cannot recover, and the jury should find for the defendant." This was a plain proposition to the jury, as the law of this state, of the doctrine of comparative negligence. The instruction appears in Sackett on Instructions with a citation of a case in Illinois as its authority. Such a doctrine once prevailed there, but it has been discarded. It never found any place in the jurisprudence of Nebraska, as appears from an inspection of the numerous negligence cases. Indeed, its correctness has been not only inferentially but directly denied. (*Village of Culbertson v. Holliday*, 50 Neb. 229; *City of Friend v. Burleigh*, 53 Neb. 674.)

It is argued that the instruction was not prejudically

erroneous, because of its last portion, which states that there can be no recovery if plaintiff did not exercise ordinary care. The answer is that the mischief had already been accomplished by the earlier statement that there could be a recovery in spite of contributory negligence, if the negligence of the defendant was gross and that of plaintiff slight in comparison therewith. Thus the jury was set to examining, not the existence of negligence, but the comparative degrees thereof. An inaccuracy or incomplete statement in a charge may be cured by further correct and supplementary statements; but an absolute misstatement of the law cannot be cured by a subsequent correct statement conflicting therewith. The doctrine is familiar.

By a recurrence to the former opinion it will be seen that a question of fact was presented by reason of certain proof of the undue projection of a bolt from the end of a car and certain bruises on the body of the deceased. It was then thought that there was sufficient evidence to go to the jury on the theory that this was a negligent construction of the car and the proximate cause of the injury. Apparently to establish the latter fact certain hypothetical questions were asked medical witnesses, of which the following is a type: "Assuming that a man about thirty-four years of age, engaged as a brakeman on a railway train, entered between two cars for the purpose of making a coupling, upon the end of which there appeared to be a stake pocket, being a piece of iron about three or four inches long by three inches wide, and around which there was an iron groove and a band of iron and adjacent to that a bolt protruded beyond the nut, which has a flat surface and is about an inch in diameter; that upon the body of the man was found a spot the size of a silver dollar, discolored, dark, and still susceptible to pressure by manipulation,—which one of these two instruments, that is, the stake pocket or the bolt, could produce the wound I have described?" Expert testimony is incompetent where the subject of in-

quiry is of such a character as to be within the knowledge of men of common education and experience and to call for no special skill, knowledge, or experience. (*Atchison, T. & S. F. R. Co. v. Lawlor*, 40 Neb. 356.) Possibly, though this we do not decide, the facts may have permitted an inference based on special medical information and experience as derived from the character of the wound, but if so, the inquiry should have been so restricted. As put, the question admitted, and chiefly required, an opinion based not on such grounds, but formed from the character of the attachments described and their location on the car. These were inferences to be drawn by the jury from the evidence relative thereto. They called for no medical skill or experience, and were not the subject of expert testimony. The question, so far as it called for an opinion based on these external physical facts, might be answered by any man of ordinary experience as well as by a physician, and was therefore incompetent. Attention is called to certain cases holding opinion evidence not prejudicially erroneous, but they are not in point. Here an opinion was asked calling for one of the principal inferences to be drawn by the jury, and its effect may have been potent. It is very different from *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907, where the objectionable hypotheses were followed in the question by their own answer, and the opinion of the witness, so far as based on those hypotheses, was thereby eliminated.

The remaining assignments of error relate for the most part to matters covered directly or impliedly in the former opinion. It will be unnecessary to notice them in detail. That opinion should be a sufficient guide so far as the evidence on a further trial renders the discussion applicable.

REVERSED AND REMANDED.

WILLIAM A. WEBB V. JULIUS THIELE.

FILED NOVEMBER 17, 1898. No. 8462.

1. **Adverse Possession:** EVIDENCE: QUESTION FOR JURY. On an issue of adverse possession, where the proof tends to show a continuous exclusive possession for the statutory period by acts indicating dominion over the land, the fact that there was proof of declarations of the occupant indicating that he did not at first claim ownership does not conclusively rebut the inference of a claim of right derivable from his acts. The issue is for the jury.
2. ———: CONTINUITY OF POSSESSION. The purchase, or attempted purchase, of an outstanding title by one in adverse possession is not alone sufficient to break the continuity of the possession or divest it of its adverse character. Especially is this so when the attempt to purchase is not made until after the expiration of the statutory period.

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

McNish & Oleson, for plaintiff in error.

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

IRVINE, C.

This was an action in ejectment for certain land in Cuming county. The plaintiff prevailed, relying on a paper title. The defendant relied on adverse possession in himself and his grantors for much more than the statutory period. It is claimed by the plaintiff that the judgment must in any event be affirmed, because the verdict was the only one which the evidence would sustain; but we cannot accept that theory. The defendant introduced evidence tending to prove that his remote grantor had entered upon the land prior to 1872, and had remained in possession, cultivating it continuously, until 1887, when he removed to California; that it was then occupied by his tenants until his death. Thereafter his heirs conveyed to one of their number and he later conveyed to

defendant, possession being continuous in this chain. As against this, plaintiff produced evidence tending to show, by the declarations of the original occupant, that he did not claim ownership, but as the land had not yet been sold by the United States, he entered upon it with the intention of retaining its use merely, and ultimately buying from whomsoever might acquire it. The nature of the occupancy was such as to justify an inference of a claim of right; it was by acts of dominion. The leasing of the land in 1887 was certainly an act indicating such a claim. Whether his declarations were of such a character as to rebut the inference derivable from his other acts was a question of fact properly left to the jury.

In submitting the issue so made to the jury an error was committed. There was evidence, objected to, but the admissibility of which we need not now consider, tending to show that in 1887 a son of the first occupant approached the plaintiff with an offer to buy the land for his father, and there was evidence tending to show agency on the part of the son. This, accompanied by the evidence of the former declarations of the father as to his purpose, was material, as tending to show that the occupancy was not under a claim of right. The court gave an undue effect, however, to this evidence by the following instruction: "The court instructs the jury that any attempt on the part of the person in possession of land upon which he has entered without any title, and who claims adversely to the owner thereof, to negotiate with the owner thereof for the purchase of the same, is a recognition of the owner's title thereto, and such person's possession is not adverse to the real owner of the land; and if you find that William Bartley, under and through whom the defendant claims to have title, negotiated with the plaintiff for the purchase of the land in controversy, in 1887, you will find for the plaintiff." This court has held that the purchase, or attempted purchase, of an outstanding title by one in adverse posses-

sion, and before the expiration of the statutory period, is not alone sufficient to divest the possession of its adverse character. (*Oldig v. Fisk*, 53 Neb. 156.) The instruction quoted made the mere attempt to negotiate for a purchase have that effect. In the case cited there was a dissenting opinion by Commissioner RAGAN, but in that it was recognized that such an attempt, made after the bar of the statute had become complete, could not divest the title created by the past adverse occupancy. In this case the title passed from the government in 1872, and if the possession was adverse at all the statute began to run that early, and title was complete before the offer to purchase in evidence. As the judgment must be reversed for the error indicated it is unnecessary at present to review the other assignments of error, which relate to matters, some settled by recent decisions of the court and some which may not recur.

REVERSED AND REMANDED.

NYE & SCHNEIDER COMPANY V. SYLVESTER S. SNYDER.

FILED NOVEMBER 17, 1898. NO. 8386.

1. **Trial:** MISCONDUCT OF JUROR: REVIEW. When there is misconduct on the part of a juror during the trial, attention should be called thereto at the first opportunity. If the defeated party knew thereof at the time the event occurred, he may not with such knowledge await the result of the trial, and when defeated be heard for the first time to complain in his motion for a new trial.

2. **Assignments of Error:** RULINGS ON EVIDENCE. An assignment of error directed to a group of rulings on a certain class of evidence raises only the question of the admissibility of such evidence as a whole. It presents no question peculiar to one ruling of the group.

3. **Sale of Cement:** BREACH OF WARRANTY: ELEMENTS OF DAMAGE. Cement was sold to the plaintiff for use in plastering a dwelling, and with a warranty of fitness for that purpose. *Held*, That expense incurred in cleaning floors marred by the falling of the

plaster, expense of removing door and window casings preparatory to replastering, expense of replastering and replacing casings, and loss of use of the house caused by these operations, were elements of damage which should have been in the contemplation of the parties at the time they made the contract as the probable consequence of the breach of warranty.

4. ———: ———: ———. When the plaintiff found the plastering was falling, he attempted to remedy the defect by patching it where obviously defective. There was no proof that at the time he did so the necessity of replastering was evident. *Held*, That plaintiff might recover the reasonable cost of the patching.

5. **Instructions:** REPETITIONS. It is not error to refuse an instruction the substance of which has been already given.

6. **Sale of Cement:** DEFENSE TO ACTION FOR BREACH OF WARRANTY. In the case above stated, *held*, that unskillfulness in the manner of applying the cement was no defense, if the manner employed was one adopted from instructions furnished by the defendant himself.

7. **Assignments of Error:** ASSESSMENT OF DAMAGES. Error in the assessment of the amount of recovery is not presented, in an action based on contract, by an assignment that the verdict is not sustained by the evidence.

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

The facts are stated by the commissioner.

Batty, Dungan & Burton, for plaintiff in error:

Where the misconduct of a juror is of such a nature that prejudice might have resulted from it, a presumption of prejudice arises, which, unless rebutted by the successful party, will require the granting of a new trial. (2 Thompson, Trials 1981; *Johnson v. Root*, 2 Clif. [U. S.] 108; *Nesmith v. Clinton Fire Ins. Co.*, 8 Abb. Pr. [N. Y.] 141.)

It was the duty of the buyer to make all reasonable exertions to render the injury as light as possible, after he discovered the defects in the cement. (*Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68; *Uhlig v. Barnum*, 43 Neb. 595.)

Warranty is a question of intent and not of express

words. (*Kankakee Stone & Lime Co. v. Ugrow*, 36 Ill. App. 448; *Torkelson v. Jorgenson*, 28 Minn. 383; *Horner v. Parkhurst*, 17 Atl. Rep. [Md.] 1027; *White v. Stelloh*, 43 N. W. Rep. [Wis.] 99; *Richey v. Daemicke*, 86 Mich. 647; *Figge v. Hill*, 61 Ia. 430.)

A representation that a material for a certain purpose is as good as any other material in the market for the same purpose constitutes an express warranty. (*Aultman v. Weber*, 28 Ill. App. 91.)

Express warranties need not assume any particular form of expression; nor is any particular word necessary to indicate the intention to warrant. (Tiedeman, Sales sec. 193; *Warren v. Philadelphia Coal Co.*, 83 Pa. St. 440; *Henshaw v. Robins*, 9 Met. [Mass.] 83; *Callanan v. Brown*, 31 Ia. 333.)

An implied warranty can only arise where there is no express warranty; hence an express warranty will always exclude an implied warranty. (Tiedeman, Sales sec. 182; *McGraw v. Fletcher*, 35 Mich. 104; *Jackson v. Langston*, 61 Ga. 392; 10 Am. & Eng. Ency. Law p. 130; Story, Sales sec. 358.)

M. A. Hartigan, contra.

IRVINE, C.

Sylvester S. Snyder purchased from the Nye & Schneider Company certain material known as "Ivory Cement," wherewith he plastered a dwelling in course of erection for his own use. The result being unsatisfactory, he brought this action against the Nye & Schneider Company to recover damages. In one count of his petition he averred a warranty that the material was suitable, fit, and especially adapted to the plastering of said house, charged as a breach that the material was unfit and unsuitable and that the plastering soon fell from the ceilings and walls, and claimed certain consequential damages. Another count was for slander of title, alleging a malicious filing of a mechanic's lien for the price of the

cement. As the matter of the second count was not submitted to the jury it may be disregarded. On the issues tendered by the first count there was a verdict for the plaintiff for $400. The defendant brings the case to this court.

The first assignment of error is that the district court erred in refusing a new trial because of the misconduct of a juror. On the motion for a new trial it was asserted that during the trial, when a sample of plastering was submitted to the inspection of the jury, one juror refused to examine it, saying: "I have thumped plastering before, and that is not Snyder's house anyway." There is a conflict in the evidence as to what was actually said; further, if the remark was made as charged, it is questionable whether it permitted an inference of prejudice against the defendant. But aside from these considerations the assignment of error is not well taken. The evidence in support of the charge is in an affidavit made by defendant's manager at Hastings, who was present at the trial and who says that he heard the remark and observed the juror. Where there is misconduct of a juror during the trial, observed by or known to the party complaining, it must be called to the attention of the court at the first opportunity. A party will not be permitted, knowing of such misconduct, to remain silent, speculate upon a favorable verdict, and, if defeated, for the first time call the attention of the court to the misconduct by a motion for a new trial. (*Scott v. Waldeck*, 12 Neb. 5; *Peterson v. Skjelver*, 43 Neb. 663.)

Certain assignments of error relate to rulings admitting evidence. These assignments are very general, each relating to a group of rulings on a certain class of evidence. Each assignment presents, therefore, only the question of the general admissibility of evidence of the class embraced within the group. No single ruling is specified so as to permit inquiry into questions peculiar to that ruling. The evidence tended to show that the plastering began to fall off soon after plaintiff took up

his abode in the house. It marred the floors, and for a certain time deprived him of the use of at least a portion of the house. Plaintiff caused patches to be applied in places, but finally found the general character of the plastering to be such that it would be necessary to replaster the whole house. To do so the removal of the door and window cases and their resetting would be necessary. The evidence objected to related to the amount of damages arising from such facts. The rule in *Hadley v. Baxendale*, 9 Exch. [Eng.] 341, applies. Of course the ordinary rule of damages would give the plaintiff such sum as would place the house in the condition it would have been in had the warranty been true. To reach this sum the cost of replastering, of taking down the casings to permit replastering, and replacing them, and the cost of refinishing the floors, would be pertinent inquiries. But in such a case as this the specific rule above stated does not satisfy the more general rule that for a breach of contract the plaintiff may recover all damages naturally arising from the breach and all that may reasonably be supposed to have been in the contemplation of the parties as the probable consequence of a breach. The defendant knew the purpose for which the cement was bought, and must be held to have anticipated that, should it prove unfit, the plaintiff would be deprived of the occupancy of the house while it was being restored.

The case is not so clear as to the cost of patching the walls. If the house should have been entirely replastered, this patching was not an effort appropriate, as the event proved, to restore the damage. But the rule of avoidable consequences is a just rule for the defendant, and for his benefit, and is always applied with liberality to the plaintiff. The plaintiff would not be entitled to recover the cost of replastering if slight patching was all that the circumstances required. There is no proof that the patching was not a reasonable effort to lessen the damage in the light of circumstances at the time the effort was made. If so, then the plaintiff should not be

forbidden to recover for his reasonable efforts to lessen the injury, because facts occurring subsequently showed that such efforts were unavailing. The plaintiff in such cases does not always have to attempt at his own peril to lessen the injury.

Complaint is made with regard to the instructions. In the motion for a new trial the following are the pertinent assignments: "The court erred in refusing to give the instructions asked for by defendant marked A, B, C, D, E, F, G, 11, and 13." "The court erred in modifying the instructions asked for by defendant marked 3, 4, and 10." "The court erred in giving the instructions asked for by plaintiff marked 1, 2, 3, 4, 5, and 6." Under a familiar rule of practice none of these assignments is of service beyond requiring an inquiry whether the ruling of the court with regard to any one instruction in each group was correct.

Of the instructions refused it is sufficient to say that one or more of them had already in substance been given, and it was not error to refuse to repeat the same principle of law in varying phraseology.

Of the group of instructions which were modified we quote the third: "The court instructs the jury that if from the evidence you believe that the plaintiff relied upon the knowledge and skill of the contractor employed by plaintiff to prepare, use, and apply said ivory cement in question to the walls of plaintiff's residence, and that the injury complained of was caused by the unskillful use, preparation, and application of the cement in question by plaintiff's agents or employés, then you must find for the defendant." Modified by adding: "Unless you find they followed the instructions in preparing and putting on same." This modification was certainly correct. Defendant furnished with the cement printed instructions as to its use. If the defendant itself directed the manner of use, the fact that the manner designated was improper or unskillful would be no defense. There was evidence tending to show that the instructions had

not been in all respects followed, but this did not affect the correctness of the rule stated.

Of the instructions given the fourth, after reciting in terms the rule in *Hadley v. Baxendale*, proceeded: "If you find from the evidence in this action that the defendant knew the purpose for which this cement sold to the plaintiff was to be used, and warranted the same to be good cement, suitable for the purpose for which they knew it was to be used, and you further find from the evidence that the cement in question was not good cement, and was not suitable for the purpose to which the defendant knew it was to be put, then your verdict should be for plaintiff, and you will determine from the evidence what damage the plaintiff has sustained and allow him by your verdict such amount as the evidence shows the damage so sustained, bearing in mind that the plaintiff is entitled to recover in that event such damages as may be reasonably supposed to have been contemplated by the plaintiff and defendant at the time the cement in question was sold, as appears from the evidence and pleadings in the action." This instruction was somewhat turgid and possibly redundant, but it stated in correct terms the true general rule of damages, and further instructions made a more specific application thereof. In that way the defects, for which a somewhat similar instruction in *Omaha Coal Coke & Lime Co. v. Fay*, 37 Neb 68, was held bad, were supplied.

It is argued that the verdict is not sustained by the evidence. It is said on this point that there was no proof that the material was defective. It is unquestioned that the finished work was so bad as to be worse than worthless. Either the material or the workmanship must have been bad. *Res ipsa loquitur.* There was evidence tending to prove that the defect was in the workmanship, and the writer, speaking for himself alone, has no hesitation in saying that, so far as can be gathered from the record, that seems the more probable theory. But the proof on that point was not of such a character

that we can say that there was no room left for a reasonable difference of opinion, and we cannot disturb the verdict.

Finally it is argued that the verdict was excessive. The argument is advanced under the assignment of insufficiency of the evidence. The action being based on contract, this assignment is not proper for raising the question. (*Riverside Coal Co. v. Holmes*, 36 Neb. 858; *Beavers v. Missouri P. R. Co.*, 47 Neb. 761; *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590; *Hammond v. Edwards*, 56 Neb. 631.)

AFFIRMED.

CITY OF LINCOLN V. CATHERINE O'BRIEN.

FILED NOVEMBER 17, 1898. No. 9756.

1. **Municipal Corporations**: DEFECTIVE SIDEWALKS: LIABILITY OF CITY. A city charged with the duty of maintaining streets and sidewalks is liable for injuries sustained by travelers, exercising ordinary care, who are injured by the city's negligent failure to perform that duty.

2. ———: ———: ———: DUTY OF PROPERTY OWNERS. The provision in Compiled Statutes, chapter 13*a*, section 67, subdivision 6, whereby it is made the duty of real estate owners and occupants to keep sidewalks in repair, and making them liable for injuries caused by defective sidewalks, does not relieve the city from that duty and consequent responsibility.

3. ———: ———: ———. The various charter provisions of cities of the first class having more than 25,000 inhabitants, with regard to the maintenance of sidewalks, construed as imposing a direct liability upon the municipality for injuries from defective walks.

4. **Claim Against City for Damages**: STATEMENT FILED WITH CITY CLERK: DESCRIPTION OF PLACE OF INJURY. Compiled Statutes, chapter 13*a*, section 36, requiring that to maintain an action against a city for an unliquidated claim the party must file in the office of the city clerk, within three months from the time the right of action accrues, a statement giving, among other things, the place of the injury, requires that the statement must describe the place with such certainty that from the description and inquiries suggested thereby, the place may with reasonable diligence be identified.

5. ———: ———: ———. A notice under that section stated that the plaintiff was passing over the sidewalk on the north side of Q street between Eighteenth and Twentieth streets, and "stepped into a hole in the sidewalk, which was in a bad state of repair." Although a space of two city blocks was described, *held*, that the notice was good, as it stated that the sidewalk was in bad repair, and that plaintiff stepped through a hole therein, there being no proof that such conditions existed at more than one spot in the space described. No presumption of negligence at other places can be indulged to relieve the city from liability.

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

The facts are stated in the opinion.

Joseph R. Webster and *John P. Maule*, for plaintiff in error:

The city charter, as amended in 1889, makes the lot owner liable primarily and casts obligation on him to keep the walk in repair, and thereby relieves the city of liability. (*Arkadelphia v. Windham*, 49 Ark. 139; *Winbigler v. City of Los Angeles*, 45 Cal. 36; *Young v. Charleston*, 20 S. Car. 116; *City of Detroit v. Blackeby*, 21 Mich. 84; *Pray v. Jersey City*, 32 N. J. Law 394; *French v. City of Boston*, 129 Mass. 592; *City of Marquette v. Cleary*, 37 Mich. 296; *Morgan v. City of Hallowell*, 57 Me. 375; *Jones v. City of New Haven*, 34 Conn. 13; *Hewison v. City of New Haven*, 37 Conn. 475; *McCutcheon v. Village of Homer*, 43 Mich. 483; *City of Detroit v. Putnam*, 45 Mich. 265.)

No claim complying with the statute, imposed as a condition precedent to a cause of action, was filed with the city clerk and no action will lie. (*City of Lincoln v. Grant*, 38 Neb. 369; *City of Lincoln v. Finkle*, 41 Neb. 575; *City of Denver v. Saulcey*, 38 Pac. Rep. [Colo.] 1098.)

Giving notice in the form and manner prescribed is a condition precedent without which plaintiff may not maintain his action. (*Reining v. City of Buffalo*, 102 N. Y. 308; *Wentworth v. Town of Summit*, 60 Wis. 281; *Gay v. City of Cambridge*, 128 Mass. 387; *Plum v. City of Fond du Lac*, 51 Wis. 353.)

N. C. Abbott, also for plaintiff in error.

Mockett & Polk and *R. D. Stearns, contra:*

A city cannot abandon its duty to keep sidewalks in repair. (*Davis v. City of Omaha*, 47 Neb. 842; *City of Lincoln v. Smith*, 28 Neb. 762; *City of Chadron v. Glover*, 43 Neb. 732; *City of Lincoln v. Calvert*, 39 Neb. 305; *City of Aurora v. Cox*, 43 Neb. 727.)

The duty of a city to keep its streets in repair extends to sidewalks, and it is liable for negligence in failing to perform that duty. (*Burns v. City of Toronto*, 42 U. C. Q. B. 560; *Hutton v. Town of Windsor*, 34 U. C. Q. B. 487; *Ray v. Village of Petrolia*, 24 U. C. C. P. 420; *Bacon v. City of Boston*, 3 Cush. [Mass.] 174; *City of Lowell v. Spaulding*, 4 Cush. [Mass.] 277; *Drake v. City of Lowell*, 13 Met. [Mass.] 292; *Hart v. City of Brooklyn*, 36 Barb. [N. Y.] 226; *Kirby v. Boylston Market Ass'n*, 14 Gray [Mass.] 249; *Manchester v. City of Hartford*, 30 Conn. 118; *Hubbard v. City of Concord*, 35 N. H. 54; *Springfield Milling Co. v. Lane County*, 5 Ore. 265; *Mayor v. Furze*, 3 Hill [N. Y.] 612; *City of Chicago v. O'Brien*, 111 Ill. 532; *Studley v. City of Oshkosh*, 45 Wis. 380; *Furnell v. City of St. Paul*, 20 Minn. 117; *Village of Warren v. Wright*, 3 Ill. App. 602; *City of Chicago v. Langlass*, 66 Ill. 361; *City of Chicago v. Crooker*, 2 Ill. App. 279; *City of Atlanta v. Perdue*, 53 Ga. 607; *City of Chicago v. McCarthy*, 75 Ill. 602; *Moore v. City of Minneapolis*, 19 Minn. 300; *Market v. City of St. Louis*, 56 Mo. 189; *Barnes v. Town of Newton*, 46 Ia. 567; *Higert v. City of Greencastle*, 43 Ind. 574; *Boucher v. City of New Haven*, 40 Conn. 456; *Phelps v. Hawley*, 52 N. Y. 23; *Hurford v. City of Omaha*, 4 Neb. 336; *Blake v. Portsmouth & C. R. Co.*, 39 N. H. 435; *Inhabitants of Veazie v. Inhabitants of China*, 50 Me. 518; *Steines v. Franklin County*, 48 Mo. 167; *Wilson v Mayor*, 43 Am. Dec. [N. Y.] 719; *City of Rochester v. Campbell*, 123 N. Y. 405.)

The neglect of an abutting owner to keep the sidewalk in repair, and to keep it free from snow and ice as re-

quired by law, does not render him liable to a party injured, or to the city itself, unless such owner himself caused the defect. (*City of Rochester v. Campbell*, 25 N. E. Rep. [N. Y.] 937; *Russell v. Village of Canastota*, 98 N. Y. 496; *Heeney v. Sprague*, 11 R. I. 456; *Flynn v. Canton Co.*, 40 Md. 312; *Hill v. City of Fond du Lac*, 56 Wis. 242; *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Eustace v. Jahns*, 38 Cal. 3; *Weller v. McCormick*, 47 N. J. Law 397; *City of Keokuk v. District of Keokuk*, 53 Ia. 352; *State v. Gorham*, 37 Me. 457.)

The charter devolves upon the city the custody of and power and control over streets usually devolved upon municipal corporations. This necessarily creates the obligation to keep the same in repair and the liability for injuries caused by neglect of that duty. (*City of St. Paul v. Seitz*, 3 Minn. 205; *Shartle v. Minneapolis*, 17 Minn. 284; *Furnell v. City of St. Paul*, 20 Minn. 117; *City of Chicago v. Robbins*, 2 Black [U. S.] 422; *Inhabitants of Westfield v. Mayo*, 122 Mass. 100; *City of Boston v. Worthington*, 10 Gray [Mass.] 496; *City of Lowell v. Short*, 4 Cush. [Mass.] 275; *Inhabitants of Milford v. Holbrook*, 9 Allen [Mass.] 17; *Inhabitants of West Boylston v. Mason*, 102 Mass. 341; *City of Norwich v. Breed*, 30 Conn. 535; *Inhabitants of Veazie v. Penobscot R. Co.*, 49 Me. 119.)

When the charter of a city gives it the power to cause sidewalks to be kept in repair and makes adequate provision for so doing, the exercise of the power follows as a duty. In such case, the city is liable for actionable defects in sidewalks, although the charter requires the lot owner to build the sidewalks and imposes a penalty for his failure in this regard. The abutting owner is not bound to keep the sidewalk in repair, unless by virtue of the requirement of a statute, and is not responsible to travelers or to the city for defects therein not caused by himself. (*Moore v. Gadsden*, 93 N. Y. 12; *Wenzlick v. McCotter*, 87 N. Y. 127; *State v. Gorham*, 37 Me. 451; *City of Philadelphia v. Smith*, 16 Atl. Rep. [Pa.] 493; *City of Bloomington v. Bay*, 42 Ill. 503; *Browning v. City of Spring-*

field, 17 Ill. 143; *City of Joliet v. Verley*, 35 Ill. 58; *Toutloff v. City of Green Bay*, 65 N. W. Rep. [Wis.] 168.)

The duty to construct and maintain sidewalks being in the nature of a tax is one that is owing only to the city, just as the duty to pay taxes for local improvements imposed in any other way. It is not, and from its very nature cannot be, a duty owing third persons. (*Noonan v. City of Stillwater*, 7 Am. & Eng. Corp. Cases [Minn.] 17; *Commissioners v. City of Topeka*, 39 Kan. 197; *Norton v. City of St. Louis*, 97 Mo. 537; *Taylor v. Lake S. & M. S. R. Co.*, 45 Mich. 74.)

The statement filed with the city clerk sufficiently described the premises where the injury occurred. (*Wall v. Town of Highland*, 39 N. W. Rep. [Wis.] 560; *Fopper v. Town of Wheatland*, 18 N. W. Rep. [Wis.] 514; *Delger v. City of St. Paul*, 14 Fed. Rep. 567; *Salladay v. Town of Dodgeville*, 55 N. W. Rep. [Wis.] 696; *Laird v. Town of Otsego*, 62 N. W. Rep. [Wis.] 1042; *Fassett v. Town of Roxbury*, 55 Vt. 552; *Fortin v. Inhabitants of Easthampton*, 8 N. E. Rep. [Mass.] 328.)

IRVINE, C.

This action was by Catherine O'Brien against the city of Lincoln to recover for personal injuries by her sustained by reason of a defective sidewalk. She had a verdict and judgment, which the city seeks to avoid. The record distinctly presents two, and only two, questions: First, is a city of the class to which Lincoln belongs liable in any event to one who suffers an injury from a defect in the sidewalk? Secondly, was the notice served upon the city before bringing suit sufficient in its description of the place where the injury occurred?

The general duty of municipal corporations to maintain their streets, including the sidewalk space, in a reasonably safe condition for public travel, and their consequent liability for a negligent failure to perform that duty has been often asserted. Among the more recent cases declaring the rule are: *City of Lincoln v. Smith*, 28

Neb. 762; *City of Lincoln v. Calvert*, 39 Neb. 305; *City of Aurora v. Cox*, 43 Neb. 727; *City of Chadron v. Glover*, 43 Neb. 732. The existence of this general rule is conceded, but it is asserted that it does not apply to the class of cities to which Lincoln belongs, and so far as concerns sidewalks, because the so-called charter, or act incorporating such cities, casts in express terms the duty of maintaining sidewalks upon the owners of abutting real estate, and so, by implication at least, relieves the city from that duty. The question is therefore wholly one of statutory construction, and cases from other states are of little assistance in solving it. Lincoln is, and in 1894, when the injury to plaintiff occurred, was, a city of the first class containing more than 25,000 inhabitants, and governed by chapter 13*a*, Compiled Statutes. The following provisions of that chapter are pertinent:

"Sec. 34. The mayor and council shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances."

"Sec. 31. The street commissioner * * * shall, subject to the orders of the mayor, have general charge, direction and control of all work in the streets, sidewalks, * * * except matters in charge of the civil engineer," etc.

Sec. 67, subdiv. 6. "The council shall have power to set aside a space designated as the sidewalk space, on each side of all streets and avenues, for sidewalks and the planting of trees and grass, and may require and regulate the planting and protecting of trees and grass, and the construction of sidewalks in such space. Such space shall extend from lot line to curb. Whenever any street or avenue shall have been brought to the established grade or permanently improved, the council shall require the owners of the real estate adjacent thereto, to bring the sidewalk space along or in front of such real estate to the established grade, and to lay a sidewalk

thereon of such width and materials as the council may determine; and in case any such property owner shall refuse and neglect to cause such grading to be done or sidewalk constructed within thirty days after being notified in the manner prescribed by ordinance, the council may order said grading to be done and said sidewalk constructed, and assess the cost thereof against the real estate in front of which the said work was done. Whenever any street or avenue shall have been brought to the established grade or permanently improved, the council may require the owners of the real estate adjacent thereto to bring the sidewalk space along or in front of such real estate to the established grade, and to lay a sidewalk thereon of such width and suitable material placed in such space in said sidewalk space as the council may determine and shall have so ordered by proper ordinances. * * * And in case any such property owners shall refuse and neglect to cause such grading to be done or said sidewalk constructed within thirty days after being notified in the manner provided by ordinance, the council shall order said grading to be done and said sidewalks constructed in conformity with the ordinances regulating the same, and shall have power to take up and remove all walks not laid in conformity with such rules and regulations as may be prescribed. And said council shall, at the beginning of each municipal year, receive bids for the erection of all sidewalks hereinafter to be laid or relaid as provided herein, and shall award therefor a contract to the lowest bidder for the year, and said contractor shall be required to lay or relay all sidewalks as ordered by the said council in accordance with the ordinances of said city, and the said contractor shall receive his pay for such work from the assessments against the real estate in front of which the said work was done; and that the cost of all such work, laying and relaying such walks in conformity with such ordinances, shall be assessed against the real estate in front of which the said work was done. And the city

treasurer of said city shall pay over to such contractor upon order of the council all assessments or special taxes against such real estate collected, together with the interest and penalty collected thereon, which shall in each case be full compensation to such contractor for any work so done under his said contract along and in front of any property upon which said assessment or tax shall have been collected. The council may by ordinance provide for the laying of temporary sidewalks upon the natural surface of the ground upon streets not brought to the established grade, and in case of refusal or neglect of [any] property owner in front of or along the side of whose lot such sidewalk may be ordered to construct the same within thirty days after being served with notice in the manner prescribed by ordinance, the council may cause the same to be constructed, and assess the cost thereof on the property in front of which the same shall be laid. In case any property owner shall refuse or neglect to repair the sidewalk adjacent to his property within two (2) days after being notified so to do in the manner prescribed by ordinance, the proper officer may cause said walk to be repaired, and shall report the cost thereof to the council, when the same may be assessed against such property. The cost of grading sidewalk space, and the construction, replacement, or repair of sidewalks as herein provided, shall be assessed at a regular meeting of the council, by a resolution fixing the cost of such grading, construction, or repairs, along the lot adjacent thereto, as a special assessment thereon; and the amount charged against the same, with the vote thereon by yeas and nays, shall be spread at length upon the minutes. Notice of the time of holding such meeting, and the purpose for which it is held, shall be published once in some newspaper published and of general circulation in said city, at least five days before the same shall be held, or, in lieu thereof, personal service may be had upon the persons owning the property to be assessed. All such assessments shall be known as special sidewalk

assessments, and, with the cost of notice, shall be levied and collected as a separate tax, in addition to the taxes for general revenue purposes, subject to the same penalties, and collected in like manner, as other city taxes, but such special assessments shall draw interest at one per cent per month. The same shall be certified by the city clerk and the city treasurer, who shall place the same on the tax list for the current year against such property. It is hereby made the duty of all real estate owners and occupants to keep the sidewalk alongside or in front of the same in good repair and free from snow and ice, and other obstructions, and they shall be liable for all damages or injuries occasioned by reason of the defective condition of any such sidewalk."

It is upon the language of the last sentence of the last section quoted that the defendant bases its argument, asserting that the duty cast upon the city is purely governmental, to enforce the primary duty of the owner or occupant of abutting real estate, and that consequently no liability rests upon it for a failure to discharge that duty. Without entering upon a detailed analysis of the several provisions we deem it sufficient to say that after a careful examination we are agreed that the purpose of the last provision of subdivision 6 was not to relieve the city from the duty, and consequent responsibility, which would clearly follow, under the uniform decisions of this court, from the sections quoted in the absence of the last provision. Whether the object was to assure a liability over from the owner or occupant to the city, or whether it was to add a liability on the part of the owner or occupant to the person injured, in addition to that attaching to the municipality, is a question not involved in this case. Certainly the object was one or the other, or both. There is no hint of an intention to relieve the city from a liability clearly implied from the preceding provisions. These cast upon the city the duty of maintaining the streets and sidewalks, create an officer to superintend the performance of that

duty, and grant to the city ample power to perform the duty by requiring the owner to build or repair, and if he fail so to do, permitting the city itself to do the work and reimburse itself by local assessment. The duty is not solely a political duty, to wield the force of the state to compel the citizen to obey the law, but it is an administrative duty, requiring the city to see that its sidewalks are properly maintained, but authorizing it to accomplish that purpose by directly or indirectly exacting payment of the expense from the property owner. There is nothing in the charter reasonably differentiating it from those under which this court has declared the general rule of the city's liability.

The other question presented is by no means free from doubt, but we think that too must be resolved in favor of the plaintiff. Section 36 of the act already cited provides: "To maintain an action against said city for any unliquidated claim it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and the time, place, nature, circumstance, and cause of the injury or damage complained of." It has been held that this is a reasonable exercise of legislative power, and that a compliance with the requirement must be alleged and proved in order to a recovery. (*City of Lincoln v. Grant*, 38 Neb. 369; *City of Lincoln v. Finkle*, 41 Neb. 575.) This requires that the place of the injury be stated. In the notice served by plaintiff she states: "That on or about the 6th day of October, 1894, this affiant was passing on and over the sidewalk on the north side of Q between Eighteenth and Twentieth streets, in said city, in the evening of said day, and stepped into a hole in said sidewalk, which was in a bad state of repair." It is to be inferred that it was the sidewalk and not the hole which plaintiff intended to say was in a bad state of repair,—a fact which, it will be seen, is of some importance. It is asserted that this statement is entirely insufficient, in that it designates

a space of two city blocks and does not lead to any more precise location. It is argued that one of the objects of the statute is to permit the city, on receiving notice, to avouch the proper land owner to defend the case, and that the statement must be sufficiently definite to permit the accomplishment of this object. In our own decisions and in those of other states where similar statutes exist it has always been said that the object is to advise the city promptly of the claim so as to afford an opportunity for investigation. It may be that where the property owner is liable over to the city, the other object also exists, and that a better statement of the purpose of the law is that it is to permit the city promptly to take any steps proper for its protection. However, there is no practical difference in the result. Whether the object be one or the other or both, it is clear that the statute requires a reasonably certain description of the place—such a description as, from its terms and from inquiries suggested thereby, will permit the officers of the city to identify the place. On the other hand, no case here or elsewhere has required that such a notice describe the place with technical accuracy. As one court has said, it was never contemplated that one who has been injured must employ a surveyor to fix the precise spot where the injury occurred. In examining the rather numerous cases on the subject certain principles will be found to run through all. One is that it is sufficient, as above stated, if the place be so described that from that description it can be identified with reasonable diligence. Another is that the sufficiency of the notice is not to be determined from its terms alone, but in the light of extraneous evidence of the situation and surroundings.

In *Fopper v. Town of Wheatland*, 18 N. W. Rep. [Wis.] 514, in that part of the notice fixing the place a considerable extent of road was described, but in describing the accident circumstances were stated which showed that it must have occurred at a particular spot along the course indicated, and this was held enough.

In *Wall v. Town of Highland*, 39 N. W. Rep. [Wis.] 560, the notice said the accident occurred on a bridge. It was in fact a culvert, but its place was quite definitely fixed and the notice was held good, although there was a bridge not far away.

In *Owen v. City of Fort Dodge*, 67 N. W. Rep. [Ia.] 281, the notice was somewhat ambiguous, but showed that the accident was about the intersection of two streets. It also showed that it occurred on a plank crossing. The evidence on the trial showing that there was only one plank crossing at the intersection named, the notice was held good, although the corner may have been improperly described.

In *Laird v. Town of Otsego*, 62 N. W. Rep. [Wis.] 1042, the description was uncertain in itself, naming an indefinite portion of a highway; but it afterwards described the obstruction causing the injury, and it was held that as this obstruction was conspicuous its description made the notice good.

In *Lyman v. Hampshire*, 138 Mass. 74, the notice placed the accident on a bridge of considerable length, but said that it was caused by stepping in a hole in the flooring caused by a short plank. There were three such holes, but the notice was held good because it did not appear that more than one was large enough to permit such an accident.

In *Brown v. Town of Southbury*, 53 Conn. 212, the notice described "a defective sluice across a highway" between certain houses. There were three sluices across the highway in the space described, but only one was defective. This was held sufficient.

In *Lowe v. Clinton*, 133 Mass. 526, the place was fixed between two houses which were fifty rods apart and there were intervening houses, but there was also described as the cause of injury a stump projecting four inches above the sidewalk. There was only one such stump, and therefore it was held that the notice was sufficient.

In *Harder v. City of Minneapolis*, 40 Minn. 446, the notice was particular on its face, but it named the adjoining cross street as "Sixteenth street." As a matter of fact it was a street of another name, and the street on which the injury occurred did not extend to Sixteenth street. The plaintiff had inferred that as the last street he had crossed was Fifteenth the next would be Sixteenth. This was held good because the officers must certainly know what was meant.

In *Cross v. City of Elmira*, 86 Hun [N. Y.] 467, the notice said that plaintiff was walking on the plank sidewalk on the north side of East Washington avenue, between Oak and Pratt streets. The distance named was 368 feet and there was plank sidewalk containing other holes than that causing the injury for a distance of 150 feet. This was held sufficient.

In *McCabe v. City of Cambridge*, 134 Mass. 484, the place on the street was not very definitely given, but the obstruction was described, and this was held enough, the court saying that the city certainly would not insist that there were several such defects in the neighborhood.

The cases cited illustrate the principles already stated, and also serve to show with what liberality the courts have construed this somewhat harsh statute. An application of the rules induced from the cases certainly helps out this notice. The evidence showed that plaintiff was injured at a spot on the sidewalk within the space named by the notice and between Eighteenth and Nineteenth streets; that this was in front of the one vacant lot in that block, and in front of that lot there was a plank sidewalk, the planks laid lengthwise and containing several large holes. It is true that it appears that the plaintiff knew the exact location and might have described it better in her notice. On the other hand, it is inferable from the evidence that the ruinous sidewalk was peculiar to that part of the street in front of this one lot. There is no proof that there were any holes elsewhere along the two blocks described, and we cannot presume that

the city was so generally neglectful of its duty that there were other places where the sidewalk was in bad repair and contained holes which one might step into within the two blocks named. From the notice it appeared that the sidewalk where the injury occurred was in bad repair and that the plaintiff stepped through a hole therein. Without indulging the presumption above adverted to, we must conclude that the notice thus furnished sufficient information to enable the city to identify the portion of the walk referred to, although perhaps not the particular hole. The city only claims that the notice should be so specific as to lead to identifying the lot in front of which the accident happened. From all that appears in the evidence it might here have done so.

AFFIRMED.

RANDOLPH MOSS V. BELLE ROBERTSON ET AL.

FILED DECEMBER 8, 1898. No. 8429.

1. **Proceedings in Error: TIME TO FILE TRANSCRIPT: ADDITIONAL TRANSCRIPT.** In proceedings in error there must be filed within a year after the rendition of the final judgment or order sought to be effected a petition in error and transcript of the proceedings containing such final judgment or order. *Held*, That jurisdiction of the appellate tribunal attaches if the petition in error and transcript of the final judgment or order are filed therein; and an amended transcript, or amendment or amendments to the transcript, may, by leave obtained, be filed and without or beyond the year after the entry of the said judgment or order.

2. **Security for Costs.** A defendant, upon whom service had been made by publication, and not otherwise, applied, under the provisions of section 82 of the Code of Civil Procedure, to have the decree rendered in the action opened and be let in to defend, and the application was sustained. The party filed an answer in the nature of a cross-petition and prayed for affirmative relief of the foreclosure of a mortgage lien on the property involved in the suit. The motion was made that the cross-petitioner be required to give security for costs, which was overruled. Such ruling *held* not erroneous.

3. **Mortgage Foreclosure: PRIORITY OF LIENS: DISTRIBUTION OF PRO-**

CEEDS OF SALE. In an action to foreclose a real estate mortgage a junior mortgagee was made a party and was defaulted. A decree was rendered, sale ordered, made, and confirmed. Of the amount of the purchase price there was a surplus after satisfaction of the first mortgage lien. Subsequently the owner of the junior mortgage, upon whom service had been constructive, was allowed to open the decree and answer. The answer was a cross-bill, by which a foreclosure of the second mortgage was sought and the appropriation of the surplus of the proceeds of the sale to the satisfaction thereof. *Held*, That as against the owner of the equity of redemption the junior mortgagee was entitled to such surplus.

4. ———: ———: ———: PROCEDURE. Under the facts and conditions which prevailed in the foreclosure suit at the time, the procedure adopted by the second mortgagee to assert a claim to the surplus of the proceeds of the sale under the lien of the first mortgage was entirely proper.

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

Story & Story, for plaintiff in error.

John B. Raper and *H. C. Lindsay, contra.*

HARRISON, C. J.

On May 22, 1890, Belle Robertson and J. H. Robertson, her husband, executed and delivered to James M. Storm a mortgage on two lots in the town of Du Bois to secure the payment of an indebtedness of $641.38, which was duly recorded, and on March 14, of the succeeding year, sold and conveyed the premises to Melissa E. Groom, the grantee assuming and agreeing to pay the mortgage debt. To secure the payment of a part of the purchase price Melissa E. Groom executed and delivered to her grantor a mortgage on the premises in the sum of $445. The condition of the mortgage to James M. Storms in regard to payment of the debt was not performed, and he instituted an action of foreclosure, to which, with others, Belle Robertson, J. H. Robertson, Melissa E. Groom and her husband were made parties. The service on the Robertsons and some others of defendants was

by publication. In the petition appeared the following statement: "The defendants Belle Robertson and J. H. Robertson claim to have an interest in said premises by virtue of a mortgage thereon from Melissa E. Groom and Isaac E. Groom, dated March 27, 1891, and recorded in book 18 of mortgages on page 231 of the records of Pawnee county, Nebraska, the amount of which interest is unknown to the plaintiff, but the lien thereof is subsequent and secondary to that of the plaintiff's mortgage." There was no appearance by the Robertsons. Their default was entered, and in due course of the proceedings in the suit a decree was rendered and sale ordered. The property was sold under the order of sale April 17, 1893, and James M. Storm, the mortgagee and plaintiff in the foreclosure suit, was the purchaser, the amount paid being $1,045, of which, after satisfaction of the decree, there remained a surplus of $252.20. After the decree, but prior to the sale to satisfy it, the property was sold and conveyed by Mrs. Groom and husband to Randolph Moss, the plaintiff in error. At or about the time of confirmation of the sale Randolph Moss appeared and moved the court that he be made a party to the action and receive the surplus of the proceeds of the sale. In the decree it had been ordered: "An order of sale shall be issued to the sheriff of Pawnee county commanding him to sell the above described real estate as upon execution, and bring the proceeds thereof into court to be applied in satisfaction of the sum of $670.80 found due." The sum set forth in the decree was the amount adjudged to be due of the debt secured by the mortgage to the plaintiff in the action of foreclosure. The record discloses, or it is a finding of the trial judge in the decree of which a reversal is now sought, that the proceeds of the sale were by the sheriff paid into court, or to its clerk. The court did not order the surplus paid to the plaintiff in error on his motion, but the clerk paid it to him. Subsequent to all the occurrences to which we have alluded Belle Robertson made an application

to have the decree of foreclosure opened and to be let in to defend under the provisions of section 82 of the Code of Civil Procedure, relative to opening decrees by parties against whom the service was constructive or by publication, which was sustained, and she filed an answer and cross-bill, in which she asked the foreclosure of the mortgage given by Melissa E. Groom and husband at the time of the purchase from the cross-petitioner of the property involved in the suit, and that she be adjudged entitled to receive and apply on the mortgage debt the surplus of the proceeds of the sale made under the decree of foreclosure of the prior mortgage. The portion of the relief for which she prayed to which we have last referred was granted her, and it is of the proceedings which led up to the decree and also of such adjudication that a review is now sought in this court.

The jurisdiction of this court is questioned by defendant in error, and this objection had best be examined first. The plaintiff in error filed a petition in error, a transcript of the entry of the judgment, and the bill of exceptions. Pursuant to leave obtained on motion for the purpose there was subsequently filed an amended transcript or amendments to the transcript. The contention for plaintiff in error is that the filings did not fulfill the requirements of section 586 of the Code of Civil Procedure, wherein it is provided that "the plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified;" that this contemplated the filing with the petition in error of a complete transcript of all the proceedings necessary to the presentation of the alleged errors to the appellate court; and further, inasmuch as error proceedings must be commenced within one year after the rendition of the judgment sought to be vacated (see Code of Civil Procedure, sec. 592), and the amendments to the transcript herein were not within a year after the judgment was entered, the supreme court did not acquire jurisdic-

tion. An examination of the decisions of this court which bear on this point of discussion satisfies us that when a transcript, inclusive of the judgment or final order, which transcript may be incomplete,—certainly not purposely or negligently so,—is filed with a petition in error within a year after the rendition of the judgment or final order, the reversal of which is the object of the proceedings, jurisdiction of the matter attaches, and on application the appellate court may, within its discretion, allow an amended transcript, or amendments to the transcript, to be filed of a date or time without or beyond the said year. This being determined the argument on this point fails.

For plaintiff in error there was filed in the district court before decree a motion that the cross-petitioner, being a non-resident, be required to give security for costs. The application to open the judgment of foreclosure of the prior mortgage was, as we have before stated, under the provisions of section 82 of the Code of Civil Procedure, in which appears the following language in regard to costs: The applicant shall "pay all costs, if the court require them to be paid." It is provided generally in respect to security for costs that "in all cases in which the plaintiff is a non-resident of the county in which the action is to be brought, before commencing such action, the plaintiff must furnish sufficient surety for costs" (Code of Civil Procedure, sec. 612); and "an action in which security for costs is required by the last section, and has not been given, shall be dismissed on motion and notice by the defendant at any proper time before judgment, unless in a reasonable time to be allowed by the court, such security for costs be given" (Code of Civil Procedure, sec. 613). Statutes in regard to costs may not be extended beyond the letter, but are to be construed strictly. (*Stanton County v. Madison County*, 10 Neb. 308.) The cross-petitioner was not within the provisions of section 612 of the Code of Civil Procedure relative to security for costs; and that security

should be given or required was not within the letter of section 82. If any inherent right was in the court to require such security, it was a matter of discretion; and without abuse of its judgment—and there was none—its ruling on the motion was not erroneous.

The only further question to be determined is whether the court erred in its decree by which it ordered that the cross-petitioner receive the surplus of the proceeds of the sale under the prior mortgage, which sale had been perfected and confirmed. It cannot be controverted that the plaintiff in error, when he purchased the land and received its conveyance from the Grooms, took the title subject to the lien of the junior mortgage. By the decree of foreclosure of the first mortgage lien and its execution by the sale the property was transferred to the purchaser shorn of the lien of the junior mortgage. Since the junior mortgagee was a party to the foreclosure suit and required to answer, she was bound by the decree. (*White v. Bartlett*, 14 Neb. 320; *Shellenbarger v. Biser*, 5 Neb. 195; *Barton v. Anderson*, 104 Ind. 579.) Upon the sale of the land under the lien of the prior mortgage the lien of the junior mortgage was shifted from the land to the surplus of the proceeds after satisfaction of the amount of the mortgage. (Kerr's Supplement to Wiltsie, Mortgage Foreclosure p. 1432, sec. 708*j*.) The second mortgagee will take a surplus of the proceeds of a sale under the first mortgage in preference to the mortgagor. (*Brown v. Crookston Agricultural Ass'n*, 34 Minn. 545.) In the opinion in the case just cited there appeared this statement: "The owner of the real estate executed, at different times, two mortgages upon it. Upon a statutory foreclosure sale, by advertisement, under the senior mortgage, the land was sold for a price which left a surplus in the hands of the sheriff after satisfying that mortgage. The only question necessary to be considered is as to whether the junior mortgagee or the mortgagor is entitled to receive that surplus, through the proper determination of the court. According to the well es-

tablished rule in such cases, the second mortgagee was entitled to the surplus, or to so much of it as might be necessary to satisfy his mortgage, in preference to the mortgagor. (2 Jones, Mortgages, secs. 1688, 1929; *Buttrick v. Wentworth*, 6 Allen [Mass.] 79; *Andrews v. Fiske*, 101 Mass. 422; *Cook v. Basley*, 123 Mass. 396; *Ballinger v. Bourland*, 87 Ill. 513; 2 Washburn, Real Property 71.) In the contemplation of equity, by the sale of the whole estate, under foreclosure proceedings affecting and binding the junior mortgagee, the land is converted into money, and this fund being treated as a substitute for the mortgaged estate, the lien of the junior mortgagee is transferred from the land to the surplus of the money arising from the sale. The rights of the parties as they before existed are not transposed by the sale, and the court will apply the fund in accordance with their rights as they existed in respect to the land." The rule announced would hold good and be forcible against the grantee of the mortgagor, here the plaintiff in error. The rule is the same, although the indebtedness the payment of which is secured by the second mortgage may not be due. (*Fagan v. People's Saving & Loan Ass'n*, 55 Minn. 437.) In this case, however, by reason of a default in its condition in regard to payment of taxes on the mortgaged property, the debt secured by the second mortgage had matured, and the second mortgagee was entitled to enforce it, and the question of its lack of maturity does not arise. The right to the surplus was properly enforceable in the court and in the action in which the decree was rendered, and while it probably in some cases might be made in a different manner than was herein adopted, under the prevailing circumstances the course of procedure was entirely proper. The proceeds of the sale had been ordered into court and the order had been obeyed, and the court had made no disposition of the surplus, and it was presumably yet in the hands of the court or its proper officer awaiting a further order. It had in fact been paid to the grantee

of the mortgagor, or the plaintiff in error, and the order in this proceeding was to the clerk of the court to pay it to the second mortgagee. With this portion of the matter we need not deal, as the clerk is not here with any complaint, and the plaintiff in error but complains and can but object to the adjudication of the trial court to the extent it purported to affect his rights. The decree or order of the district court is

AFFIRMED.

CHARLOTTE GORDER ET AL., APPELLEES, V. JOSEPH A. CONNOR ET AL., APPELLANTS.

FILED DECEMBER 8, 1898. No. 8533.

1. **Corporations:** LIABILITY OF STOCKHOLDERS. Within the common-law rule there was no individual liability of stockholders in a corporation for its debts.

2. ———: ———: CONSTITUTIONAL LAW. Our constitution states and also limits the liability of a stockholder in a corporation for its debts. (See Constitution, art. 11, sec. 4, Miscellaneous Corporations.)

3. ———: ———: ———. The liability of a stock subscriber for corporate debts, except of a banking corporation, is measured by his unpaid stock subscription.

4. ———: ———: CONTRIBUTION. A voluntary assumption of the debt of a corporation, or a voluntary payment of its debt, or the two in combination, will not alone confer on a stockholder of the corporation the right to contribution from the other members.

5. ———: ———: ———: ASSUMPTION OF DEBT. An agreement by stockholders of a corporation to indemnify one for the personal assumption or payment of a corporate debt, or to contribute, may be enforced.

6. ———: ———: ———: ———: EVIDENCE. The evidence herein *held* insufficient to sustain a finding of such a promise or agreement by some of the stockholders of a corporation of indemnity or contribution to other of the stockholders for the assumption or payment of corporate debts by the latter.

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

Jesse L. Root, Allen Beeson, Byron Clark, C. A. Rawls, and *Beeson & Root,* for appellants.

A. N. Sullivan, contra.

HARRISON, C. J.

In this, an appeal from a decree of the district court of Cass county, it appears from the pleadings and evidence presented in the record of the proceedings in the trial court that there was during the year 1887 duly formed and organized a corporation styled "The Plattsmouth Canning Company;" that during the course of its business career there were borrowed, for its use and benefit in its transactions, sums of money, and promissory notes were executed to evidence the debts created by such loans, which were signed by certain directors or officers of the corporation, not for the company or officially, but individually; that they thus became personally liable for the payment of said debts and finally did pay them. It was pleaded and put in issue that the appellants were stockholders of the concern, and authorized the borrowing of the moneys to which we have alluded; and that it was pursuant to such authorization that the loans were obtained and the debts contracted. It was uncontroverted that each stockholder had regularly paid to the corporation, or for its use, the full amount called for by his stock. It also appeared that to secure or indemnify against loss parties, directors or officers, who signed the notes given for the borrowed moneys, and who became personally liable therefor, there was executed and delivered to them a mortgage on the property of the corporation, which was by the mortgagees subsequently foreclosed, the decree of the trial court in a suit to subject the property to the payment of the debt being on appeal affirmed in this court. (See *Gorder v. Plattsmouth Canning Co.,* 36 Neb. 548.) In that action, after a sale of the property and application of

the proceeds to the extinguishment of the mortgage, there remained a deficiency, for which judgment was rendered against the corporation in the sum of $9,724.98. In the present action it was sought to recover of appellants such sums as it was asserted they severally were liable to contribute to reimburse appellees for the payments made by them in and about the business, and for the use and benefit of the corporation, inclusive of costs in lawsuits, $500 of which were stated to have been expended in the matter of the foreclosure of the mortgage on the property of the corporation, in favor of the appellees. Called out by statements in the answers filed for appellants there was an averment in the reply to the effect that nothing was herein claimed by reason of any liability of stockholders for the corporate indebtedness which arose or might have arisen by or through the neglect or failure to publish any notice of the financial condition of the corporation. The claim of appellees was based, then, on an obligation contractual in its origin, either expressed or implied, or on the proposition that one stockholder may be compelled to reimburse another for expenditures made for the use and benefit of the corporation by reason of the relations which they bear toward each other as members or stockholders of the corporation.

A member of a corporation such as the Plattsmouth Canning Company is individually liable for its debts to the extent of any unpaid stock subscription. (Constitution, art. 11, sec. 4, Miscellaneous Corporations.) The general rule of law is that members or stockholders of a corporation are not personally liable for its debts. (*Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; 3 Thompson, Corporations sec. 2925; 1 Cook, Corporations [4th ed.] sec. 11.)

"The liability of a stock subscriber for corporate debts, except he be a stock subscriber of a banking corporation, is limited to the amount of his unpaid stock subscription." (*Van Pelt v. Gardner*, 54 Neb. 701.) Each member

of the Plattsmouth Canning Company had paid in full the amount of his stock and was no further individually liable for its debts, and voluntary payment of a corporate debt by one stockholder could not create a personal liability of other stockholders where none existed, and raise the right to contribution. (*Cary v. Holmes*, 2 Allen [Mass.] 501; *Andrews v. Callender*, 13 Pick. [Mass.] 484.) There was in this case no claim of a forced assumption of the debts of the corporation. There may be cases in which the circumstances are such that to many the payments made by one or more of the members of a corporation would suggest that it would be but fair,—certainly not unfair,—from a moral point of view, to contribute to a reimbursement; but still there may be presented no enforceable right within the rules which, through long years of experience, examinations, and adjudications of the like business transactions of men, have been established as governable, because productive of the best results and of the greatest good and right to the majority or greatest number.

It is further to be considered whether it was shown that signing the notes by the appellees, and their becoming liable for the corporate debts, was pursuant to promises or requests on the part of the other stockholders, or were there any actions by the stockholders other than the signers of the notes, inclusive of appellants, from which an assumpsit or promise of contribution originated. For a review of some precedents on the subject of assumpsit, and a discussion of it, see *Stuht v. Sweesy*, 48 Neb. 767. In the case at bar the utmost that can be said of the evidence is that it discloses a knowledge on the part of the stockholders that the loans were to be obtained for the corporation, and authorization thereof; and further knowledge of some members, inclusive of some appellants, that a number of the members were becoming personally liable for the payments, but no request, express or implied, that they act as they did in the matters was shown, nor any promise to contribute or

reimburse shown; hence no liability was shown. (*Larson v. Dayton*, 52 Ia. 597, 3 N. W. Rep. 213.) It has been held that an agreement to indemnify or to contribute will be enforced. (*Taylor v. Coon*, 79 Wis. 76; *Taylor v. North*, 79 Wis. 86; 1 Cook, Corporations sec. 76; *Sterling Wrench Co. v. Amstutz*, 50 O. St. 484.) But the basis of the right is derived from the assumpsit or contract, and not primarily from the relations. As stockholders without the promise, the right would not arise or exist. It follows that the findings and resultant judgment in this action must be reversed and the cause dismissed.

REVERSED AND DISMISSED.

CHARLES AUGUST LIND, APPELLEE, V. MATILDA BURKE ET AL., APPELLANTS.

FILED DECEMBER 8, 1898. No. 8501.

Illegitimate Children: PATERNITY: ACKNOWLEDGMENT. Writings introduced in evidence examined and determined insufficient as acknowledgments to fulfill the requirements of that portion of section 31, chapter 23, Compiled Statutes 1897, which reads as follows: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child."

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

The opinion contains a statement of the case.

F. C. Power, for appellants:

August Lind did not, by writing signed in presence of a competent witness, acknowledge himself to be the father of plaintiff, within the meaning of section 31, chapter 23, Compiled Statutes. (*Hunt v. Hunt*, 37 Me. 333; *Estate of Sanford*, 4 Cal. 12; 24 Am. & Eng. Ency. Law

414; *Cope v. Cope*, 137 U. S. 682; *Pratt v. Atwood*, 108 Mass. 40; *Knight v. New England Worsted Co.*, 2 Cush. [Mass.] 272.)

George B. France and *Merton Meeker, contra:*

The purpose of the statute was to enable illegitimate children to inherit their father's estate the same as legitimate children. The statute should be liberally construed. Within the meaning of the statute, August Lind acknowledged himself to be the father of plaintiff. (*Buckmaster v. McElroy*, 20 Neb. 557; *Kearney Electric Co. v. Laughlin*, 45 Neb. 390; *In re Jessup*, 21 Pac. Rep. [Cal.] 976, 22 Pac. Rep. 742; *Blythe v. Ayres*, 31 Pac. Rep. [Cal.] 915; *Crane v. Crane*, 31 Ia. 296; *Bailey v. Boyd*, 59 Ind. 297; *Brock v. State*, 85 Ind. 397; *Rice v. Efford*, 3 Hen. & M. [Va.] 227; *Pina v. Peck*, 31 Cal. 359; *In re Noble*, 124 Ill. 270; *Comb's Appeal*, 105 Pa. St. 159.)

HARRISON, C. J.

The appellee commenced this action to recover an alleged interest in the estate of August Lind, deceased, and it was for appellee pleaded that he was the illegitimate child of August Lind, born in Sweden prior to the time the latter during his life came to America; that appellee had been rendered capable of heirship by an acknowledgment in writing, in the presence of a competent witness, by August Lind of his relationship of father of the appellee. From a decree favorable to the claim of appellee an appeal to this court has been perfected for the adverse parties.

By the common-law rule illegitimate children are excluded from inheritance in the estate of the father (1 Blackstone, Commentaries 458); but in this state we have the following statutory provision on the subject: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the

father of such child." (Compiled Statutes 1897, ch. 23, sec. 31.) It is under this portion of our statutes that the appellee asserts the alleged acquired right of heirship to the estate of August Lind, now deceased. It is contended for the appellants that there is contemplated by the statute we have quoted a writing made with the intention then in mind to confer the right, as heir, on the illegitimate child, and in the presence of a witness called for the purpose of acquiring information of the acknowledgment. On the other hand, counsel for appellee insist that an acknowledgment of the fact of paternity, in any writing made for any purpose in the presence of any person competent to testify of the matter, is sufficient to meet the requirements of the law. It is also of the arguments for the appellants that the evidence is insufficient. Within what we think a proper disposition of the litigation herein, as presented in the record, a decision of the first question we have outlined, as urged in argument, is not necessary, if it be conceded—and we do not decide it—that a writing other than a formal acknowledgment of paternity made for the express purpose may be sufficient. There is the further query herein of the sufficiency or lack thereof of the evidence to establish the particular point of the issue tried on which its determination rested and must now depend. We are satisfied that a writing, to fulfill the requirement of the law which we have quoted, must be at least one in which the paternity is directly, unequivocally, and unquestionably acknowledged. Whether it should go further than this, as we have before stated, we need not, and do not now, decide; but so much it must voice to be of force. In the light of this view of the requisites of the evidence we will now refer to such portions of the latter as are pertinent to the matter specifically under consideration.

The appellee was born in Sweden, where August Lind then lived. The latter soon afterward came to the United States and finally became a resident of Hamilton county, this state, and the owner of a tract of land sit-

uate in said county; and also accumulated some considerable personal belongings. For reasons not material to be particularly noticed here August Lind thought best that the appellee should come to this country to live, and with him, August Lind. In pursuance of the thought which, when entertained, became a settled purpose, August Lind purchased the necessary tickets of one McEndree of Lone Tree, now Central City, and forwarded them to parties, his relations, in Sweden, who, in compliance with written directions which accompanied the tickets, started the boy on his journey to this country, where he, in due time, safely arrived and was met at Lone Tree by August Lind, with whom and to whose home he went, and there lived for a time apparently as one of the family. The deposition of McEndree was taken and was read in evidence. He stated in substance that, when August Lind bought the steamship ticket for the transportation of the appellee to this country, he required McEndree to write a letter or statement to be carried by the boy during his trip and shown to people along the route. This was written in the English language and stated from and to where the boy was traveling, and requested that he be assisted in selecting the right vessel and railroad trains. It was written by McEndree, and he attached to it the signature of August Lind, by request of the latter. At the same time and place there was written in Swedish by August Lind a letter to the relatives in Sweden, in which were set forth certain matters relative to the steamship ticket, the statement which the boy was to carry with him, and what he should do when he arrived at Lone Tree. This was dictated by McEndree and, after August Lind had written and signed it, he translated it verbally to McEndree. These instruments, it was shown, were no longer in existence, and McEndree prepared in writing what he stated was in substance their contents respectively, and the prepared articles were attached to his deposition. In an answer to one interrogatory McEndree said: "Yes, sir; he had me write

a letter for him, and he had me sign his name to it, in which he called the plaintiff 'my boy.' The reason I signed his name to it was because the letter was written in English. It contained instructions to guide him in coming from Sweden to Central City, Nebraska. At that time Central City was called 'Lone Tree.'" In cross-examination he stated in regard to reproducing the letters: "I claim that I have given the substance of those letters as near as I can remember; not *verbatim* by a good deal. That is something I could not do. I gave the substance of those letters to the best of my memory." What he gives from memory as written by him, and on which he states he placed the signature of August Lind by request, is as follows:

"To Whom May Make Inquiries of the Bearer, Charles Lind, My Dear Son, who Holds a Steamship Ticket from Sweden to Lone Tree, Nebraska:

"This boy is traveling alone under the management of the Cunard Steamship Co., and whose folks reside in Lone Tree, Nebraska. Who will kindly assist the boy in seeing that he gets the right vessel named on his ticket and railroad train through to Lone Tree, Neb., will confer a great favor on his father, the undersigned,

"AUGUST LIND."

What was given by the witness as the substance of the letter in the Swedish language was as follows:

"DEAR MOTHER: I herewith send you a steamship ticket and letter of advice how to come over here. You may fix up Charles for me, and get him ready, and start him so he will take certain vessel, on certain date, that will put him in New York on certain date. Tell Charles that when he gets at Castle Garden, New York, where all the emigrants arrive, to show the inclosed letter in English and his ticket to the officers who will ask him where he is going. These officers will arrange his railroad ticket, and see that he will be put on his right train that will bring him on through. When you get to Lone

Tree, show the card to any one at the depot, and they will show you William McEndree's store. Go there. Mr. McEndree will take care of you, if I am not in town.

"AUGUST LIND."

It will be noticed that in the latter letter there is nothing which contains a reference to the boy in the character of a child, or even a relative of the writer. It must be borne in mind in the consideration of these letters that they were but the memory of the witness and were not purported to be correct. The first one quoted contains a reference to the boy as a "son" of the writer. This expression may be used to mean a male child, issue or offspring, but also may be applied to a distant male descendant, or any young male person may be so designated, as a pupil, a ward, an adopted male child or dependent. (Webster's International Dictionary; Century Dictionary.) In it also appears the words "his father." The term "father" may mean the male parent; a male who has begotten a child. It may also mean the adopted father, or a male ancestor more remote than a parent. (Webster's International Dictionary; Century Dictionary.) It must not be forgotten in this examination that it is not because the person can be shown to be the offspring, or is in fact the illegitimate child, that it may assert heirship, but because it has been in writing acknowledged; and hence the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity. With the many concurrent significations which belong to the words used and modified as they were, even if they are now as they stood in the original writings,—which is not entirely certain,—the writings cannot be adjudged sufficient to fulfill the statutory requirement.

There were also introduced some lists of all the children of school age in school district No. 65 of Hamilton county, of which August Lind was then director. One was the school census of said district for the school year ending in April, 1877, and the other for the school year

ending April, 1878, and each was subscribed and sworn to by August Lind before a justice of the peace. The statement in each affidavit was as follows: "August Lind, above named, being duly sworn, says that the following is a correct list of the names of all the children belonging to district No. 65 aforesaid, between the ages of five and twenty-one years, as he verily believes, as taken by him as aforesaid." This shows that it but purports to be a correct list of the children and is not declared to be exact in other particulars. In each, under the heading, "Name of Parent or Guardian," was written names of parties supposedly bearing one or the other relation to the person named directly opposite in the following column of the list, which column was headed, "Names of Youth." As parent or guardian appeared the name of August Lind, and opposite, as youth, "Elvira" and "Charly." These, as proofs, left the matter open as to whether the party named in the first column was parent or guardian, even if sufficient in all other respects,—which is extremely doubtful,—and they did not establish a written acknowledgment such as is requisite under the law.

Another piece of evidence was what on its face or by its recitals purported to be a record, or portion of a record, of a school meeting held in said district 65 on April 2, 1877. It is not signed by any one, but some witness stated it was written, or he saw it prepared, by August Lind, and in it there appears the statement:

"August Lind, Parent.

"Charly	12	13
"Elvira	—	6"

The lack of signature constitutes this incompetent and insufficient as proof of the acknowledgment prescribed by the law.

It follows that the decree was not sustained by the evidence; hence it must be reversed and the action dismissed.

REVERSED AND DISMISSED.

WILLIAM P. BERDOLT V. MAMIE H. BERDOLT.

FILED DECEMBER 8, 1898. No. 8507.

1. **Divorce:** CROSS-PETITION. It is competent in this state, in an action for divorce, for the defendant to file a cross-petition, in effect a cross-action for divorce, and the defendant may be accorded affirmative relief.

2. ———: ———. The charges made in a petition in a suit for divorce do not furnish proper and forceful grounds to be pleaded and urged in the cross-petition in the same action.

3. ———: SUFFICIENCY OF EVIDENCE. The evidence adjudged insufficient to warrant a finding for the plaintiff upon either of his two causes of action.

4. ———: EXTREME CRUELTY. A decree of divorce may be granted in this state for "extreme cruelty, whether practiced by using personal violence, or by any other means." (Compiled Statutes, ch. 25, sec. 7; *Walton v. Walton*, 57 Neb. 102.)

5. ———: ———. A false charge of physical incompetency or disqualification to consummate the marriage or fully perform marital duties may, under certain circumstances, and if thereby such mental disquietude or suffering is caused as to impair the health or threaten its injury, or as to render the further continuance of the marriage contract and life intolerable and impracticable, constitute extreme cruelty, within the meaning of the words as they are employed in our statutes on the subject of divorce.

6. ———: ———: EVIDENCE. The evidence in this case *held* to sustain a finding of extreme cruelty by the plaintiff toward the defendant.

7. ———: ALIMONY: EXCESSIVE ALLOWANCE: REMITTITUR. The permanent alimony ordered paid in the sum of $5,000 adjudged excessive, defendant in error allowed to file a remittitur of $3,500, and the decree thus changed affirmed. If remittitur is not filed, the decree of divorce is affirmed, and the branch of the cause in regard to permanent alimony reversed and remanded.

ERROR from the district court of Seward county. Tried below before BATES, J. *Affirmed upon filing of remittitur.*

R. S. Norval, Norval Bros., and *D. C. McKillip*, for plaintiff in error.

George W. Lowley and *Biggs & Thomas, contra.*

HARRISON, C. J.

The plaintiff in error commenced this suit in the district court of Seward county to obtain a divorce or dissolution of the marital tie which existed between him and the defendant in error. In his petition it was pleaded that the marriage of the parties occurred of date July 11, 1894, and that he had ever since that event conducted himself toward the defendant in error as a "kind, affectionate, and virtuous husband." The general averments of such a petition were followed by statements of two causes of action, one of which was to the effect that prior to and subsequent to the marriage, and of continuance to the time of the suit, the defendant in error was physically incapable of a consummation of the marriage; that there could at none of said times be complete sexual intercourse between the parties because of "incurable" personal and physical defects of the organization of defendant in error, and also for the additional reason that she was afflicted with "catarrh of the womb," which was incurable; that all of these matters were well known to defendant in error prior to and at the time of the marriage, and were unknown to plaintiff in error, and were by the former concealed from the latter. In the second cause of action it was complained that about December 25, 1894, defendant in error in a fit of anger struck the plaintiff in error and thereby caused him much pain and suffering. In the answer there were admissions of the marriage and some others of the matters alleged in the petition, but all the material statements of the two causes of action were denied; and there was further pleading, in the nature of a cross-petition, in which it was charged that the plaintiff in error was of exceedingly strong or unnatural sexual passion or desire, and that he urged and demanded and received of defendant in error extraordinary and excessive indulgence of his said propensity. It was also set forth in this portion of the answer, and as further basis for affirmative

relief to defendant in error, that "The said plaintiff, during the continuance of said marriage relation, wrongfully and maliciously charged this defendant with having deceived him, and repeatedly and continuously charged this defendant with having been diseased at the time of her marriage with the plaintiff, and of having certain incurable personal defects and malformations, which said charges and statements as made were wholly false and untrue; and that by reason of said false and malicious charges and statements this defendant was greatly humiliated, and plaintiff thereby caused this defendant great mental and physical pain and anguish. Defendant further avers that plaintiff was guilty of extreme cruelty toward this defendant by reason of the facts hereinbefore set forth, and defendant further avers that said plaintiff, during the continuance of said marriage relation, publicly talked and told divers persons that this defendant was diseased, and was afflicted with certain incurable disease and malformation, while this plaintiff was receiving medical treatment at Ashland, Nebraska, from a physician mutually agreed upon by the plaintiff and defendant's father, the expense of which was to be borne equally by plaintiff and defendant's father, and while plaintiff was all the time professing great regard and love for this defendant, he was, at the same time, at Seward, Nebraska, publicly making the aforesaid statements and charges, which were wholly false and untrue, and that by reason thereof this defendant has been greatly humiliated and disgraced, and has suffered great mental and physical pain and anguish." Also, that the defendant in error went, by agreement and with the concurrence of her husband, to Ashland for treatment for the disease with which she was supposed to be afflicted; and it developed on examination that she had in fact catarrh of the womb, and they were informed that it would require a treatment of from six or eight to twelve weeks, and that a cure could be effected. It appears in evidence that she was cured, or became entirely

well, but the recovery was not complete until after this suit had been instituted. It was further pleaded in this connection that plaintiff in error had agreed to await the results of the treatment to the extent of one year's time, if necessary, but did not do so, filed his petition herein, and therein made charges against the defendant in error, which were to his knowledge false and unfounded. The foregoing affirmative matters of the answer were pleaded as acts of extreme cruelty on the part of plaintiff in error toward defendant in error. It was further alleged in the answer that plaintiff in error was possessed of property of the aggregate value of $20,000 over and above liabilities and indebtedness. The prayer of the answer was for a divorce and proper alimony. To the answer a demurrer was interposed, which on hearing was overruled. The plaintiff in error then filed a reply, in which the new material matter of the answer was denied, and it was averred that he was not worth beyond his indebtedness to exceed $4,000. The issues were tried and the plaintiff in error denied relief. A decree of divorce was granted defendant in error, and all the household furniture was given to her, and the plaintiff in error ordered to pay to her the sum of $5,000. The case is presented to this court for the plaintiff by petition in error.

It is insisted that inasmuch as in the statutory provisions relative to actions to obtain divorces there is no provision which authorizes the presentment of a cross-petition or the granting of affirmative relief to defendants in such actions, none may be filed, and no such relief can be afforded. Section 11 of chapter 25, Compiled Statutes, subject "Divorce and Alimony," reads as follows: "Suits to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner as other suits in courts of equity; and the court shall have the power to award issues, to decree costs, and enforce its decrees as in other cases." In any action a defendant may set forth in the answer and is entitled to be heard

on as many grounds of defense and counter-claim as may exist in his or her favor. The counter-claim must be one arising out of the contract or transaction set forth in the petition, or connected with the subject of the action. (Code of Civil Procedure, secs. 100, 101.) Under similar general provisions, it has been adjudged competent for the defendant in an action of divorce to plead and maintain in effect a cross-action. (*Dodd v. Dodd*, 14 Ore. 338, and citations; *Wilson v. Wilson*, 40 Ia. 230.) Under the rules of the common law, a defendant may be entitled to a claim and receive affirmative relief, and in the absence of statutes on the subject this may be followed. (*Wucst v. Wuest*, 17 Nev. 217; *Blakely v. Blakely*, 89 Cal. 324.) In this state, to the extent I am informed, it is the practice universally observed by the bar, and in the district courts, to file cross-petitions for defendants in divorce cases, and to demand, and if there is sufficient cause shown there is granted, affirmative relief. In the supreme court the practice may be at the least said to have been recognized. (See *Wilde v. Wilde*, 37 Neb. 891; *Shafer v. Shafer*, 10 Neb. 468; *Greene v. Greene*, 49 Neb. 546; *Atkins v. Atkins*, 13 Neb. 271.) That it is a matter of established practice is proper to be considered, though not necessarily determinable of the question. (*Min Young v. Min Young*, 24 Weekly Law Bulletin [O.] 260.) We feel constrained to hold that cross-petitions are proper and may be filed in actions of divorce, and affirmative relief obtained.

One complaint of the answer or cross-bill was based on the charges made by plaintiff in error in the petition in this action, and the question argued is, can the defendant in the cross-petition declare, and successfully rely for affirmative relief, upon the charges in the petition in the same action. That such charges had been made might possibly afford material for suit by the defendant subsequent to the determination of the action in which they were made, but not for a cross-bill in the same case. (*Simons v. Simons*, 13 Tex. 468; *Haley v. Haley*,

74 Cal. 489.) It is insisted that the evidence fully warranted a finding for plaintiff in error on the allegations of the first cause of action, and it was error that the trial court did not adjudicate in his favor as to this branch of the case. The evidence did disclose that the defendant in error was not entirely healthy at the time of the marriage, and had for some considerable time prior thereto had a more or less continuous discharge from the vagina, which evidenced a somewhat diseased condition, and of this she had knowledge, but of its exact character or significance, or that it betokened any disease, or that she was other than a perfectly healthy woman she did not know. The trouble had never caused her any pain, uneasiness, or difficulty; hence she had not thought much about it, or had paid very little attention to it. The evidence disclosed that the plaintiff in error at the time of the marriage was a year or more than thirty years of age, and the defendant in error was nineteen. Neither of them desired that she should conceive as the result of their union and intercourse; did not wish any child to be born to them, or not until after the lapse of some considerable time more than naturally it is usual to expect such an occurrence or event. The plaintiff in error procured and carried with him on the wedding trip, not, however, by pre-arrangement or with her knowledge, some sulphate of zinc, and at night, the first night of the marriage, after they had sexual intercourse, he gave some to her for use; a certain amount dissolved in a prescribed quantity of water to be injected into the private parts for the purpose, she testified he stated to her, of prevention of conception. It is his testimony that he told her it was for the promotion of cleanliness, and that with this latter purpose in view he had obtained it; that he used it himself. Its use was continued by the wife, and more especially after it was discovered that she had a discharge from the parts. She then resorted to it once and sometimes twice during the day. There was testimony sufficient to induce a belief that

during the first few weeks of the married life of this couple there was sexual intercourse at the demand of the male almost every night; and subsequently two or three times every week, he stating to her that twice a week was as often as the best interests of his health would permit. It was of her testimony that she gratified his desires whenever he expressed a wish in that direction, and that he expressed himself as well pleased and entirely satisfied; that he said, after it was ascertained that she was not entirely free from disease, that it caused him no uneasiness or lack of enjoyment, and never faulted her, or made any objections to her or her physical condition, competency, or qualifications, until December 26 of the year they were married, and about six months after the wedding, at which time, in the evening or night-time after they had retired to bed, he, after about fifteen minutes in the bed, arose and said he could not sleep, and made the specific charges against her that she was diseased and malformed, and incurably so, that she was physically incapacitated thereby to perform her part in the married life, that his uneasiness and disappointment at her lack of response to his advances were ruining his health, and they must separate. The next morning a letter which he had written to her father and which read as follows:

"SEWARD, NEB., Dec. 27, 1894.

"*Mr. John Kribbeler, City*—DEAR SIR: Please read the enclosed pages. Mamie is badly afflicted with several diseases, which are ruinous to a man's health. Therefore I request that Mamie and I be separated to-day, in a peaceful and friendly manner, for the benefit of each other's future happiness. My advice would be to send her to a specialist of female diseases. I request a meeting—you and myself—at my residence at 7 o'clock this evening,"—

was delivered, and on that day the father, mother, daughter, and son-in-law met at the home of the young people, and after some considerable consultation about

a separation, to which all were opposed, except the plaintiff in error, and for which he at that time apparently was not anxious, if any other proper and satisfactory solution of the matter could be made, the agreement for treatment of the defendant in error by the physician at Ashland was concluded. The plaintiff in error testified that he knew that his wife was not healthy, or that she was not just as she should be physically, but did not say much about it for some months, but about October 10, 1894 (they were married, it will be remembered, July 11 of the year), he asked her about it, and made an examination, and from then sulphate of zinc was used once a day or oftener during a month or more, but without any apparent change for the better. Aside from this one matter it was shown that their life together was undisturbed by any unpleasantness or difficulty of any nature. Each treated the other with due consideration and kindness, and there was no fault-finding or cause given for it, except in one instance, the blow which in the second cause of action it was alleged the defendant in error struck the plaintiff in error. Of this more anon. Further in regard to plaintiff in error's first cause of action it was shown that defendant in error, within the number of weeks assigned as necessary for treatment, became cured, and continued, at the time of trial of this cause, a healthy, perfect woman. On some points relative to this branch of the case the evidence was in direct conflict, but there was ample to sustain the finding of the district court, and it will be allowed to stand.

In relation to the complaint of the second cause of action there was testimony to support a conclusion that it was a matter of playful or accidental occurrence, and was so treated and regarded by the immediate parties to it until the inception of this suit, when what may have been the real concurrent thoughts of the plaintiff in error were given in the pleading. The conditions of the evidence are such that the finding of the trial court must, under the prevalent rule, remain undisturbed.

Another question much mooted is the want of evidence to warrant the finding in favor of defendant in error on the allegations of the cross-petition. It may be said that the charges by plaintiff in error that the defendant in error was incurably diseased were false; that they were made and urged persistently and at inopportune times and places, not only in the presence of and to the defendant in error and near relatives or immediate members of the family, but to others of the community in which the parties resided; that they were thus given publicity. It was of the evidence that the plaintiff in error talked about the matter of his wife's physical short-comings, for such he viewed and termed them,—with his barber, not once, but a number of different times; and these continual complaints to her personally, and her knowledge that his assertion of her diseased condition had been given publicity by reason of his conversations, all combined, she states caused her much mental anguish and trouble, and bodily ill. That they did so might readily be concluded without any direct testimony to such effect. But there was the testimony, and we must accept the finding of the district court on the facts as warranted by the evidence; but in this connection it is further urged that conceding all these things to be true or established, there was not thus proven conduct toward the defendant in error by plaintiff in error which constituted "extreme cruelty" within the accepted definition of such expression or within its meaning as used in our statutes. In our law on the subject the statement is: "A divorce from the bonds of matrimony * * * may be decreed for the cause of extreme cruelty, whether practiced by using personal violence, or by any other means." (Compiled Statutes, ch. 25, sec. 7.) It would seem to require no more than a fair construction, or rather no construction, if the words employed be given their ordinary signification, which is proper, any conduct which is cruel in the extreme sense was the intention and is included, and if extreme cruelty can be practiced without a manual

or such threatened hurt to the physical organization, then actions of the nature disclosed herein may furnish cause for divorce. The definitions of cruelty, as used in the law of divorce, have been many, but it has been probably generally stated that to constitute it there must be actual personal violence, or the reasonable apprehension of it, or in another form that physical harm is the test of cruelty. It is said that the weight of authority now is to the effect that misconduct which tends to impair the health, or which creates an apprehension of bodily injury, is cruelty, although no personal violence is used. (9 Am. & Eng. Ency. Law [2d ed.] 788.) That extreme cruelty included conduct other than personal violence has been recognized by this court (*Powers v. Powers*, 20 Neb. 529), and to a lesser degree in some others; but in all there was an accompaniment of personal violence, or it was threatened. A false and malicious charge of adultery is within the definitions of cruelty. (9 Am. & Eng. Ency. Law [2d ed.] 797.) A malicious accusation of impotence may be cruelty. (*Barber v. Barber*, 7 Western L. J. [N. Y.] 277. The charge made was quite similar to the one in the case at bar. In Kansas one of the things for which a divorce might be granted was "extreme cruelty," and it was held that mental suffering which rendered the married life intolerable or destroyed its legitimate ends and objects was "extreme cruelty." (*Carpenter v. Carpenter*, 30 Kan. 712.) It was observed in the body of the opinion that "The legal question that arises upon these facts is, whether they constitute 'extreme cruelty,' or not, within the meaning of the divorce statute. It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or the wife, which so grievously

wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health or endanger the life of the other, or such as in any other manner endangers the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes 'extreme cruelty' under the statutes, although no physical or personal violence may be inflicted or even threatened."

The facts of the present case are different, but the charges made were ugly ones and certainly well calculated to, and did, if we may believe the evidence,—and the trial court apparently believed it,—destroy the defendant in error's peace of mind; and it would be difficult to imagine any further marital intercourse between these parties which could have been other than distasteful and intolerable to the defendant in error, or indeed to the other party. We think the case considered in the abstract comes within a fair reading of our statute on the subject. This particular case is not by its facts as satisfactorily within such a rule as may be some of a similar nature, but we feel constrained to conclude not to disturb the finding and adjudication on this branch of it made in the district court, although a contrary finding would not have been changed.

The decree of the trial court in regard to alimony was as follows: "The court further finds that the defendant be allowed alimony as follows: The entire household furniture and one Steinway piano, now in the residence lately occupied by the parties, all of the value of $1,000, and the sum of $5,000 in money, to all of which plaintiff excepts." It is strenuously urged that this was excessive, and the reversal of this portion of the decree in whole or in part is asked, if the decree, inasmuch as it awards a divorce, is approved. The allowance of alimony, especially the amount thereof, is within the discretion of the trial court, and unless there has been a clearly wrongful exercise of the discretion, this court will not interfere on the ground that there was an exces-

sive sum given. (*Wilde v. Wilde*, 37 Neb. 891.) "There is no fixed rule as to the proportion of the husband's property or permanent alimony to be decreed to the wife on granting a divorce. * * * The amount is to be just and equitable, due regard being had to the legal and equitable right of each party, the ability of the husband, the special estate of the wife, and the character and situation of the parties." (*Varney v. Varney*, 58 Wis. 19; *Smith v. Smith*, 19 Neb. 706; *Cochran v. Cochran*, 42 Neb. 612.) We need not quote from or summarize here the evidence on this branch of the case. A careful examination of it convinces us that the trial court erred in its allowance of alimony. The wife had contributed nothing to the common fund. It is true some furniture and household articles had been given to her, but it does not appear that anything had been contributed by or for her to the financial worth of the parties. The defendant in error may within twenty days file a remittitur of the sum of $3,500 of the amount of $5,000 ordered to be paid as permanent alimony. If done, the decree, as thus changed, is affirmed; if not done, the decree of a divorce to the defendant in error is affirmed, and the order for alimony is reversed, and the branch of the cause in regard thereto is reversed and remanded.

JUDGMENT ACCORDINGLY.

NORVAL, J., offered no opinion.

COLUMBIA NATIONAL BANK OF LINCOLN V. GERMAN NATIONAL BANK OF LINCOLN.

FILED DECEMBER 8, 1898. No. 8509.

1. **Testimony and Evidence:** DEFINITIONS. "Testimony" and "evidence" are not synonymous terms. The latter is the generic term, and the former applicable to a species or kind of evidence.

2. **Bill of Exceptions:** PRESUMPTIONS: EVIDENCE. If a bill of excep-

tions which purports to contain all the evidence is submitted to the adverse party for examination and amendment, and he returns it with an indorsement that he has no amendments to propose, it will be presumed to contain all the evidence. (*Cattle v. Haddox*, 14 Neb. 59.)

3. ———: AUTHENTICATION. The use of the word "testimony" for "evidence" in the certificate of the trial judge in the allowance of a bill of exceptions, if the meaning is obvious, or it is clear that the latter is intended, will not render the document inoperative.

4. **Action on Check.** A check upon a bank by a depositor operates a transfer of its amount to the payee if on deposit at the time of presentation, and the payee or holder may, on refusal of payment, maintain a suit on the instrument for the recovery of its stated sum.

5. **Banks and Banking:** APPLYING ACCOUNT TO DEPOSITOR'S DEBT: CHECKS. As against the holder of a check against an account of a depositor the bank of deposit may not apply the amount of the account to the payment of the indebtedness of the depositor to the bank which is not yet due, although the depositor may be insolvent.

6. **Pleading:** INCONSISTENT DEFENSES: ESTOPPEL. Two defenses irreconcilably inconsistent may not be enforced, and the position assumed by the party prior to the suit relative to the facts and circumstances involved in the transactions drawn into question will prevail.

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

J. H. Broady and *E. E. Brown*, for plaintiff in error.

N. C. Abbott and *Abbott, Selleck & Lane, contra.*

HARRISON, C. J.

On June 2, 1893, the State Bank of Cortland was engaged in the business suggested by its name, and at the place thereby indicated, and in the course of such business drew and forwarded an order or a check on the German National Bank of Lincoln in favor of "J. H. McClay, cashier," he being such officer of the Columbia National Bank of Lincoln, for the sum of $898, and inclosed the same in an envelope addressed "Columbia Na-

tional Bank, Lincoln, Nebraska," and mailed the package. On June 3 it did likewise in relation to an order or check similar in form and substance in the material portions except amount, which was $3.88. The instruments, or checks we may call them,—for whatever may be the proper technical designation they were in effect checks and to be considered as such (*Bull v. First Nat. Bank of Kasson*, 123 U. S. 109),—were received through the mail by the Columbia National Bank on June 7, 1893, and were, in the morning of the day of reception, presented to the drawee for payment, which was refused. The bank of Cortland had an account with the German National Bank, and on the morning of June 7, 1893, there was to the credit of the former the sum of $983, which was subject to check. At the close of business on June 6, 1893, the bank of Cortland suspended, passed into the hands of a receiver, who afterward continued in possession for the sole purpose of adjustment of its affairs. The bank of Cortland was a debtor of the German National Bank, the indebtedness being evidenced by promissory notes which were payable on dates subsequent to June 7, 1893, or they were not then due, but on that date the amount, which was shown by the open account, in favor of the bank of Cortland was by the German National Bank credited as a payment on one of the notes to which we have just referred, and the account balanced or closed. In this, an action by the Columbia National Bank against the German National Bank to recover the amount of the two checks sent it by the bank at Cortland, the defendant was accorded a judgment, to reverse which the plaintiff has prosecuted an error proceeding to this court.

What may not be inaptly termed a preliminary question, which has its origin in the condition of the record as presented, is raised and urged for the defendant. The certificate of the trial judge of the allowance of the bill of exceptions recites that the document contains "all the testimony adduced or offered on the hearing of the"

cause, and in other portions of its statements the reference in each is to "testimony." It is of this it is objected that it is insufficient, inasmuch as "testimony" means but a part of the evidence, and the certificate should show that all the evidence was included in the bill of exceptions. It is incontestably true that "testimony" and "evidence" are not synonymous terms; that testimony is but a kind or species of evidence; that the former is in a trial the portion of the latter which may be given orally by witnesses; that the latter is inclusive of the testimony of witnesses, documents, etc.; that "evidence" is the generic term (*Gazette Printing Co. v. Morse*, 60 Ind. 153); and if we were confined to the certificate and could look no further, it might be fatal to the bill of exceptions (*Gazette Printing Co. v. Morse, supra; Lindley v. Dakin*, 13 Ind. 388); but an examination of other parts of the document reveals that it was presented, as the law required, to the adverse party for examination and proposal of amendments, and returned indorsed, "I herewith return the within bill of exceptions and suggest no amendments," over the signature of counsel. From such an indorsement the presumption arises that the bill of exceptions, on which it appears, contains all the evidence, though the certificate of the trial judge may not so state. (*Cattle v. Haddox*, 14 Neb. 59.) There being nothing in this record to indicate to the contrary, such presumption must be indulged and govern. Furthermore, if the certificate be read in connection with other matters of the bill of exceptions to which it is attached, it is clearly disclosed that testimony therein is used as the equivalent of evidence, and when this is true, it is sufficient. (*Harris v. Tomlinson*, 130 Ind. 426.)

It is the contention for the plaintiff that the judgment of the trial court was violative of the rules that a check drawn on funds in a bank is an appropriation of its amount in favor of the holder, and on refusal of its payment, where the funds have not been drawn out prior thereto, the holder may sue for the recovery of the

amount (*Fonner v. Smith*, 31 Neb. 107); and further, that the bank could not, as against the rights of the holder of the checks, apply the deposit or money on open account subject to check to the payment of a debt of the depositor to the bank, which had not matured or was not due. We believe these propositions advanced for the plaintiff are sound, and will adopt them. They are thoroughly supported by precedent, and we think the logic and reason applicable to the events and circumstances of the matter in hand. Counsel for plaintiff have cited the following cases, which fully sustain their position: *Merchants Nat. Bank v. Robinson*, 97 Ky. 552, 31 S. W. Rep. 136; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Fuller v. Steiglitz*, 27 O. St. 355; *Jones v. Manufacturers Bank*, 10 W. N. C. [Pa.] 102; *Manufacturers Nat. Bank v. Jones*, 2 Pen. [Pa.] 377; *Oatman v. Batavian Bank*, 77 Wis. 501; *Merchants Nat. Bank v. Ritzinger*, 20 Ill. App. 27; *Skunk v. Merchants Nat. Bank*, 16 W. L. B. [O.] 353; *Spalding v. Backus*, 122 Mass. 553.

It was of the evidence that on the morning of June 7, 1893, the cashiers of the defendant bank had a telephonic conversation with the president of the bank of Cortland, in which the propriety of the action of the former in applying the amount of the open account of the latter as a payment on its debt to the former, which was not yet due, was discussed, and soon after this conversation was closed, the president of the bank of Cortland sent a telegram to the said cashier in which he attempted for the bank to authorize such action as we have indicated. The telegram was of date June 7 and stated: "Apply our balance on our indebtedness. State Bank Cortland." But all this was futile, for the Cortland bank had, on the evening of June 6, passed from the control of its officers to the hands of the officers of the state, and it was no longer a going concern.

It appeared in evidence that of the amount of the open account of the Cortland bank with the defendant at or about the times of the transactions involved herein there

was the sum of $590.05, the amount of a draft received from the bank of Cortland, and with which it was credited and of which payment was refused on presentation to the bank in Chicago on which it was drawn. It was subsequently paid, but this fact cuts no figure in the present controversy. It is now urged for defendant that it had the right, when the payment of this draft was refused, to charge its amount back against the account of the Cortland bank, and this being true, there was not money to pay the checks of plaintiff in the hands of defendant, and its refusal of payment was warranted and must be upheld. As we view this matter as developed in the evidence the defendant has furnished by its action a solution of this question. On the morning of June 7 it had no hesitancy, when it desired to apply the amount of the balance of the account of the bank of Cortland to the payment of its debt to the defendant, in considering the whole of such amount as belonging unqualifiedly to the bank of Cortland, and will not be heard to assert now, if such money cannot be applied as it was then placed, it was but conditionally the property of the bank of Cortland, and we will now take another and different position in regard to it. It follows from what has been said that the judgment of the trial court was wrong, and it must be reversed.

REVERSED AND REMANDED.

O. C. GATES, APPELLEE, V. B. F. JOHNSON, APPELLANT.

FILED DECEMBER 8, 1898. No. 8529.

1. **Conflicting Evidence:** REVIEW. In an appeal to this court the findings of a trial court, if upon conflicting evidence, will not be disturbed unless clearly wrong.

2. **Partnership:** DEFINITION. "Copartnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to

divide the profits or bear the loss in certain proportions. Following Kent's definition, 3 Comm. 34." (*Waggoner v. First Nat. Bank of Creighton*, 43 Neb. 84.)

3. ———: COMMUNITY OF INTEREST. A community of interest in the profits as such, of a business venture, and not by way of payment or compensation for services or other assistance therein, may be sufficient to constitute a copartnership.

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

B. F. Johnson, for appellant.

Stewart & Munger, contra.

HARRISON, C. J.

In an action by the appellee against the appellant in the district court of Lancaster county to recover an alleged share of the profits derived from the erection of a building, the former was successful and the matter has been appealed to this court. The determination of the litigated issues in the trial court hinged upon the question of the existence or non-existence of a partnership between the parties to the suit at the time or during the performance of the building contract. It is here asserted for the appellant that the evidence was insufficient to support the finding that there was a partnership. Suffice it to say on this subject that an examination of the evidence develops that in it there was a conflict on the issue of a partnership or non-partnership, and that it was somewhat evenly balanced, but with sufficient to sustain a finding of either, which being true, the settlement of the question by the trial court must be given recognition, and prevail. It cannot be said that the conclusion of the district court was clearly wrong or had not sufficient evidence in its support. (*Hunt v. Huffman*, 41 Neb. 244; *Steinkraus v. Korth*, 44 Neb. 777.) For a definition of copartnership, and that a community of interest in a business enterprise, venture, or undertaking and the profits thereof may constitute it, without an express agreement

to share any losses, see *Waggoner v. First Nat. Bank of Creighton*, 43 Neb. 84. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. JOSEPH S. BARTLEY ET AL.

FILED DECEMBER 8, 1898. NO. 10117.

1. **Impaneling Jury:** REVIEW OF RULINGS. Retention or rejection of a juror, during the impaneling of a jury, to whom an objection has been interposed, is a matter within the discretion of the trial judge, and in the absence of an abuse of such discretion will furnish no available error.

2. **New Trial:** RULING ON MOTION: EXCEPTION: REVIEW. To obtain a review in this court of questions raised in a motion for a new trial an exception must be taken at the time of the decision to the overruling of said motion.

3. **Construction of Code.** The Code of Civil Procedure, in all its provisions and all proceedings under it, must be liberally construed, with a view to promote its object and assist parties in obtaining justice. (Code of Civil Procedure, sec. 1.)

4. **Review:** EXCEPTION TO JUDGMENT. To obtain a review of the proceedings of the trial court in a suit an exception to the final judgment is unnecessary.

5. **New Trial:** RULING ON MOTION: EXCEPTION: REVIEW. A journal entry disclosed the presentment of a motion for a new trial. In the same entry was stated that defendant moved for judgment, also the rendition of the same,—following all of which there appeared this: "To all of which plaintiff duly excepts." *Held*, Sufficient evidence of the exception to the action of the court on the motion for a new trial, although somewhat questionable practice to have the exception so noted.

6. **Instructions:** RECORD FOR REVIEW. The instructions to a jury are proper matters of the record, and need not, in general, be preserved in the bill of exceptions. (*Blumer v. Bennett*, 44 Neb. 873.)

7. **Exception:** RECORD. Taking an exception is an act of counsel in court. The evidence of the act is its notation of record. (*Blumer v. Bennett*, 44 Neb. 873.)

8. **Instructions:** EXCEPTIONS: RECORD FOR REVIEW. A prepared statement in writing of the exceptions to the giving specifically designated instructions, also to refusals to give requested ones duly filed at the proper time, indorsed by the trial judge "allowed," and authenticated as a part of the proceedings, *held* to furnish

evidence of the exception having been made and to not be an improper manner of notation; also properly of the record.

9. ———: EVIDENCE: REVIEW. Instructions to a jury which leave that body at liberty to infer or find facts as existent, of which there is no evidence, are erroneous, and such errors, unless without prejudice, furnish ground for reversal of a judgment.

10. **Action on Bond of State Treasurer:** VERDICT FOR DEFENDANTS: EVIDENCE: INSTRUCTIONS. The verdict, insomuch as it was necessarily based on a negative finding upon one of the issues in relation to an alleged failure or default of a state treasurer in the performance of the obligations of his official bond, determined not sustained by sufficient evidence, contrary to the evidence, the instruction of the court, and the law.

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

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

John C. Cowin, E. M. Bartlett, James Manahan, Frank T. Ransom, E. E. Brown, N. S. Harwood, John H. Ames, Harwood, Ames & Pettis, and *C. C. McNish, contra.*

HARRISON, C. J.

In the petition in this, an action commenced in the district court of Douglas county, it was pleaded that Joseph S. Bartley was duly elected treasurer of the state, for a specific stated term, furnished the necessary bond, and assumed the duties of the said office. It was further alleged that in Douglas county he converted to his own use the sum of $201,884.05, and had failed and refused to account for said sum or to turn the same over to his successor in office. It was also set forth that he had failed to account for or pay to his successor a sum of $353,906.61, with which he as such officer stood charged. This suit was on the bond against him as principal, and the other defendants as sureties, to recover the amounts of the alleged shortages in his accounts, aggregating $555,790.66. The petition also contained an allegation that the Omaha National Bank was a duly accepted, ap-

proved, and designated state depositary for funds of the state, and had on a designated date on deposit a sum of the public moneys in excess of $201,884.05. The answers of the defendants were of much the same tenor, except in that of Mary Fitzgerald there was a further defense, —that of her insanity at the time she signed the bond in suit. Of each of the answers was a portion whereby it was sought to raise the question of the jurisdiction of the trial court to entertain and hear the cause. Issues were joined, and a trial resulted in a verdict and judgment for the defendants, and the state seeks a review of the proceedings.

In the brief filed for plaintiff in error there is first contained a complaint of some orders and actions of a judge or the judges of the trial court, of whom there are several in the district of the trial of the cause, with reference to before which one the trial of the suit should be, and its ordered removal from the call which would have brought it on for trial before one of the judges to the call which caused the trial to be before another judge. Whatever there may have been of these things, an examination of the record does not disclose other than a desire of the judge who presided during the trial to fairly and impartially conduct the same. We do not know whether counsel, in the remarks on this subject, merely indulged a wish to scold a little; but whatever may have prompted the remarks, the record shows nothing reprehensible, erroneous, or extraordinary in the actions which furnished the basis for the statements in the brief.

In each of the matters of rejections and retentions of jurors, to which reference is made in the argument for plaintiff in error, the trial court might exercise its discretion; and without an abuse thereof they can furnish no cause for reversal. There was no abuse of the discretion, and the argument fails. They can furnish no cause for reversal. (*Omaha S. R. Co. v. Beeson*, 36 Neb. 361.)

We will now turn our attention to some arguments for the defendants in error relative to points of practice, in

each of which it is asserted there is a lack or failure of proper objections, or to preserve exceptions to decisions or actions of the trial court, such as precludes their presentment for review here. Of these is that there was no exception to the ruling on the motion for a new trial. Such an exception is necessary to obtain a review of questions raised in the motion. (*Van Etten v. Medland*, 53 Neb. 569; *Twomey v. Willman*, 43 Neb. 28.) If an exception was noted to the overruling of the motion for a new trial, that it was done appears in the following journal entry: "Now, on this day, this cause coming on for hearing upon the motion of the plaintiff filed herein, to set aside the verdict of the jury heretofore rendered in this case, and for a new trial herein, the court on consideration hereof, being fully advised in the premises, overrules said motion. Thereupon, on motion of defendants for judgment on the verdict, it is considered by the court that the above entitled cause be, and the same hereby is, dismissed, and that the said defendants, and each of them, go hence without day and recover of and from the said plaintiff their costs herein expended, taxed at $——, to all of which the plaintiff duly excepts, and on application is hereby given forty days from and after the rising of the court at its present term in which to prepare and serve bill of exceptions herein." The argument here is that the entry discloses two motions,—one for plaintiff, which was overruled and no exception taken; a motion for judgment sustained, to "all of which the plaintiff duly excepts;" that this was an exception to the affirmative action on the motion for judgment and entry of judgment, or the exception was, at least, indefinite, and cannot be said to be applicable to the negative action as to the motion for a new trial. In section 1 of the Code of Civil Procedure it is prescribed: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its object

and assist the parties in obtaining justice." With this in view, the exception noted in the entry which we have quoted must be held directed against the order relative to the new trial. No exception to the final judgment or to the ruling by which it was rendered was necessary (*Erck v. Omaha Nat. Bank*, 43 Neb. 613); and to say, where there is a statement of an order overruling a motion for a new trial, also of a rendition of judgment, and motion for it sustained, and all are blended or appear in statement in one journal entry, and the statement in regard to exceptions is at the close of the entry, and such notation of exception is worded as the one in this case, that it is applicable to the action relative to which none was necessary, and inapplicable to the one as to which it was a vital necessity, or that it was so indefinite that the ruling against which it was specifically directed is not ascertainable or cannot be discerned, would not be giving force to the rule of construction to which we have referred, but would be to ignore it. It would doubtless in this case have been better practice to have secured an entry to be made which would have shown beyond a possibility of question, or even cavil, the exception to the order on the motion for a new trial; but we must consider the record as made, and we conclude the exception to such order is sufficiently disclosed by the record.

It is also urged for defendants that there were no exceptions to the instructions of the court, or its refusal to give requested instructions. There is in the record a copy of a paper, which the clerk of the court states was duly filed, and which is marked "Exception by plaintiff," and "Exceptions taken by plaintiff to instructions given by the court on its own motion, and to the refusal of the court to give instructions requested by plaintiff;" and the several numbered exceptions indicated by the heading appear in the body of the document, which has at its close the signature of the attorneys for the plaintiff; and there also appears on the paper the following: "Exceptions allowed. Clinton N. Powell, Judge." This,

the transcript states, was filed the day the cause was submitted to the jury, and immediately succeeding it in the transcript is the statement: "And the said jury now having heard the remaining arguments of counsel, and the charge of the court, retire to their room in charge of bailiff," etc. In the certificate to the record is, with others, the following statement: "I, Albyn L. Frank, clerk of the district court in and for Douglas county, Nebraska, do here certify that the foregoing is a full and true transcript of the proceedings had in the cause, * * * containing the petition, * * * charge of the court, instructions asked by plaintiff and refused, exceptions by plaintiff." In sections 52 to 56, inclusive, chapter 19, Compiled Statutes 1897, are contained directions in regard to instructions to juries and exceptions thereto. Section 308 of the Code of Civil Procedure is to the effect that an exception must be to a decision at the time made. Section 310 states that if the decision is entered of record, also the grounds of objection, the exception may be by a notation at the end of the decision; but nowhere do we find just how the exceptions shall be evidenced of record.

It is stated in the reply brief filed for the state that the exceptions to the instructions in this case were evidenced in accordance with the method almost universally practiced by the bar in Douglas county,—the place of trial. However this last may be, the instructions were themselves properly matters of the record in this state, and not to be preserved in the bill of exceptions. (*Eaton v. Carruth*, 11 Neb. 231; *Cleveland Paper Co. v. Banks*, 15 Neb. 20; *Blumer v. Bennett*, 44 Neb. 873.) Taking an exception is the act of counsel in court. The evidence of such act is its notation on the record. (*Blumer v. Bennett, supra.*) We are satisfied that the manner of evidencing the exceptions in the present case was not improper, and that the notation by form of statement expressed in writing, and the prepared statement allowed and so indorsed by the trial judge, and filed with the clerk of the

court, and authenticated as a part of the proceedings, must be received as a recitation, and evidential of the exceptions; and to be so received, it need not be embodied in the bill of exceptions.

We have now noticed and determined such matters as were urged on behalf of defendants, the disposition of which must necessarily precede the examination of the questions raised in the arguments for the plaintiff.

One of the alleged shortages declared upon in the petition was of the sum of $201,884.05, and relative to this sum it was shown that the legislature had passed an act in which an amount, $180,101.75, was appropriated from the general fund of the state to reimburse the sinking fund in said amount. In the act making the appropriation the language was as follows: "For state sinking fund, one hundred eighty thousand and one hundred and one and seventy-five one hundredths ($180,101.75) dollars, to reimburse said fund for amount tied up in Capital National Bank." (Session Laws 1895, p. 404, ch. 88.) The act was approved and became of effect; and it appears that afterward a voucher signed by J. S. Bartley was presented to the auditor of public accounts and approved, and that J. S. Bartley signed a receipt thereon to the effect that he received warrant No. 95241, amount $180,101.75. The voucher to which we have just referred was a claim to the said sum for the sinking fund, and for its reimbursement, and recited the facts in substance as stated in the act of appropriation, and identified the act as being a "house roll," and gave its number. The warrant was as follows:

"TREASURY WARRANT.

"$180,101.75 STATE OF NEBRASKA. No. 95241.
21,782.30

$201,884.05

"OFFICE OF AUDITOR OF PUBLIC ACCOUNTS.

"LINCOLN, NEB., Apr. 10, 1895.

"*Treasurer of Nebraska*,

"Pay to J. S. Bartley, or order, one hundred eighty

thousand one hundred one & 75-100 dollars, for to reimburse state sinking fund. In accordance with legislative appropriation approved Apr. 10, 1895, and charge general fund. EUGENE MOORE,

"Countersigned: *Auditor Public Accounts.*

"J. S. BARTLEY,

"*State Treasurer.* P. O. HEDLUND, *Deputy.*"

Stamped on face with rubber stamp: "Paid Jan. 3, 1897."

The warrant and the money were the property of the state. The designated sum was but to be changed from one fund to another, as authorized by the legislative act, and the treasurer took the method indicated, presumably to effect the desired transfer. It was also of the evidence that this warrant was registered for payment on the date of its issuance, April 10, 1895; and in the "Warrant Register" the date it was paid appeared as "1|2|97;" interest $21,782.30; total $201,884.05. The evidence further disclosed that on January 2 or 3, 1897, the warrant was in the Omaha National Bank, and Joseph S. Bartley, then state treasurer, went to Omaha and to the bank, there drew his check as state treasurer, or had one with him which he had previously drawn, for the sum of $201,884.05, payable to either the bank or "J. H. Millard, Pt.," delivered it to the cashier of the bank, and received from him the warrant, No. 95241, stamped paid. The bank was then a state depositary of funds and had more than the amount called for in moneys of the general fund of the state then on deposit. The check ordered the payment of its amount from the amount on deposit of said fund, and it was testified that it was so paid to the party in whose favor the check was drawn. The account of the bank with the general fund of the state was charged with, and diminished by, the sum so paid. The sinking fund did not receive it. There was, by all this, effected by the treasurer a misappropriation of the said amount, and a shortage created in the funds of the state. He thereby violated the obligation of his bond, and there

accrued a liability on his bond. There was also elemental of this transaction that which satisfied the jurisdictional question raised by the answers.

In regard to the occurrences in the Omaha National Bank the trial court charged the jury as follows: "You are instructed that the defendant Joseph S. Bartley, as state treasurer, had no right or authority to transfer to the Omaha National Bank, or to any other person, the title to the warrant for $180,101.75 received in evidence in this case, nor had he the right to pay the same to said bank, or to any other person, out of the money of the state of Nebraska. His sole duty in the premises was to take the money out of the general fund and turn the same into the sinking fund, credit one fund with the amount, and charge the other fund with a like amount; and if you find from the evidence that he failed to perform his duty in this regard, and paid the amount thereof to a party not entitled to receive the same, then he and his bondsmen would be chargeable in this action for such an amount, if any, as you find from the evidence the state was damaged thereby. Given." The jury, the evidence being to the effect it was on this subject of the trial, rendered a verdict which, it may fairly be said, was contrary to this instruction, and contrary to law.

In addition to the defenses interposed by and for the other defendants there was for Mary Fitzgerald, as we have before stated, the further defense of her insanity at the time she signed the instruments by which it was sought to bind her in the present action; and it is contended that there was sufficient evidence to sustain a finding in her favor as to this defense, and the verdict as to her must be affirmed. The parties are very urgent in their arguments on this branch of the case, and we have carefully weighed all the evidence which has reference to it, as, indeed, we have all of it. It would serve no useful purpose to quote from it or to summarize it here. It was conflicting and, as is often the nature of evidence, and on the subject here involved, not altogether satisfactory. It

may be further stated by way of argument alone that the instructions in regard to the issue of the insanity of Mrs. Fitzgerald, at the time she signed the instruments by which it was sought to bind her herein, were not erroneous; also that there was no error in the refusals to give the ones requested by or for the state relative to this issue; but of those given by the court on its own motion relative to the issue of any liability on the bond there were two at least which were bad in that by each the jury was allowed to deliberate and determine as to facts, and base a verdict upon said decision or finding, and of such facts there was no evidence,—was a total absence of any evidence. This was radical error (*Cropsey v. Averill*, 8 Neb. 151; *McCready v. Phillips*, 44 Neb. 790; *City of Crete v. Childs*, 11 Neb. 252; *Farmers Loan & Trust Co. v. Montgomery*, 30 Neb. 33; *La Bonty v. Lundgren*, 31 Neb. 419); and that it was committed was well calculated to mislead the jury. As to at least one, if not both, of these matters there was requested for the state an instruction by which, if it had been given in place of the one read, the error would have been avoided.

There were for Mrs. Fitzgerald two defenses. No special finding or verdict was asked for her relative to the issue of insanity, which was interposed for her, and for none other of the defendants; and no special finding as to such issue was made. The verdict was a general one in favor of the defendants. There is nothing in the record from which it can be determined whether the jury decided for or against Mrs. Fitzgerald on any particular issue. There is no means by which it can be determined; hence the court cannot ascertain it. The evidence on the question of the insanity of Mrs. Fitzgerald was not all to the one effect. That it was conflicting, we have before stated. There was error, as we have seen, in the submission of the one issue,—that of any default in the obligation of the bond,—which it cannot be said was not prejudicial; and this conclusion calls for the reversal of the verdict and judgment in favor of Mrs Fitzgerald, as

well as against the other parties. There were errors committed which it cannot be said were not prejudicial to the rights of the complaining party, and the verdict must be set aside. (*McCready v. Phillips, supra; Roberts v. Drehmer*, 41 Neb. 306; *Kansas City & Q. R. Co. v. Rogers*, 48 Neb. 653.)

A discussion of the other points would necessitate a more or less extended reference to, and comment upon, the evidence bearing upon them, and it is thought best, since the cause must be remanded for further proceedings, to not do so at this time; hence such discussion will be omitted. It follows from what has been determined herein that the judgment must be, and is, reversed and the cause remanded.

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Abstracts of Title.

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2. Facts stated in opinion *held* not ground of defense in an action against an abstracter for failure to make his abstract disclose the pendency of a suit affecting the title to the property involved. *Id.*

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Adverse Possession.

1. One who has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city under a claim of right, for ten years or more, thereby acquires an absolute title to the property. *Webster v. City of Lincoln* 502

2. A tenant remaining in possession after expiration of his term, without repudiating the relation created by the lease, does not hold adversely. *Carson v. Broady*..... 648

3. Where the proof tends to show a continuous exclusive possession for the statutory period by acts indicating dominion over the land, that there was proof of declarations of the occupant indicating that he did not at first claim ownership does not conclusively rebut the inference of a claim of right derivable from his acts, but the issue is for the jury. *Webb v. Thiele* 752

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4. Assignor of a note secured by mortgage cannot release promisor from liability for the debt, or disturb the mortgage lien. *Anderson v. Kreidler*..... 171

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1. A petition in a suit for wrongful attachment *held* not demurrable for omitting to give names of persons who refused plaintiff credit because of the attachment. *Kyd v. Cook*..... 71
2. Averments of petition in a suit for wrongful attachment of a merchant's goods *held* sufficiently specific to permit plaintiff to introduce evidence of loss of credit sustained by him. *Id.*
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4. Gains prevented by closing a merchant's store under a wrongful attachment are recoverable in a suit for damages. *Id.*
5. Where plaintiff's credit was injured or destroyed by wrongful attachment, he may recover whatever pecuniary damages he can prove by competent testimony. *Id.*
6. A loss of profits is a loss which may be reasonably, naturally, and ordinarily expected to follow from the closing up of a merchant's place of business and the seizure of his goods. *Id.*
7. Where a sheriff wrongfully attached a merchant's goods and retained them three months, the merchant, in a suit for damages, may prove sales and profits during corresponding months of the previous year as a basis to determine profits lost. *Id.*
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9. Where plaintiff in attachment knows that goods owned by a stranger were seized under the writ and sold, the act of the former in receiving the proceeds of the sale constitutes a ratification of the levy. *Omaha Nat. Bank v. Robinson*.... 590
10. Attachment plaintiff from whom the property was taken in replevin must follow the replevin action to judgment, and if successful, and the property be not returned, satisfy his judgment by execution, and, failing in this, look to the replevin bond for indemnity, and, if this proves worthless, to the official bond of the officer for negligently approving an insufficient replevin bond. *Shull v. Barton*..... 718

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2. Where an attorney purchases at judicial sale property in which his client is interested and conceals material facts which might affect the client's election to treat the attorney as trustee, dealings with the attorney on the basis of the latter's ownership will not prevent the client, on learning the facts, from enforcing the trust. *Id.*

3. Where an attorney purchases at judicial sale property in which his client is interested, the latter may treat the attorney as trustee, but the client, by afterward dealing with the attorney as owner, may ratify such purchase or estop himself from claiming the benefit thereof. *Id.*

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1. An assessment levied by the comptroller of the currency on a stockholder of a national bank draws interest from the date such assessment is made payable. *Estate of Davis v. Watkins* 288

2. In a suit against a stockholder of a national bank to recover assessments levied against him by the comptroller of the currency it will be presumed that the stock certificate bearing the corporate seal of the bank was issued and signed by the officer having authority. *Id.*

Banks and Banking—*concluded.*

3. In a suit against a stockholder of a national bank to recover assessments defendant cannot assail the validity of the incorporation of the bank. *Id.* 289

4. A national bank having given a transaction the form of one with an individual for the purpose of evading the liabilities peculiar to national banks, cannot be heard to assert its true nature for the purpose of evading the liabilities attaching to individuals and of claiming the privileges of national banks. *Gadsden v. Thrush* 565

5. A bank check transfers the amount thereof to payee if on deposit at the time of presentation, and the payee or holder may maintain suit on the check upon refusal of the bank to make payment. *Columbia Nat. Bank v. German Nat. Bank* .. 804

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1. In settling a bill of exceptions it is not sufficient that a paper containing suggestions of amendments be attached, and that it be disclosed that such amendments were allowed, but amendments which are allowed should be actually made in the body of the bill. *Brennan-Love Co. v. McIntosh* 140

2. A district judge has authority, after the expiration of the time for settling a bill of exceptions, to make corrections therein, if it be found not to disclose what it was intended to at the time of settlement. *Id.* ..... 141.

3. After the bill reaches the supreme court, if it does not disclose what the trial judge intended at the time of settlement, it will be remanded to the district court for correction. *Id.*

4. Where no order is made extending the time, a bill of exceptions, including the evidence given on the trial of a case, must be served within fifteen days from the final adjournment of the term at which the motion for a new trial is ruled on. *State v. Dickinson* 251

5. If there be no motion for a new trial, as in equity cases, the bill must be served within fifteen days from the final adjournment of the term at which judgment is rendered. *Id.*

6. Where there have been two or more trials, the bill of exceptions cannot, after the ruling on the final motion, reach back indefinitely and bring into the record the evidence adduced on former trials. *Id.*

7. The motion for a new trial mentioned in section 311 of the Code relating to bills of exceptions does not necessarily mean the motion immediately preceding judgment, but

Bill of Exceptions—*concluded.*

means in every case the motion following the particular trial, the events of which it is sought to make authentic history. *Id.*

8. Where a bill of exceptions purporting to contain all the evidence is submitted to the adverse party and returned with an indorsement that he has no amendments to offer, it will be presumed to contain all the evidence. *Columbia Nat. Bank v. German Nat. Bank*..... 804

9. A judge's use of the word "testimony" instead of "evidence" in his certificate of allowance *held* not to render the bill inoperative. *Id.*

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Clerk of District Court.

A clerk of the district court who receives, and in his own name deposits in bank, fines imposed by the court, and unlawfully uses the funds for private purposes, thereby converts

Clerk of District Court—*concluded.*

public moneys to his own use, is in default within the meaning of section 2, article 14, of the constitution, and is ineligible to any office of trust or profit during such default. *State v. Moores* 2

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Confessions. See CRIMINAL LAW, 7.

Consideration. See NEGOTIABLE INSTRUMENTS, 11.

Constitutional Law. See MUNICIPAL CORPORATIONS, 12-16. STATUTES.

1. Jurisdiction conferred upon the supreme court in direct terms by the constitution may be exercised, though no rules of procedure have been provided by the legislature. *State v. Moores* 1
2. In a quo warranto proceeding respondent cannot demand a jury trial as a matter of right. *Id.*
3. A clerk of the district court who receives, and in his own name deposits in bank, fines imposed by the court, and unlawfully uses the funds for private purposes, thereby converts public moneys to his own use, is in default within the meaning of section 2, article 14, of the constitution, and is ineligible to any office of trust or profit during such default. *Id.* 2
4. Section 4, article 11, of the constitution, by fixing the liability of stockholders, limits such liability, and it is not within the power of the legislature to extend it. *Gorder v. Connor* 781

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1. Payment of money by a public contractor to induce men to remain silent, or to lobby on behalf of contracts or estimates, is against public policy, and the courts will not compel contribution between partners on account thereof, nor will they, when one partner is chargeable with the receipts,

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2. Where two persons formed a partnership for the purpose of paving streets, and agreed that one member of the firm should manage the business and receive a stated salary therefor, and the firm employed a third person to superintend the work for 25 per cent of the net profits, it was *held* that in calculating the latter's compensation the salary of such member should be treated as an expense, but interest on money used in manufacturing brick was not allowed. *Id.* 88

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7. A plain, unambiguous contract in writing cannot be varied by parol evidence. *Id.*

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10. A contract rescinded for fraud is rescinded *in toto*, and an adjustment of matters growing therefrom must proceed on both sides independent of the contract. *Olson v. Lamb*..... 105

11. One rescinding a contract on the ground of fraud cannot recover damages sustained by reason of the fraud. *Smith v. Myers* 508

Restraint of Trade.

12. All contracts in restraint of trade are not forbidden by the

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anti-trust law (Session Laws 1889, p. 516, ch. 69), but only such as are entered into by parties who are "engaged in manufacturing, selling, or dealing in the same or any like manufactured or natural products." *Downing v. Lewis*..... 386

13. An agreement in partial restraint of trade, which is not within the inhibition of the anti-trust law (Session Laws 1889, p. 516, ch. 69), is valid and may in a proper case be enforced by injunction. *Id.*

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2. A stock subscriber who participated in a distribution of the assets of an insolvent corporation *held* not estopped from maintaining against co-subscribers an action for contribution, where the debt discharged by him was not provided for in the distribution. *Id.*

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Corporations. See BANKS AND BANKING.

1. Where partners in a bank transfer their assets to an incorporated bank, guaranty payment, and become stockholders and officers of the incorporated bank, a settlement of the liability of the copartnership and the incorporated bank by its managing officers, is voidable at the election of the incorporated bank, unless the full amount due on the guaranty is paid, or the settlement authorized or ratified by the stockholders, the guarantors not voting. *Leonhardt v. Citizens Bank of Ulysses*..... 39

2. Corporations for pecuniary profit may sue and be sued, complain and defend in courts of law and equity. *Solomon v. Schneider* 680

Liability of Stockholders. Contribution. Actions.

3. Where a stock subscriber discharges a debt of an insolvent corporation for which all the stock subscribers thereof are liable, he may maintain an action for contribution against his co-subscribers. *Bennison v. McConnell*..... 46

4. A stock subscriber who participated in a distribution of the assets of an insolvent corporation *held* not estopped from

Corporations—*concluded.*

maintaining against co-subscribers an action for contribution, where the debt discharged by him was not provided for in the distribution. *Id.*

5. An agreement by stockholders of a corporation to indemnify one for the personal assumption or payment of a corporate debt, or to contribute, may be enforced. *Gorder v. Connor* 781
6. A voluntary assumption of the debt of a corporation, or a voluntary payment of its debt, or the two in combination, will not alone confer on a stockholder of the corporation the right to contribution from the other members. *Id.*
7. Evidence *held* insufficient to sustain a finding of a promise by some of the stockholders of indemnity or contribution to other of the stockholders for the assumption or payment of corporate debts by the latter. *Id.*
8. The liability of a stock subscriber for corporate debts, except of a banking corporation, is measured by his unpaid stock subscription. *Id.*
9. The constitution states and also limits the liability of a stockholder in a corporation for its debts. *Id.*
10. Within the common-law rule there was no individual liability of stockholders in a corporation for its debts. *Id.*
11. The liability of a stockholder in a banking corporation, under the provisions of section 7, article 11, of the constitution, is for the creation of a fund for the benefit of all creditors, and an action to enforce such liability must be prosecuted for the benefit of all the creditors against all the stockholders. *Pickering v. Hastings*..... 201
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2. Generally, costs are awarded to the successful party, and taxed against the losing party. *Id.*
3. *Prima facie* the unsuccessful litigant is liable for costs. *Id.*. 56
4. The discretion of courts under section 623 of the Code relating to costs cannot be exercised arbitrarily, but must be exercised within the limits of legal and equitable principles. *Id.*
5. To justify a judgment awarding costs to an unsuccessful litigant there must be express statutory authority, or the circumstances be such that a judgment against him for costs would be inequitable. *Id.*
6. Courts cannot award costs or attorney's fees to an unsuccessful contestant of a will solely because he acted in good faith and probable cause for the contest existed. *Id.*
7. On rendering judgment on a policy of insurance on real property, a reasonable attorney's fee may be allowed plaintiff and taxed as costs without regard to the date the risk was written. *American Fire Ins. Co. v. Landfare*..... 483
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1. The failure of a county judge, after the expiration of his official term, to pay over to his successor in office, or the person entitled thereto, money deposited in condemnation proceeding, is a breach of his official bond; and thereupon a cause of action accrues to the person damaged by such breach. *Chicago, B. & Q. R. Co. v. Philpott*..... 212
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Courts. See CLERK OF DISTRICT COURT. COUNTY JUDGE.

Supreme Court. Jurisdiction.

1. Jurisdiction conferred upon the supreme court in direct terms by the constitution may be exercised, though no rules of procedure have been provided by the legislature. *State v. Moores*..... 1

Courts—*concluded.*

Commissioner.

2. A commissioner of the supreme court, in addition to his salary as such, may receive from the state compensation for lectures delivered by him before the law class of the state university. *Cornell v. Irvine*..... 657

3. Consent of parties cannot confer jurisdiction of the subject-matter. *Johnson v. Bouton*..... 626

County Court. Jurisdiction.

4. It is the duty of a county judge to make a correct record of the proceedings before him and the district court may mandamus him to perform that duty. *New Home Sewing-Machine Co. v. Thornburg*..... 636

5. Neither a justice of the peace nor a county judge has jurisdiction to try one charged with selling intoxicating liquors contrary to section 11, chapter 50, Compiled Statutes. *In re Chenoweth* 688

6. The criminal jurisdiction of a county court or county judge is the same as that of a justice of the peace. *Id.*

7. Section 16, article 6, of the constituti n does not invest the county courts of the state with any criminal jurisdiction, but authorizes the legislature to define the criminal jurisdiction of such courts within certain limitations. *Id*..... 689

8. County courts have not been invested with any criminal jurisdiction except such as the legislature conferred upon justices of the peace. *Id.*

Covenants. See JUDGMENTS, 7.

In an action to recover damages for breach of covenants of warranty of title it is essential to allege in the petition that plaintiff has been evicted by title paramount. *Hampton v. Webster* 628

Coverture. See HUSBAND AND WIFE, 1.

Criminal Law. See INDICTMENT AND INFORMATION. INSTRUCTIONS, 5, 21, 32. INTOXICATING LIQUORS, 5. NEW TRIAL, 10. PHYSICIANS AND SURGEONS.

1. Where two parties jointly indicted are tried separately, it is not error for the court to require the presence of one of them in the court room during the trial of the other. *Cunningham v. State*..... 691

2. Except in cases where it is necessary to show guilty knowledge of the prisoner, it is not competent to prove that at another time and place he committed, or attempted to commit, a crime similar to that for which he is on trial. *Morgan v. State* 696

3. Neither a justice of the peace nor a county judge has jurisdiction to try one charged with selling intoxicating liquors

Criminal Law—*concluded.*

contrary to section 11, chapter 50, Compiled Statutes. *In re Chenoweth* 688

Admission of Facts.

4. Where accused on the trial stipulates that certain facts exist, the court may assume those facts as established and instruct the jury as to their legal effect. *Pisar v. State*.... 455

5. Where accused solemnly admits facts establishing his guilt, he is not entitled to have the jury pass on the issue of his actual intent to violate the law. *Id.*

Confessions. Foundation.

6. In laying the foundation for evidence of confessions it is sufficient to prove affirmatively all that occurred prior to and at the time of the confessions, provided such proof excludes the hypothesis of inducements of hope or fear. *Snider v. State*..... 309

7. When the offense charged has been fully established by competent evidence, the free and voluntary statement and confessions of the accused may be proven for the purpose of connecting him with the crime. *Chezem v. State*..... 497

Insanity. Burden of Proof.

8. To cast on the state the burden of proving sanity it is only requisite that there be some evidence tending to prove insanity, and it is not necessary that there must first be evidence sufficient to raise a reasonable doubt. *Snider v. State*, 310

Order of Introducing Testimony.

9. The order of introducing testimony designated by section 478 of the Criminal Code will not preclude a defendant from introducing, in a proper case, testimony to impeach a witness examined by the state on rebuttal. *Argabright v. State*, 363

10. The order of introducing testimony in a criminal case rests largely in the discretion of the trial court, and an abuse of discretion in that regard is sufficient ground for reversal. *Id.*

Cross-Appeal. See REVIEW, 60.

Cross-Examination. See REVIEW, 29. WITNESSES, 9-12.

Curtesy. See ESTATES, 2.

Custom and Usage.

A custom, special to a particular class of business operations, to be availed of, must be pleaded, and, if put in issue, proved. *First Nat. Bank of Hastings v. Farmers & Merchants Bank* 150

Damages. See ABSTRACTS OF TITLE. ASSAULT AND BATTERY. ATTORNEY AND CLIENT, 5. EMINENT DOMAIN. INTOXICATING LIQUORS, 4. MASTER AND SERVANT, 4. MUNICIPAL CORPORATIONS, 1-6. TELEGRAPH COMPANIES.

1. Measure of damages for wrongful attachment. *Kyd v. Cook*, 72

Damages—*concluded.*

2. Evidence *held* sufficient to sustain a verdict for slight damages in an action by a vendee of land for false representations by vendor as to quantity. *Hankins v. Majors*..... 299
3. In an action for damages by a vendor for fraud practiced by vendee, instructions and rulings on evidence *held* to be free from prejudicial error. *McCready v. Phillips*..... 446
4. Measure of damages for breach of a warranty that cement sold was fit for use in plastering a dwelling. *Nye & Schneider Co. v. Snyder*..... 754
5. In an action for damages resulting from defendant's wrongful act it is error to instruct the jury that considerations of sympathy or public policy may be taken into account in weighing the evidence. *Robertson v. Brown*..... 390
6. One rescinding a contract on the ground of fraud cannot recover damages sustained by reason of the fraud. *Smith v. Myers* 508
7. An officer is liable for damages which result from his negligence in approving an insufficient replevin bond. *Shull v. Barton* 717

Deceit.

Where one buys property on credit, with the intention at the time of not paying therefor, he is guilty of actionable fraud. *McCready v. Phillips*..... 446

Declarations. See EVIDENCE, 7, 8.

Deeds.

The introduction in evidence of a recorded deed by the grantee mentioned therein in support of his claim of title to the property is sufficient to establish his acceptance of such deed. *American Fire Ins. Co. v. Landfare*..... 482

Default. See OFFICE AND OFFICERS, 1.

Depositions.

1. Depositions filed in a lower court are presumed, in the absence of proof to the contrary, to have been transmitted to the district court within the time limited by the statute for that purpose. *Thomas v. Nebraska Moline Plow Co*..... 383
2. Objection to depositions, based on the fact that they did not bear the clerk's file mark showing they had been filed more than one day before the trial, was properly overruled where they had been taken and used in the lower court and had been for a long time among the files in the district court. *Id.*
3. Objection relating to delay of the officer taking depositions cannot be urged against their admissibility. *Poska v. Stearns* 542

Descent and Distribution. See PARENT AND CHILD, 1.

Under sections 30 and 176, chapter 23, Compiled Statutes, the personal property of a childless intestate, after payment of his debts, descends to his widow, to the exclusion of his brothers and sisters who survive him and the children of other brothers and sisters whom he had survived. *Hinds v. Hinds* 545

Description. See EXECUTIONS, 8. MUNICIPAL CORPORATIONS, 1, 2. TAXATION, 3-8.

Detectives. See REWARD.

Dismissal.

1. A dismissal which does not involve the merits of the case is not a bar to another suit upon the same cause of action, nor to presentation of the claim against the estate of deceased defendant. *Bank of Maywood v. Estate of McAllister*.. 188
2. A case cannot be dismissed at the instance of a party who may be liable to a judgment therein, against the objection of his adversary, though the recovery might be only for nominal damages. *Houck v. Linn*..... 743

Divorce.

1. Defendant may file a cross-petition and obtain affirmative relief. *Berdolt v. Berdolt*..... 792
2. Charges made in plaintiff's petition for a divorce do not furnish grounds to be pleaded and urged in a cross-petition for affirmative relief. *Id.*
3. A decree of divorce may be granted for extreme cruelty, whether practiced by using personal violence, or by any other means. *Id.*
4. A false charge of physical incompetency to consummate the marriage or fully perform marital duties may constitute extreme cruelty warranting a divorce. *Id.*
5. Evidence *held* insufficient to warrant a finding for the husband either upon the ground of the wife's physical incompetency to consummate the marriage or upon the ground of extreme cruelty on her part. *Id.*
6. Evidence *held* to sustain a finding of extreme cruelty on part of the husband. *Id.*
7. Alimony in the sum of $5,000 *held* excessive and remittitur of $3,500 made a condition of affirming decree for alimony. *Id.*

Easements.

Mill dam and race *held* to be easements upon the fee of school land which had been leased by the state. *Hoover v. Hale*.... 67

Ejectment.

Where defendant refuses to plead further, but permits judgment to go against him on demurrer to plaintiff's reply, he

Ejectment—*concluded.*

is not as of course entitled to have the judgment set aside and a new trial ordered under section 630 of the Code. *Whiteman v. Perkins*..... 181

Elections. See PUBLIC POLICY, 2.

1. In an election contest declarations made by illegal voters as to the nature of votes cast by them are not admissible unless the declarations are part of the *res gestæ* or fall within an exception to the rule excluding hearsay evidence. *Dean v. State*..... 301
2. Affirmance of judgment ordering secretary of a republican committee to certify to the committee's nomination to fill a vacancy. *Emory v. State*..... 550
3. Failure of the secretary of a county convention to certify the name of a nominee, *held* to create a vacancy which the county central committee of the party was authorized to fill under provisions of the Australian Ballot Law. *State v. Clark* 584

Eminent Domain.

1. The elements of damage for the construction of a railroad across a farm are the actual value of the portion taken and the depreciation in value of the remainder, excluding general benefits. *Chicago, R. I. & P. R. Co. v. Buel*..... 205
2. Where an owner who resided upon land taken for right of way is familiar with the value of the land he is a competent witness on the question of such value. *Id.*
3. On the trial of an appeal from an award of damages for land appropriated for railroad purposes a map or plat of the premises, shown to be correct, is admissible in evidence. *Id.*
4. Where, on appeal from an award, the damages are found to exceed the award of the commissioners, it is proper to allow interest from the time of condemnation at the rate of seven per cent. *Id.*

Equity. See ACTIONS. FRAUDULENT CONVEYANCES, 3.

1. The findings and decree in an action in equity should respond to all the material issues presented by the pleadings. *Clark v. Neumann*..... 374
2. "He who seeks equity must do equity" and come into court with clean hands. *Lewis v. Holdrege*..... 379
3. A plaintiff who does not stand in conscientious relations towards his adversary, with reference to the claim which is the subject of the action, is not entitled to the aid of a court of equity, and will be denied affirmative relief, although such claim does not arise out of an illegal transaction and is not tainted with actual fraud. *Id.*
4. If the plaintiff, or his assignor, has been guilty of any misconduct in connection with the transaction out of which the

Equity—*concluded.*

claim in suit arose, so that the enforcement of such claim would be harsh, unconscionable, and oppressive, a court of equity will either decline to grant any relief whatever or grant it on such terms as may be just and equitable. *Id.*

Error. See REVIEW.

Estates.

1. An estate less than a freehold is not an estate of inheritance, and a freehold estate is one of which possession, at the common law, could only be given by livery of seisin. *Hall v. Crabb* 392
2. A surviving husband, whose wife died in 1877, was not entitled to an estate of curtesy in lands in which she had a mere equitable estate at the time of her death. *Id.*
3. As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate. *Spiech v. Tierney,* 514

Estoppel. See ATTORNEY AND CLIENT, 3. BANKS AND BANKING, 4. CORPORATIONS, 4. GUARANTY, 1. HUSBAND AND WIFE, 1. MORTGAGES, 1. NEGOTIABLE INSTRUMENTS, 8. PLEADING, 6. REPLEVIN, 3, 4. RES JUDICATA.

1. Sureties of officer who collected fees from an insurance company and embezzled them *held* not estopped to assert that such fees were not received by their principal in his official capacity. *State v. Moore*..... 82
2. Facts from which an estoppel *in pais* arises, to be available as such, must be pleaded. *Henderson v. Keutzer*..... 460
3. Two defenses irreconcilably inconsistent may not be enforced, and the position assumed by the party prior to the suit relative to the facts and circumstances involved in the transactions will prevail. *Columbia Nat. Bank v. German Nat. Bank* 804

Evidence. See CRIMINAL LAW, 6, 7. DEPOSITIONS. GUARANTY, 5, 6. ILLEGITIMATE CHILDREN. REVIEW, 20-34. TRIAL, 1-3. WITNESSES.

1. "Testimony" and "evidence" are not synonymous terms, the latter being the generic term, and the former applicable to a species or kind of evidence. *Columbia Nat. Bank v. German Nat. Bank* 803

Account Books.

2. In an accounting between paving contractors and one employed by them to superintend the work for 25 per cent of the net profits, the contractor's account books were *held* competent evidence, where the superintendent constantly availed himself of a right to examine the books. *McDonald v. Buckstaff* 88

Evidence—*continued.*

Admissions.

3. An admission by one of the parties, of the existence of a judgment which it was incumbent on his adversary to prove, *held* to imply that such judgment was valid. *McCurdy v. Ryan* 511

Assault and Battery.

4. Evidence *held* to sustain a verdict for plaintiff for $2,000 for damages for assault and battery. *Barr v. Post*..... 700

Circumstances.

5. Circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is sufficient to authorize a conviction. *Cunningham v. State*..... 691

Confessions. Declarations.

6. In laying foundation for evidence of confessions in a criminal case it is sufficient to prove affirmatively all that occurred prior to and at the time of the confessions, provided such proof excludes the hypothesis of inducements of hope or fear. *Snider v. State*..... 309

7. In an election contest declarations of illegal voters as to nature of votes cast by them are not admissible unless the declarations are part of the *res gestæ* or fall within an exception to the rule excluding hearsay evidence. *Dean v. State*.. 301

8. After conveyance of property, declarations of seller in disparagement of the buyer's title are not admissible in evidence, but an exception to the rule arises where the conveyance is assailed as fraudulent. *Kyd v. Cook*..... 72

9. Competency of seller's declarations as to title, where the conveyance is assailed as fraudulent. *Id.*

Crimes.

10. Except where it is necessary to show guilty knowledge of one accused of crime, it is not competent to prove that he had committed crimes similar to that charged. *Morgan v. State* 696

Conversations. Decedents.

11. In a contest between the alleged widow of intestate and his nephew, for the right to nominate an administrator, her own testimony as to a conversation between herself and decedent, constituting a present verbal contract of marriage, or common-law marriage, *held* incompetent under section 329 of the Code. *Sorensen v. Sorensen*..... 729

Documents. Letters.

12. Admissibility of evidence tending to show that a subscriber to stock of a corporation waived subscription of the entire capital stock. *Macfarland v. West Side Improvement Ass'n*.... 277

13. The commission of a receiver, issued by the comptroller of

Evidence—*continued.*

the currency and attested by his official seal, is a certificate within the meaning of section 884, Revised Statutes, U. S., and is admissible in evidence without extraneous proof of its genuineness. *Estate of Davis v. Watkins*..... 288

14. Admission of a tax-sale certificate does not include assignments indorsed thereon, unless the offer of proof was broad enough for such purpose. *Levy v. Cunningham*..... 348

15. Letter-press copies of letters are but secondary evidence, and are not admissible against objection without showing the loss of the originals or giving notice to produce them. *Westinghouse Co. v. Tilden*..... 129

Expert Testimony. Opinions.

16. Non-expert witnesses can be permitted to express opinions as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of mental condition is based. *Lamb v. Lynch*..... 135

17. Non-expert witnesses may give their opinions as to a person's sanity only after narrating the facts by them observed on which they base their opinions. *Snider v. State*... 309

18. Evidence *held* not objectionable as being the opinion of the witness. *Barr v. Post*..... 699

19. Expert testimony is incompetent where the subject of inquiry is of such a character as to be within the knowledge of men of common education and experience and to call for no special skill, knowledge, or experience. *Missouri P. R. Co. v. Fox*..... 746

20. A hypothetical question should not be permitted when it only in part calls for the exercise of special skill or knowledge, and for the rest asks the witness to base his opinion on matters within the ordinary experience of men. *Id*..... 747

Handwriting.

21. Evidence *held* not to sustain a finding that an indorsement of a check was genuine. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*..... 149

Homicide.

22. Evidence *held* sufficient to sustain a verdict of murder in the first degree. *Argabright v. State*..... 363

Infant's Wages.

23. Evidence *held* insufficient to establish right of plaintiff to maintain an action for wages earned during his minority. *Nicolaus v. Synder*..... 531

Judicial Notice.

24. State courts take judicial notice of the acts of congress providing for the appointment of a deputy comptroller of the

Evidence—*continued.*

currency and defining his powers and duties. *Estate of Davis v. Watkins* 288

Maps.

25. On trial of an appeal from an award of damages for land appropriated for railroad purposes a correct map of the premises may be admitted in evidence. *Chicago, R. I. & P. R. Co. v. Buel*..... 205

Negligence.

26. Evidence *held* to show that a section-hand, in stepping upon a railroad track without looking for approaching trains, was guilty of negligence. *Chicago, B. & Q. R. Co. v. Yost*.... 439

Newspapers.

27. A subscriber to a newspaper is not bound at his peril to know all it contains, but is chargeable with what he has seen or read therein and also with knowledge of statutory notices or legal orders which are conclusive of his rights when published. *American Fire Ins. Co. v. Landfare*..... 482

Ownership.

28. Possession of a promissory note payable to bearer is *prima facie* evidence of the holder's ownership. *New England Loan & Trust Co. v. Robinson*..... 51

29. A policy of fire insurance is *prima facie* an admission by insurer of insured's title to the property. *American Fire Ins. Co. v. Landfare*..... 482

Parol Testimony. Contracts.

30. In interpreting an ambiguous contract in writing acts of the parties and other circumstances may be considered, but a plain, unambiguous contract in writing cannot be varied by parol evidence. *Latenser v. Misner*..... 340

31. A plain, valid contract in writing cannot be varied by parol evidence. *Thomas v. Nebraska Moline Plow Co*..... 383

32. In absence of fraud, mistake, or ambiguity the writing signed by the parties constitutes the best and only competent evidence of the contract originally made. *State Bank of Ceresco v. Belk*..... 710

Presumptions. Officers.

33. In the absence of evidence to the contrary, it will be presumed that a public officer proceeded regularly and performed his official duties within the law. *Spieth v. Tierney*.. 514

Profits.

34. Where a sheriff wrongfully attached a merchant's goods and retained them three months, the merchant, in a suit for damages, may prove sales and profits during corresponding months of the previous year as a basis to determine profits lost. *Kyd v. Cook*..... 72

Evidence—*concluded.*

Records.

35. Grantee's introduction in evidence of a recorded deed is sufficient to establish his acceptance of the deed. *American Fire Ins. Co. v. Landfare*..... 482

Secondary Evidence.

36. An answer should be excluded when it is clear from what preceded that it would be secondary evidence, and not a matter of personal knowledge, though the question apparently calls for matter within the knowledge of the witness. *Pease Piano Co. v. Cameron*..... 561

Sympathy.

37. In an action in tort plaintiff is entitled to have the evidence considered by the jury uninfluenced by considerations of sympathy or public policy. *Robertson v. Brown*..... 390

Statutes. House Journals.

38. Evidence as to enactment of a statute. *In re Granger*..... 260

39. The journals of the houses of the legislature are records of legislative proceedings, and where they show that a bill did not pass, the presumption in favor of a certificate of the presiding officers that the bill did pass is overthrown. *Webster v. City of Hastings*..... 669

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 20-26. REVIEW, 35-37.

Executions. See VENUE.

Appraisement.

1. To make the low valuation of realty under mortgage foreclosure a ground of attack, the appraisement must be assailed for fraud. *Brown v. Fitzpatrick*..... 61

2. An appraisement under mortgage foreclosure cannot be attacked solely on the ground that the valuation was too low.. *Id.*

3. Where mortgagor by affidavit assails the appraisement on the ground that it is too low, but does not charge fraud, the court may confirm a mortgage-foreclosure sale, though mortgagee did not file an affidavit in support of the appraisement. *Id.*

4. Separate appraisement and advertisement of flour-mill and water power *held* proper, though not essential. *Hoover v. Hale*..... 67

5. Objections that realty has been appraised too high or too low should be made and filed before the sale occurs. *Id.*

6. Where lands constituting one body are used as a single tract, ordinarily they may for judicial sale be appraised together. *Smith Bros. Loan & Trust Co. v. Weiss*..... 210

7. Objections to appraisement should be made before sale. *Id.*

Executions—*continued.*

8. An error in appraising land whereby a tax-lien was deducted twice is without prejudice to the defendants when the land sold for more than two-thirds of the appraised value, correcting the error. *La Selle v. Nicholls*..... 458

Bids and Bidders. Attorneys.

9. Contract between two persons for one of them to bid at a judicial sale for the benefit of both may be upheld where the intent or effect was not to chill bids or to prevent competition. *Olson v. Lamb*..... 104

10. Where it was shown that an attorney owned one of several liens upon property under foreclosure; that a sale was made and to procure a re-sale he offered to bid a certain sum; that on re-sale he bought for $1,000 less than his offer; that to procure confirmation he remitted $1,000 from his lien; that one of his clients owned a lien of equal priority, and the bid actually made was insufficient to pay this class,—*held* that on accounting the client was entitled to such share of the $1,000 as he would have realized if the bid had been that much higher and no remittitur entered. *Id*..... 105

Confirmation. Notice.

11. Mortgagor who was ordered to show cause by a certain date why foreclosure sale should not be confirmed, *held* not entitled to notice of the time when the court would pass on the motion to confirm the sale. *Brown v. Fitzpatrick*..... 61

12. Mortgagor *held* not entitled to notice of affidavits filed in support of appraisement after the date on which he was required to show cause why foreclosure sale should not be confirmed. *Id.*

13. Where mortgagor has been ordered to show cause by a certain date why a foreclosure sale should not be confirmed, the court is not obliged to rule on the motion on such date, but may consider affidavits subsequently filed by mortgagee. *Id.*

14. In a proceeding to confirm a sale to satisfy a judgment the court cannot inquire into the merits of the judgment. *Hoover v. Hale*..... 67

Distribution of Proceeds.

15. A junior mortgagee, as against the owner of the equity of redemption, *held* entitled to surplus on foreclosure of the senior mortgage. *Moss v. Robertson*..... 775

Estate Conveyed. Vacating Judgment.

16. Estate conveyed by execution sale under a judgment on a note signed by husband and wife, where the sheriff levied on a flour-mill and five acres of land owned by the wife and on defendant's interest in water power furnished by a race and dam situate on adjoining school land owned by the state, but of which the husband was lessee. *Hoover v. Hale*, 67

Executions—*concluded.*

17. After setting aside a decree under section 82 of the Code upon application of a non-resident defendant served with notice by publication alone, *held* erroneous upon further proceedings to set aside a title acquired by a purchaser under the provisions of said decree while in force. *Citizens State Bank of Council Bluffs v. Haymes*..... 394

18. Setting aside a decree under section 82 of the Code upon application of a non-resident defendant served with notice by publication alone, *held* not to affect the title acquired in good faith by a purchaser at a sale under the decree. *Security Abstract of Title Co. v. Longacre*..... 469

Notice of Sale. Proof.

19. A purported affidavit of proof of publication of notice of sale of land under an order of sale is not sufficiently authenticated if it lacks the signature of an officer to the jurat. *Holmes v. Crooks*..... 467

Officer Making Sale.

20. Alleged error in an order modifying a decree so as to appoint a master to make the sale instead of the sheriff was not reviewed where the transcript did not contain a copy of the decree or a copy of the order modifying it. *La Selle v. Nicholls* 458

21. A sheriff who, during his term of office, commenced the execution of an order of sale may complete the service after his term of office expires. *Holmes v. Crooks*..... 466

Place of Sale.

22. The sale of lands under a decree of foreclosure must take place at the court house, unless there be none in the county, in which case the sale must occur at the door of the building in which the last district court was held. *Smith Bros. Loan & Trust Co. v. Weiss*..... 210

Separate Tracts. Descriptions.

23. In the absence of evidence it will not be inferred that land described as the "north one-third of lots five and six" constitutes separate tracts which should be sold separately. *La Selle v. Nicholls*..... 458

Executors and Administrators. See DESCENT AND DISTRIBUTION.

1. A dismissal which does not involve the merits of the case is not a bar to another suit upon the same cause of action nor to presentation of the claim against the estate of deceased defendant. *Bank of Maywood v. Estate of McAllister*.. 188

2. Where a party dies after judgment has been rendered against him, the administrator may prosecute error without procuring an order of revivor. *Webster v. City of Hastings* 245

3. An administrator or executor is neither a joint tenant nor

Executors and Administrators—*concluded.*

a tenant in common with the heir or devisee of his decedent, and cannot maintain an action for the partition of his real estate. *Phillips v. Dorris* 293

4. In a contest between the alleged widow of intestate and his nephew, for the right to nominate an administrator, her own testimony as to a conversation between herself and decedent constituting a present verbal contract of marriage, or common-law marriage, *held* incompetent under section 329 of the Code. *Sorensen v. Sorensen* 729

Exemption.

1. The exemption allowed by section 520 of the Code was intended to be an exemption in addition to the articles of personalty specifically exempted by section 530 of the Code. *Johnson v. Bartek* 422

2. The appraisal which section 522 of the Code requires to be made of property seized on judicial process, and claimed by the debtor to be exempt, has no reference whatever to property specifically exempted by section 530 of the Code. *Id.*

3. A sheriff is not required by statute to have property appraised before releasing it to the debtor, where it is specifically exempt. *Id.*

Factors and Brokers. See TRUSTS, 3.

1. Where a real estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one, financially able, with whom the owner actually makes an enforceable contract of sale, and failure to carry out that contract, even if the default be that of the purchaser, does not deprive the broker of his right to commission. *Lunney v. Healey* 313

2. Evidence *held* sufficient to sustain plaintiff's recovery in an action by a real estate agent for commissions. *Id.*

False Pretenses.

On trial of one charged with having procured the indorsement of a draft by false representations, evidence that he previously committed a similar offense *held* erroneously admitted. *Morgan v. State* 696

False Representations. See SALES, 6. VENDOR AND VENDEE, 4.

Findings. See TRIAL, 6.

Foreclosure. See EXECUTIONS.

Forfeiture. See VENDOR AND VENDEE, 2, 3.

Forgery. See NEGOTIABLE INSTRUMENTS, 7-9.

Fraud. See EXECUTIONS, 10. VENDOR AND VENDEE, 4-9.

1. Where one buys property on credit, with the intention at

Fraud—*concluded.*

the time of not paying therefor, he is guilty of actionable fraud, and in such a case the fraud does not consist in the unfulfilled promise to pay but in the expressed or implied false representation of the intention to pay. *McCready v. Phillips* 446

2. Evidence *held* sufficient to establish that plaintiff was induced to make an exchange of lands through fraud. *Smith v. Myers* 503

3. Fraud is never presumed, but must be established, by the party alleging it, by clear and satisfactory evidence. *Hampton v. Webster* 628

Fraudulent Conveyances.

1. Competency of seller's declarations as to title, where the conveyance is assailed as fraudulent. *Kyd v. Cook* 72

2. A sale or transfer of property in fraud of the rights of creditors of the vendor is valid between the parties thereto; and it is void as to such creditors only to the extent that they are prejudiced thereby. *Lewis v. Holdrege* 379

3. A defendant who took part in the trial of the merits of a case on the issue whether he held property in fraud of the rights of his grantor's creditors was not permitted to complain that the court had no power to enter a decree on such issue without first setting aside an interlocutory decree finding that said defendant was entitled to a foreclosure against said property. *Ellis v. Harris* 398

4. Evidence *held* insufficient to sustain a finding that the sale through which plaintiff claims title to the property in dispute was fraudulent as to her vendor's creditors. *McCurdy v. Ryan* 511

Gambling. See PUBLIC POLICY, 2.

Good-Will. See SALES, 1.

Guaranty.

1. Where a partnership bank guarantied payment of a note and transferred it to an incorporated bank of which two of the partners became officers, the defense that the transferee extended the time of payment of the note was *held* not available to defendants in a suit by the transferee on the guaranty. *Leonhardt v. Citizens Bank of Ulysses* 38

2. The following contract in connection with a transfer of partnership assets to an incorporated bank *held* a guaranty of payment, and not of collection: "All bills receivable taken by the new bank are to be fully guarantied by Leonhardt Bros. & Co., and such guaranty to remain on all bad and doubtful paper until same are collected." *Id.* 39

3. A mere guarantor of collection is liable upon his guaranty

Guaranty—*concluded.*

where it is shown that the note guarantied cannot be collected of the maker, and not otherwise. *Central Investment Co. v. Miles*..... 272

4. One is bound by his guaranty where, after knowledge of facts which might operate to release him, he recognizes his liability and procures extension of time for payment. *Harvey v. First Nat. Bank of Omaha*..... 320

5. A finding that renewals by giving notes were within the contemplation of the parties and within the time of credit extended to the principal debtor *held* to be supported by the evidence. *Id.*

6. Whether extensions of time for payments were within the scope of unlimited credit as to time in terms of guaranty should be determined by evidence of custom and usage and acts of the parties. *Id.*

7. Contract of guaranty *held* to be without limitation as to time of credit to be given the principal debtor. *Id.*

Harmless Error. See REVIEW, 25, 40, 41.

Hearsay Evidence. See EVIDENCE, 7.

Highways. See MUNICIPAL CORPORATIONS, 17.

Homicide. See INSURANCE, 1.

1. It was *held* that the instructions were based on the evidence. *Argabright v. State*..... 363

2. Evidence *held* sufficient to sustain a verdict of murder in the first degree. *Id.*

House Journals. See STATUTES, 4, 5.

Husband and Wife. See ESTATES, 2. WITNESSES, 6.

1. In a suit by a bank upon a note a wife *held* not estopped from interposing, as a defense, her coverture and her signing as surety. *Westervelt v. Baker*..... 63

2. The signing of a note by a wife does not raise the presumption that she intended to render her separate estate liable for its payment. *Id.*..... 66

3. Evidence *held* sufficient to sustain a finding of the trial court that the note in suit was not made by a wife with reference to, nor upon the credit of, her individual property. *Smith v. Bond*..... 529

4. In an action against a married woman on a note executed by her as surety for another, coverture is a complete defense, unless it be shown that such note was made with the intention on her part of binding her separate estate. *Id.*

Illegitimate Children.

Writings *held* insufficient to fulfill requirements of section 31, chapter 23, Compiled Statutes, relating to acknowledgment of illegitimate children. *Lind v. Burke*..... 785

Impeachment of Witness. See WITNESSES, 15.

Improvements. See PARTITION, 6, 7. VENDOR AND VENDEE, 10.

Indemnity. See TAXATION, 13.

Indictment and Information. See LARCENY, 1.

Different criminal acts which constitute part of the same transaction, such as burglary with intent to steal particular property and larceny of the property described, may be charged in the same indictment or count thereof. *Cunningham v. State*..... 691

Indorsements. See EVIDENCE, 14. NEGOTIABLE INSTRUMENTS, 7-12.

Infants. See PARENT AND CHILD.

Inheritance. See ESTATES, 1.

Injunction. See JUDGMENTS, 5, 9.

1. One who sold his laundry and good-will agreeing not to engage in the laundry business for five years may be restrained by injunction from violating his agreement. *Downing v. Lewis*..... 387
2. A district judge at chambers has no power to determine finally an action for injunction. *Johnson v. Bouton*..... 626
3. An action on a temporary injunction bond will not lie until there has been a final adjudication of the injunction cause on its merits. *Id.*

Insanity. See EVIDENCE, 16, 17.

Instructions. See DAMAGES, 5. WILLS, 2.

Circumstantial Evidence.

1. On trial of accused for burglary and larceny the following instruction was *held* proper where the evidence was circumstantial: "What is meant by circumstantial evidence, in criminal cases, is the proof of such facts or circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty." *Cunningham v. State* 691
2. On trial of accused for burglary and larceny the following instruction was *held* proper when the evidence was circumstantial: "Circumstantial evidence is legal and competent in criminal cases, and if it is of such character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is sufficient to authorize a conviction." *Id.*

Contradictory Statements.

3. An erroneous statement of the law in an instruction cannot

Instructions—*continued.*

be cured by a correct statement in another instruction. *Crosby v. Ritchey* 336

4. A positive misstatement of the law in an instruction is not cured by a further correct statement in conflict with the first. *Missouri P. R. Co. v. Fox*..... 746

Criminal Law. Insanity. Burden of Proof.

5. An instruction in a criminal case, in effect, that every one is presumed sane, but if there is evidence tending to rebut the presumption and sufficient to raise a reasonable doubt on the issue of insanity, then the burden is upon the state to show sanity beyond a reasonable doubt, shifts the burden of proof and is therefore erroneous. *Snider v. State*..... 309

Directing Verdict.

6. It is error to direct a verdict where there are issues of fact which should be submitted to the jury. *Connor v. Becker*.... 343

7. Peremptory instruction for plaintiff, in an action against an abstracter for failure to make an abstract disclose the pendency of a suit involving the title to the property, *held* not erroneous. *Security Abstract of Title Co. v. Longacre*.... 469

Disregard of Jury.

8. A verdict in plain disregard of the instructions of the court is contrary to law. *Westinghouse Co. v. Tilden*..... 129

9. A verdict rendered in plain disregard of instructions is contrary to law and will ordinarily be set aside, whether or not the instructions were correct. *Boyesen v. Heidelbrecht*... 570

Evidence. Assuming Facts.

10. It is reversible error to give an instruction assuming the existence of material facts which are unsupported by evidence. *Burnet v. Cavanagh*..... 190

11. Where instructions lay down correct legal propositions, possibly pertinent under the pleadings, it will be presumed, in the absence of a bill of exceptions, that such instructions were applicable to the evidence. *Hudelson v. First Nat. Bank of Tobias* 247

12. An instruction assuming a disputed fact as established is erroneous. *Levy v. Cunningham*..... 348

13. It is erroneous to give instructions assuming the existence of evidence tending to prove a certain fact, when no evidence of such character was given. *Kroncke v. Madsen*..... 614

14. Instructions leaving the jury at liberty to find facts as to which there is no evidence may be ground for reversing a judgment. *State v. Bartley*..... 811

15. It is not error to refuse an instruction which has the effect to withdraw from the consideration of the jury competent material evidence in the case. *Chezem v. State*..... 497

Instructions—*continued.*

16. Error cannot be predicated upon the refusal of an instruction which is not applicable to the evidence. *Id.*

17. An instruction which ignores a proposition material to the conclusion which it announces may, under certain findings, be reached for one of the parties, is erroneous. *Globe Oil Co. v. Powell* 463

18. Error cannot be predicated upon the admission of evidence to establish a particular issue, where such issue is subsequently withdrawn from the jury by the court in its instructions. *American Fire Ins. Co. v. Landfare*..... 482

19. It is not error to refuse an instruction where the only evidence offered to which the instruction would be applicable was rejected. *Pease Piano Co. v. Cameron*..... 561

Exceptions. New Trial. Review.

20. An exception at the time of giving an instruction is essential to its review. *Burnet v. Cavanagh*..... 190

21. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered upon review unless such ruling is first challenged by motion for a new trial. *Lackey v. State*..... 298

22. A general exception to instructions is insufficient, and where a charge consists of several paragraphs, there must be an exception to each instruction claimed to be erroneous. *American Fire Ins. Co. v. Landfare*..... 483

23. An exception to all of the court's instructions, without distributive words, is unavailing if any portion of the charge be correct. *Pease Piano Co. v. Cameron*..... 561

24. Exception to a portion of the instructions as a "paragraph" *held* proper. *McClellan v. Hein*..... 601

25. The instructions to a jury are proper matters of record, and need not be preserved in the bill of exceptions. *State v. Bartley* 810

26. Exceptions to instructions and record of exceptions *held* sufficient for purposes of review. *Id.*

General Statements.

27. Where statements upon a material point are too general, the court, upon request, should give an explicit instruction which is pertinent to the issues and evidence. *Crosby v. Ritchey* 337

Harmless Error.

28. Instructions relating to the right to recover, and having no bearing on the *quantum* of damages, cannot be complained of by the plaintiff when the verdict was in his favor, and unsatisfactory only in its amount. *Hankins v. Majors*..... 299

29. The giving of an instruction inapplicable to the issues or

Instructions—*continued.*

evidence is not ground for reversing a judgment unless the party complaining was prejudiced. *McClellan v. Hein*..... 601

30. Failure to mark an instruction "given" will not prevent a review thereof upon a record showing that the instruction was part of the charge and that an exception was taken. *Id.*

Homicide.

31. Instructions *held* applicable to the evidence in a prosecution for murder. *Argabright v. State*..... 363

Interest of Witness.

32. It is not error to instruct a jury that they must alone determine the credibility of witnesses, and that in doing so it is proper to consider the interest, if any, of a witness in the result of the suit, and his demeanor upon the stand. *Chezem v. State*..... 497

Issues.

33. The court, without request, must instruct the jury upon the material issues of the case. *Kyd v. Cook*..... 72

34. Instruction *held* not open to the criticism that it contained an attempt to specifically state all the essential or material elements of the issues. *Norfolk Beet-Sugar Co. v. Hight*..... 163

35. An instruction allowing the jury to render a verdict on an issue not in the pleadings is erroneous. *Id.*

36. It is error to submit to the jury the determination of an issue relevant only to a count which had been abandoned by plaintiff. *Columbus State Bank v. Crane Co*..... 317

37. An instruction intended to include all elements of the issues necessary to a finding is prejudicially erroneous where a material element has been omitted. *Levy v. Cunningham*.... 348

Negligence.

38. It is error to instruct the jury that plaintiff may recover, although guilty of contributory negligence, provided the negligence of defendant was gross and that of plaintiff slight in comparison. *Missouri P. R. Co. v. Fox*..... 746

Repetitions.

39. It is not error to refuse an instruction on points properly stated in instructions given. *Bates-Smith Investment Co. v. Scott* 475

40. It is not error to refuse an instruction the substance of which has been already given. *Nye & Schneider Co. v. Snyder* 755

Requests.

41. The court, without request, is not obliged to formulate for the jury a method of computation for estimating damages. *Kyd v. Cook*..... 72

42. A party cannot complain of the giving of an instruction in harmony with one which he requested. *American Fire Ins. Co. v. Landfare*..... 483

Instructions—*concluded.*

43. A party who tendered an instruction given to the jury, and which assumed the existence of evidence to establish an issuable fact, cannot afterward be heard to assert that there was no evidence received tending to prove such fact. *Id.*

44. A party cannot usually be heard to complain of the failure of the court to instruct upon a particular feature of the case where he has not requested a proper instruction upon the subject. *Chezem v. State*..... 497

Text-Books.

45. Text-books on instructions should be used with caution. *Snider v. State*..... 312

Insurance.

Accident Policies.

1. Where assured was shot and killed by a robber, it was *held*, in a suit on an accident policy, that plaintiff could recover unless the shooting was the robber's intentional act. *Railway Officials & Employés Accident Ass'n v. Drummond*..... 235

2. An accident, within the meaning of contracts of insurance against accidents, includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby. *Id.*

3. Where, in an action on a contract of insurance, it is claimed that death resulted from one of the excepted causes enumerated on the back of the policy, it is for the defendant to plead and prove that fact. *Id.*

Attorney's Fees. Review of Allowance.

4. On rendering judgment on a policy of insurance on real property, a reasonable attorney's fee may be allowed plaintiff and taxed as costs without regard to the date the risk was written. *American Fire Ins. Co. v. Landfare*..... 483

5. A motion to retax costs is unnecessary to review a judgment awarding an attorney's fee in an action on a policy. *Id.*

Fees Payable by Companies.

6. Section 32, chapter 43, Compiled Statutes, directing that certain fees due from insurance companies be paid to the auditor of public accounts was modified by the constitution of 1875 so as to require such fees to be paid in advance into the state treasury. *State v. Moore*..... 82

Knowledge of Agents.

7. Insurer's agent, empowered to receive and transmit applications and to receive payment of the premium, binds the company by knowledge acquired in and about the preparation of the applications and by representations made to the insured while so doing. *Home Fire Ins. Co. v. Gurney*..... 306

Limitation of Actions.

8. A clause in an insurance policy limiting the right of action

Insurance—*concluded.*

to a different time from that allowed by statute is void as against public policy. *Omaha Fire Ins. Co. v. Drennan*..... 623

Ownership of Property.

9. Policy of fire insurance is *prima facie* an admission by the insurer of the title or ownership of the insured to the property covered by the policy. *American Fire Ins. Co. v. Landfare* 482

Parties to Judgment on Policy.

10. Error in entering a judgment for a stated sum upon an insurance policy in favor of two joint plaintiffs, the insured and the owner of a mortgage on the insured premises, where the latter alone was entitled to recover the full amount of the loss, is harmless. *Id*..... 483

Reformation of Policy.

11. Evidence *held* sufficient to justify reformation of policy. *Home Fire Ins. Co. v. Gurney*..... 306

Title. Change.

12. Where insured and wife conveyed insured realty to their son, and the latter conveyed it to his mother to be held in trust for her husband, the insurance was terminated under a provision of the policy for bidding a change of title. *Farmers & Merchants Ins. Co. v. Jensen*..... 285

13. An insurance contract is a personal one between insured and insurer. *Id*..... 284

14. A provision in a fire insurance policy that it should cease to be in effect if the insured conveyed the title of the insured property without the insurer's consent is a reasonable and valid one. *Id.*

Title. False Statements. Mortgagees.

15. Clause providing for forfeiture of policy in case of a false statement as to condition of title, under facts stated in opinion, should not be so construed as to defeat recovery by mortgagee. *Liverpool & London & Globe Ins. Co. v. Davis*.. 684

Interest. See BANKS AND BANKING, 1. EMINENT DOMAIN, 4. JUSTICE OF THE PEACE, 3.

Intervention.

1. An intervener must plead some interest in the subject-matter of the litigation, a mere denial of plaintiff's right not being sufficient to give him a standing in court. *Moline v. Hamilton* 132

2. An interest in the intervener is a traversable fact, and in a case appealed from the county court the assertion of such interest in the petition of intervention in the county court does not excuse the failure to plead it, and so tender an issue in the district court. *Id.*

Intoxicating Liquors.

1. An application for a license to sell liquor cannot be acted upon until at least two weeks' notice has been given in the manner specified by statute. *Pisar v. State*..... 455
2. Action on an application for license can only be taken after the expiration of two weeks, and consequently action on the fourteenth day after the first publication of notice is premature. *Id.*
3. Notice of application for license, in compliance with statute, is essential to confer jurisdiction on the license board, and a license issued without such notice is void and may be collaterally attacked. *Id.*
4. In an action for damages caused by the furnishing of intoxicating liquors, it is not necessary that the liquor furnished, or any resultant intoxication, should be the sole or even principal cause of the damages, but it is sufficient if it contributes to produce the injuries. *McClellan v. Hein*, 601
5. Neither a justice of the peace nor a county judge has jurisdiction to try one charged with selling intoxicating liquors contrary to section 11, chapter 50, Compiled Statutes. *In re Chenoweth* 688

Issues. See TRIAL, 4, 5. INSTRUCTIONS, 33-37.

Joinder. See PARTIES, 1.

Journal Entry. See REVIEW, 36.

Judge. See COUNTY JUDGE.

A district judge at chambers has no power to determine finally an action for injunction, or to enter an order out of term time dismissing a cause. *Johnson v. Bouton*..... 626

Judgments. See EXECUTIONS, 17, 18. INSURANCE, 10. JUSTICE OF THE PEACE, 2. PLEADING, 10. PRINCIPAL AND SURETY, 5. RES JUDICATA.

1. A judgment is an adjudication of the rights of the litigant to the subject-matter of the suit. *Hoover v. Hale*..... 67
2. Dismissal of petition of intervention in replevin, after a finding for plaintiff, *held* an adjudication against intervener, from which an error proceeding will lie. *Moline v. Hamilton*, 132
3. In a suit in equity the decree should respond to all the material issues presented by the pleadings. *Clark v. Neumann*, 374

Confession.

4. Power of a corporation to confess judgment. *Solomon v. Schneider* 680

Enforcement. Injunction. Supersedeas. Lien. Final Order.

5. Where plaintiff has complied with the provisions of section 591 of the Code permitting enforcement of his judgment notwithstanding the execution of a supersedeas bond, defendant is not entitled to an order restraining enforcement

Judgments—*concluded.*

of the judgment pending review. *Bodewig v. Standard Cattle Co*..... 217

6. After giving the undertaking prescribed by section 591 of the Code and obtaining leave of court, plaintiff may enforce a judgment recovered by him on a contract for payment of money, though defendant executed a sufficient supersedeas bond for the purpose of staying proceedings pending review of the judgment. *Id.*

7. One who purchases land charged with the lien of a judgment, which is specifically excepted from the covenants of warranty contained in the deed through which he claims title, cannot insist that his grantor's chattels shall be exhausted before such land is sold for the satisfaction of an execution issued on the judgment. *Wollam v. Brandt*..... 527

8. A decree finding a defendant entitled to a foreclosure against property which had been conveyed to him, and retaining the case for further proof as to the consideration and amount due, *held* not a final order. *Ellis v. Harris*..... 398

9. An action may be maintained to enjoin the enforcement of a void judgment when there is a concurrence of the following conditions: (1) The judgment must be without any legal or equitable basis; (2) its invalidity must not appear on the face of the record; and (3) the party complaining must be without an adequate remedy at law. *Kaufmann v. Drexel* 229

Modification.

10. Section 602 of the Code relating to modification of judgments has reference only to judgments and orders possessing some degree of legal vitality, and not to such as are absolutely void. *Id.*

Parties. Review.

11. On review a judgment against two defendants, where a several judgment might have been proper, may be affirmed as to one defendant though the court had no jurisdiction of the other. *Bates-Smith Investment Co. v. Scott*..... 475

Presumption of Jurisdiction.

12. Where judgment is rendered against a party whose appearance in the cause is entered by an unauthorized attorney, the presumption of jurisdiction is not conclusive in an original action directly assailing such judgment. *Kaufmann v. Drexel*..... 229

Proceedings to Vacate.

13. Under section 1001 of the Code, a motion to set aside a joint judgment against two or more defendants, inseparably connected as such, should be overruled when made by one defendant on his own behalf. *Boyd v. Munson*..... 269

Judicial Notice. See EVIDENCE, 24.

Judicial Sales. See EXECUTIONS.

Jurisdiction. See COURTS. JUDGMENTS, 11. JUSTICE OF THE PEACE, 2-6. PLEADING, 11, 12. REPLEVIN, 3, 4. REVIEW, 43-45.

Jury. See INSTRUCTIONS.

1. Retention or rejection of a juror, during the impaneling of a jury, to whom an objection has been interposed, is a matter within the discretion of the trial judge. *State v. Bartley*, 810
2. In a quo warranto proceeding respondent cannot demand a jury trial as a matter of right. *State v. Moores*..... 1

Jury Trial. See JURY. REPLEVIN, 3, 4.

Justice of the Peace. See COURTS, 5-8.

Appointment of Officer.

1. A justice of the peace is invested with jurisdiction to specially depute a proper person to execute a search-warrant. *Miller v. Hogeboom*..... 434

Judgment. Default.

2. A statement of plaintiff's demand in the writ and its indorsement as $150 and interest, without specifying the rate or the time for which it was demanded, authorize judgment by default for only $150 and interest from commencement of suit. *Adams v. Nebraska Savings & Exchange Bank*.. 121

Jurisdiction.

3. In ascertaining the jurisdictional amount interest accrued on an interest-bearing debt should be considered. *Id.*
4. It is not the amount which the bill of particulars shows the plaintiff might claim, but the actual amount of his demand, which ascertains the jurisdictional amount. *Id.*
5. Where there is a variance in respect to the amount demanded between the bill of particulars and the writ, the writ controls in ascertaining the jurisdictional amount. *Id.*
6. Where the defendant failed to appear, the justice of the peace had jurisdiction of the subject-matter, the amount for which he might render judgment according to the face of the writ and the indorsement thereon being less than $200. *Id.*

Time to Make Transcript.

7. "Thereupon," in section 1039 of the Code relating to time of filing papers in district court upon removal of action of replevin, means without delay. *Kaufmann v. Drexel*..... 229
8. If, in an action of replevin pending before a justice of the peace, the appraised value of the property taken on the writ exceeds $200, it is the duty of the justice to transmit the transcript and files therein to the district court without unnecessary delay, and the failure of the justice to comply with the requirements of said section for a period of nearly ten months works a discontinuance of the action. *Id.*

Land Contracts. See VENDOR AND VENDEE.

Landlord and Tenant. See SCHOOL LANDS.

A landlord's ownership cannot be denied by a tenant in possession under a lease, and the principal applies to every case in which an entry upon land has been affected by permission of the owner and in recognition of his title. *Carson v. Broady* 648

Larceny.

1. An averment in an information that the accused, from the person of the prosecuting witness, unlawfully and feloniously, did steal, take, and carry away certain property belonging to such witness sufficiently charges that the taking was against the will of the owner. *Chezem v. State*..... 496
2. To sustain a conviction the *corpus delicti* must be proven beyond a reasonable doubt. *Id.*
3. Evidence *held* sufficient to sustain accused's conviction of the crime of larceny from the person. *Id.*

Laundry. See MONOPOLIES.

Letters. See EVIDENCE, 15.

Libel and Slander.

1. In a suit for libel, where the defense is the truth of the matter published, the defendant, to exonerate himself, must establish the truth of each libelous charge made and published. *Neilson v. Jensen*..... 430
2. Where the truth of the publication is the defense of one sued for libel, he must show that he acted with good motives and for justifiable ends. *Id.*
3. In an action for libel evidence *held* not to sustain a verdict for defendants. *Id.*

Liens. See TRUSTS, 3. VENDOR AND VENDEE, 12.

The holder of a lien may, for his own protection, discharge any prior valid lien and add the amount to his own lien. *New England Loan & Trust Co. v. Robinson*..... 51

Life Estates. See ESTATES, 3.

Limitation of Actions. See REVIEW, 43-45.

1. An action on the official bond of a county judge is barred in ten years after the cause of action accrued. *Chicago, B. & Q. R. Co. v. Philpott*..... 212
2. An action on a check by the holder against the maker after demand of the drawee and non-payment is a suit on a written instrument, within the meaning of section 10 of the Code, and the limitation is five years. *Connor v. Becker*..... 343
3. An action to foreclose a real estate mortgage may be commenced at any time within ten years after the cause of action accrues. *Campbell v. Upton*..... 385

Limitation of Actions—*concluded.*

4. A clause in an insurance policy limiting the right of action to a time different from that fixed by statute is void as against public policy. *Omaha Fire Ins. Co. v. Drennan*..... 623

5. An action to enforce a tax lien is barred in five years, and where a void tax deed has been issued to the lien claimant, the issuance of the deed and the failure of the title which it assumes to convey are concurrent events. *Carson v. Broady* 649

Lis Pendens.

Issues *held* not to present question as to force of notice of *lis pendens*. *Anderson v. Kreidler*..... 171

Lobbying. See PUBLIC POLICY, 1.

Mandamus.

1. Where the auditor refuses to pass upon a claim, he may be compelled by mandamus to do so, but the court will not examine into the merits of the claim in such a proceeding. *State v. Cornell*..... 143

2. Mandamus will not issue to require an officer to perform duties prescribed by a void act of the legislature. *State v. Holcomb* 583

3. A county clerk may be required to insert in the official ballot the name of a candidate who was regularly selected by the county central committee of a political party to fill a vacancy on the ticket. *State v. Clark*..... 584

4. The district court may require a county judge to make a correct record of the proceedings before him. *New Home Sewing-Machine Co. v. Thornburg*..... 636

Maps. See EVIDENCE, 25.

Marriage. See WITNESSES, 6.

Master and Servant.

1. An employé assumes risks and hazards of which he is possessed of sufficient intelligence and capacity to know and understand. *Norfolk Beet-Sugar Co. v. Hight*..... 162

2. An adult person is presumed to be of sufficient mental power to comprehend the ordinary risks incident to his employment. *Id.*

3. An employé who, through inexperience, youth, ignorance, or want of mental capacity, fails to comprehend the danger of a situation in which he has been placed should be warned and instructed by his employer. *Id.*

4. In an action by a servant for damages an instruction limiting the risks of employment to such as were known at the time of employment, or then discernible by the exercise of ordinary care, *held* prejudicially erroneous. *Id*..... 163

5. Evidence *held* to show that a section-hand, in stepping upon

Master and Servant—*concluded.*

a railroad track without looking for approaching trains, was guilty of negligence which prevented a recovery for injuries resulting from a collision with an engine. *Chicago, B. & Q. R. Co. v. Yost*..... 439

Maxims.

1. He who seeks equity must do equity. *Lewis v. Holdrege*.... 379
2. *Ignorantia legis neminem excusat. Pisar v. State*..... 455

Mechanics' Liens.

1. To entitle a subcontractor to a mechanic's lien he must file his sworn statement or claim for lien with the register of deeds of the proper county. *Watkins v. Bugge*..... 615
2. In mechanics' lien law "filed in the office of the register of deeds" and "filed with the register of deeds" are equivalent expressions and are used interchangeably. *Id.*
3. The proper filing of a claim for a mechanic's lien consists in placing the sworn statement in the custody of, and leaving the same with, the proper officer for the purpose of recording. *Id.*
4. Failure of a register of deeds to record the sworn statement of claim of lien filed does not affect the validity of the lien. *Id.*
5. All the lienor is required to do to perfect his lien is to file the verified claim in seasonable time with the proper officer, actual recording thereof not being a prerequisite to securing the lien. *Id.*
6. Each order and delivery of material made at different times does not necessarily constitute a separate contract. *Id.*
7. To constitute a single contract it is not necessary that the materials should all be furnished at one time, but may be obtained at different times and still be embraced in a single contract, if such was within the contemplation of the parties. *Id.*
8. Materials ordered and delivered from time to time during the progress of the work *held* to have been furnished under a single contract. *Id.*
9. A material-man cannot tack one contract to another and thereby obtain a lien for the materials furnished under both by filing a sworn statement for lien within the statutory period from the date of the furnishing of the last item. *Id.*..... 621

Monopolies.

1. The anti-trust law (Session Laws 1889, p. 516, ch. 69) was designed to prevent manufacturers and dealers in articles of commerce from combining for the purpose of lessening competition, regulating production, and increasing profits,

Monopolies—*concluded.*

and to secure to the public the benefits of fair competition in trade. *Downing v. Lewis*..... 386

2. A laundry is not a manufacturing establishment within the meaning of the anti-trust law (Session Laws 1889, p. 516, ch. 69). *Id.*

Mortgage Foreclosure. See EXECUTIONS. FRAUDULENT CONVEYANCES, 3. INSURANCE, 15. LIMITATION OF ACTIONS, 3.

Mortgages.

1. A mortgagee is not estopped from assailing the validity of an apparently senior lien by a mere exception from the mortgagor's covenant against incumbrances of a class of liens which would include that assailed if it were valid. *Gadsden v. Thrush*..... 565

Action to Recover Debt.

2. In the absence of an agreement by a mortgagee to look primarily to his security for satisfaction of the debt, a foreclosure of the mortgage is not a condition precedent to an action at law on the secured claim. *Grable v. Beatty*..... 642

3. The holder of a note secured by mortgage may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged property primarily liable for the debt. *Id.*

Assignments. Release.

4. Detaching an interest coupon from the bond secured and transferring it to a third person operate as an assignment *pro tanto* of the mortgage. *New England Loan & Trust Co. v. Robinson*..... 50

5. Provisions of a mortgage are not personal to mortgagee, but inure to the owner of any part of the debt secured. *Id.*, 51

6. Ownership of a mortgage follows a transfer or assignment of the debt which it secures. *Anderson v. Kreidler*..... 171

7. Assignor of a note secured by mortgage cannot release promisor from liability for the debt or disturb the mortgage lien. *Id.*

Delivery. Validity.

8. Under facts stated in opinion, *held* that a mortgage was inoperative, there being no consensus, and there never having been an effectual delivery. *Gadsden v. Thrush*..... 565

Discharge of Prior Lien.

9. The holder of a mortgage may, for his own protection, discharge any prior valid lien and add the amount to his own lien, and it is not essential that this right shall be found in express contract between the property holder and the lien holder. *New England Loan & Trust Co. v. Robinson*..... 51

Distribution of Proceeds of Sale.

10. Procedure adopted by a junior mortgagee in asserting his

Mortgages—*concluded.*

claim to the surplus on foreclosure of the senior mortgage, *held* proper. *Moss v. Robertson*..... 775

11. A junior mortgagee, as against the owner of the equity of redemption, *held* entitled to surplus on foreclosure of the senior mortgage. *Id.*

Foreclosure by Holder of Coupon.

12. Mortgage *held* not to contain a contract precluding the holder of an interest coupon from maintaining suit thereon, nor to contain a provision that only the owner and holder of the bond secured should maintain a foreclosure suit. *New England Loan & Trust Co. v. Robinson*..... 50

Notice of Lien.

13. Proof of publication in a newspaper as an item of news of the giving of a mortgage upon real estate is alone insufficient to establish that a particular subscriber had actual knowledge of the existence of such mortgage. *American Fire Ins. Co. v. Landfare*..... 482

Motions.

A motion which cannot be allowed substantially as made may be overruled. *Hudelson v. First Nat. Bank of Tobias*..... 247

Municipal Corporations. See PUBLIC POLICY, 1.

Claim for Damages. Description of Place of Injury.

1. One filing with the city clerk, as provided by statute, an unliquidated claim for injuries resulting from negligence of the city must describe the premises where the injuries occurred with such certainty that the place may with reasonable diligence be identified. *City of Lincoln v. O'Brien*..... 761

2. In a statutory notice to a city of a claim for injuries resulting from a dangerous sidewalk, a description of the defective premises was *held* sufficient where it stated that claimant was passing over the sidewalk on the north side of Q street between Eighteenth and Twentieth streets, and "stepped into a hole in the sidewalk, which was in a bad state of repair." *Id.*

Defective Streets and Walks. Personal Injuries. Damages.

3. Where one who was injured on a street sued the city for damages, the city pleading in bar plaintiff's failure to file with the city clerk a statement as required by the city charter, and plaintiff alleging in avoidance that the charter never passed the legislature, judgment cannot be entered for defendant on the pleadings. *Webster v. City of Hastings*.. 669

4. A city charged with the duty of maintaining streets and sidewalks is liable for injuries sustained by travelers, exercising ordinary care, who are injured by the city's negligent failure to perform that duty. *City of Lincoln v. O'Brien* 761

5. The statute (Compiled Statutes, ch. 13*a*, sec. 67, sub. 6)

Municipal Corporations—*continued.*

requiring owners and occupants to keep sidewalks in repair, and making them liable for injuries caused by defective sidewalks, does not relieve the city from that duty and consequent liability. *Id.*

6. The various charter provisions of cities of the first class having more than 25,000 inhabitants, with regard to the maintenance of sidewalks, construed as imposing a direct liability upon the municipality for injuries from defective walks. *Id.*

Ordinances. Suspension of Rules.

7. A suspension of the rule requiring an ordinance to be read once on each of three different days *held* effective, where the council consisted of six members, four voting for suspension, one being absent and one having resigned. *City of North Platte v. North Platte Water-Works Co*..... 403

Taxation. Cost of Abating Nuisance. Occupation Tax.

8. The invalidity of a special tax levied by a municipal corporation against the lot of an individual is ordinarily as available to the subsequent purchaser of the property as to one who was its owner when the assessment was imposed. *Lasbury v. McCague*..... 221

9. Where the owner of a city lot institutes an action to have declared void certain special taxes assessed against the lot, the burden is upon him to establish the invalidity of said tax. *Id.*

10. A special tax assessed by a city on the lot of a citizen to pay the costs of abating a nuisance created by the municipality on the same lot will not be sustained in equity. *Id.*

11. Under section 29, chapter 12*a*, Compiled Statutes, 1895, the city may drain a lot to abate a nuisance thereon and assess the cost against the property, but this power is contingent upon the owner's failure to do such work when requested. *Id*..... 220

12. An ordinance levying an occupation tax on railroad companies *held* not violative of the federal constitution as imposing a burden on interstate commerce. *City of York v. Chicago, B. & Q. R. Co*..... 572

15. An ordinance levying an occupation tax on railroad companies *held* not violative of the state constitution. *Id.*

14. An ordinance levying an occupation tax on railroad companies *held* not void because imposing a tax on a business not wholly carried on within the city. *Id*..... 573

15. An ordinance levying an occupation tax on railroad companies *held* not an attempt to impose a tax on depots in addition to the tax arising from the general assessment of property. *Id.*

16. Section 6 of article 9 of the constitution fixes the power of

Municipal Corporations—*concluded.*

the legislature to authorize municipalities to impose taxes for municipal purposes, and is independent of section 1 of the same article, which authorizes the legislature to directly impose taxes for general purposes, and therefore the limitation of occupation taxes in section 1 to certain named occupations does not forbid taxes on other occupations for municipal purposes alone. *Id.*

Title to Streets.

17. By adverse possession one may acquire title to a street. *Webster v. City of Lincoln*..... 502

Water-Works.

18. Ordinance authorizing a corporation to erect and maintain for twenty-five years a system of water-works, *held* valid, though not preceded by an appropriation to meet payment of water rentals. *City of North Platte v. North Platte Water-Works Co.*..... 403

Names. See PRINCIPAL AND AGENT, 5.

National Banks. See BANKS AND BANKING.

Negligence. See ATTORNEY AND CLIENT, 5. CARRIERS. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1-6. SHERIFFS AND CONSTABLES, 3-15. TELEGRAPH COMPANIES.

The doctrine of comparative negligence is not in force. *Missouri P. R. Co. v. Fox*..... 746

Negotiable Instruments. See ASSIGNMENTS, 3. BANKS AND BANKING, 5. GUARANTY, 1, 2. HUSBAND AND WIFE, 4. LIMITATION OF ACTIONS, 2. PAYMENT, 3, 4. USURY.

1. A contract for the payment of money, to be negotiable, must, among other things, be payable at some time or other, though it may be uncertain when that time will arrive. *Specht v. Beindorf*..... 553

2. A note reading, "six months after date, if elected county commissioner, I promise to pay," etc., is not a negotiable instrument. *Id.*

3. Answer *held* to state no defense in a suit on a note. *State Bank of Ceresco v. Belk*..... 710

Action on Note. Mortgages.

4. The holder of a note secured by a mortgage may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged property primarily liable for the debt. *Grable v. Beatty*..... 642

Coverture. Liability of Married Woman.

5. In a suit by a bank upon a note a wife *held* not estopped from interposing, as a defense, her coverture and her signing as surety. *Westervelt v. Baker*..... 63

6. The signing of a note by a wife does not raise the presump-

Negotiable Instruments—*concluded.*

tion that she intended to render her separate estate liable for its payment. *Id.* 66

Indorsements. Liability of Indorser. Forgery. Burden of Proof.

7. An indorser of a negotiable instrument guaranties the genuineness of prior indorsements. *First Nat. Bank of Hastings v. Farmers & Merchants Bank* 149

8. Where a check is drawn payable to the order of a named payee, one who takes the check on the forged indorsement of the payee and himself indorses it, is liable to the bank on which the check is drawn if that bank pays it in ignorance of the forgery, in the absence of circumstances estopping the drawer from setting up the forgery. *Id.*

9. Genuineness and effect of indorsement of a check payable to a borrower, and which had been sent by a loan company to its correspondent, where the abstract showing borrower's title to land offered as security for the loan was a forgery, the borrower having no interest in such land. *Id.*

10. Evidence *held* not to sustain a finding that an indorsement was genuine. *Id.*

11. Where the only defense to an action by an indorsee is failure of consideration, the burden is on defendant to overcome the presumption that the note was transferred for value before maturity. *Crosby v. Ritchey* 336

12. A condition or memorandum written in or indorsed on a note by the maker prior to its delivery is a substantive part of the note. *Specht v. Beindorf* 553

Possession.

13. Possession of a promissory note payable to bearer is *prima facie* evidence of the holder's ownership. *New England Loan & Trust Co. v. Robinson* 51

Principal and Surety.

14. One who signs a note as surety is liable for payment thereof precisely to the same extent as his principal. *Kroncke v. Madsen* 609

Wager. Public Policy.

15. A note reading, "six months after date, if elected county commissioner, I promise to pay," etc., is a contract of wager on the result of an election, and on grounds of public policy will be declared void. *Specht v. Beindorf* 553

Newspapers. See EVIDENCE, 27.

New Trial. See BILL OF EXCEPTIONS, 7. INSTRUCTIONS, 21.

Assignments of Error.

1. An assignment in a motion for a new trial that a group of instructions is erroneous is insufficient if one of them is without error and was properly given. *American Fire Ins. Co. v. Landfare* 483

New Trial—*concluded.*

2. Error in the assessment of the amount due will not be reviewed under an assignment in the motion for a new trial that the verdict is not sustained by sufficient evidence. *Hammond v. Edwards*..... 631

3. An assignment of error in the motion for a new trial relative to giving instructions must be specific as to each. *McIntyre v. Union P. R. Co*..... 587

4. It is not error to overrule an assignment that the court erred in refusing to give three instructions where one of them was erroneous. *Globe Oil Co. v. Powell*..... 463

Ejectment. Judgment on Demurrer.

5. Where defendant refuses to plead further, but permits judgment to go against him on demurrer to plaintiff's reply in an action of ejectment, he is not as of course entitled to have the judgment set aside and a new trial ordered under section 630 of the Code. *Whiteman v. Perkins*..... 181

Exception to Ruling on Motion.

6. To obtain a review of questions raised in a motion for a new trial an exception must be taken at the time of the decision to the overruling of the motion. *State v. Bartley*..... 810

Joint Motion.

7. A joint motion for a new trial by two or more parties, if not good as to all, should be overruled. *Leonhardt v. Citizens Bank of Ulysses*..... 39

Misconduct of Counsel.

8. New trial on the ground of misconduct of counsel *held* properly denied. *Barr v. Post*..... 698

Misconduct of Jury.

9. Where the defeated party knew of misconduct of a juror when it occurred, he may not await the result of the trial and be heard for the first time to complain in his motion for a new trial. *Nye & Schneider Co. v. Snyder*..... 754

Newly-Discovered Evidence.

10. A new trial should not be granted a party on the ground of newly-discovered evidence, unless he makes it appear that the newly-discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial. *Cunningham v. State*, 691

Notice. See EXECUTIONS, 11, 12, 19. INTOXICATING LIQUORS, 1-3.

A subscriber to a newspaper is not bound at his peril to know all it contains, but is chargeable with what he has seen or read therein and also with knowledge of statutory notices or legal orders which are conclusive of his rights when published. *American Fire Ins. Co. v. Landfare*..... 482

Nuisance. See MUNICIPAL CORPORATIONS, 8-11.

Occupation Tax. See MUNICIPAL CORPORATIONS, 13-16.

Occupying Claimants. See VENDOR AND VENDEE, 10.

Offer of Proof. See EVIDENCE, 14.

Office and Officer. See COUNTY JUDGE. REWARD. SHERIFFS AND CONSTABLES. STATE AND STATE OFFICERS. VENUE.

1. A clerk of the district court who receives, and in his own name deposits in bank, fines imposed by the court, and unlawfully uses the funds for private purposes, thereby converts public moneys to his own use, is in default within the meaning of section 2, article 14, of the constitution, and is ineligible to any office of trust or profit during such default. *State v. Moores* 2
2. For all wrongful acts or omissions of a public officer within the limits of what the law enjoins upon him as such officer his sureties are liable, but they are not liable for moneys collected and embezzled by him, unless as such officer he was authorized by law to collect or receive such moneys. *State v. Moore* 82
3. In absence of evidence to the contrary it will be presumed that a public officer proceeded regularly and performed his official duties within the law. *Spiech v. Tierney* 514

Opening and Closing. See TRIAL, 9.

Opinion Evidence. See EVIDENCE, 16-20.

Order on Debtor. See ASSIGNMENTS, 3.

Ordinances. See MUNICIPAL CORPORATIONS, 7.

Parent and Child.

1. Writings *held* insufficient to fulfill requirements of section 31, chapter 23, Compiled Statutes, relating to acknowledgment of illegitimate children. *Lind v. Burke* 785
2. Evidence adduced by plaintiff to establish his rights to maintain an action for wages earned by him during his minority *held* insufficient for that purpose. *Nicolaus v. Synder* 531

Parliamentary Law. See MUNICIPAL CORPORATIONS, 7.

Parties. See CORPORATIONS, 11. INTERVENTION. MORTGAGES, 12. PARTITION, 2, 3. REPLEVIN, 6. REVIVOR.

Action Against Officer Approving Bond.

1. Two creditors who lost their several claims and attachment liens, because a coroner negligently approved a worthless replevin bond in a suit in which the attached property was taken from the sheriff, cannot join as plaintiffs in an action for damages against the coroner for approving such bond. *Shull v. Barton* 718
2. Attachment creditor, and not the sheriff from whom attached property was replevied, is the proper party to main-

Parties—*concluded.*

tain a suit against the replevying officer for negligently approving a worthless replevin bond. *Id.*

Action on Replevin Bond.

3. A sheriff, from whom attached property was replevied, may maintain a suit on the replevin bond. *Id.*

Plaintiff's Ownership of Claim.

4. That plaintiffs were not the owners of the claim sued on *held* proper matter of defense. *Levy v. Cunningham*..... 348

Revivor. Review.

5. Where a party dies after judgment has been rendered against him, the administrator may prosecute error without procuring an order of revivor. *Webster v. City of Hastings*.. 245

6. On review a judgment against two defendants, where a several judgment might have been proper, may be affirmed as to one defendant though the court had no jurisdiction of the other. *Bates-Smith Investment Co. v. Scott*..... 475

7. All parties to a joint judgment should be made parties to a proceeding in error, but where there is no objection on account of non-joinder until after submission of the cause to the appellate court, defect of parties is waived. *Id.*

Partition.

1. The object of a partition suit is to assign property, the fee simple title to which is held by two or more persons as tenants, or joint tenants in common, to them in severalty. *Phillips v. Dorris*..... 293

2. Only a joint tenant or a tenant in common of real estate can maintain an action for its partition. *Id.*

3. Neither an administrator nor an executor can maintain a suit for partition of realty. *Id.*

4. The raising of questions of adverse title in a partition suit does not oust the court of jurisdiction nor render a dismissal necessary, but the court may hold the case, determine the issues of title, and then proceed with the partition. *Id.*

5. In an action for the partition of real property among several co-owners the district court cannot properly adjudicate upon conflicting legal titles, but if the issue is tried without objection, and the disputed title conclusively established in favor of one of the parties, the other will not be heard to question the correctness and binding force of the judgment. *Carson v. Broady*..... 648

6. The portion of property improved by a co-tenant in possession should be allotted to him, where the rights of his co-owner will not be prejudiced. *Id*..... 649

7. Where a portion of property not susceptible of physical division has been improved by a co-tenant in possession, the

Partition—*concluded.*

property should be sold and the proceeds divided after deducting for his benefit such sum as the salable value was enhanced by the improvements. *Id.*

Partnership. See CHATTEL MORTGAGES. GUARANTY, 1, 2.

1. Where two persons formed a partnership for the purpose of paving streets, and agreed that one member of the firm should manage the business and receive a stated salary therefor, and the firm employed a third person to superintend the work for 25 per cent of the net profits, it was *held* that in calculating the latter's compensation the salary of such member should be treated as an expense, but interest on money used in manufacturing brick was not allowed. *McDonald v. Buckstaff* 88

2. Payment of money by a public contractor to induce men to remain silent, or to lobby on behalf of contracts or estimates, is against public policy, and the courts will not compel contribution between partners on account thereof, nor will they, when one partner is chargeable with the receipts, allow him credit for money so expended. *Id.* 89

3. A claim owing to a firm of which the defendant was a member cannot be set off against debts owing by defendant individually. *Olson v. Lamb* 105

4. Definition of partnership. *Gates v. Johnson* 808

5. A community of interest in the profits as such, of a business venture, and not by way of payment or compensation for services or other assistance, may be sufficient to constitute a copartnership. *Id.*

Payment.

1. Evidence *held* not to sustain the defense of payment. *Leonhardt v. Citizens Bank of Ulysses* 39

2. Lienor's discharge of a prior valid tax or other valid lien is not a voluntary payment. *New England Loan & Trust Co. v. Robinson* 51

3. Whether a renewal note is payment is to be determined from the intent of the parties as shown by the facts. *Harvey v. First Nat. Bank of Omaha* 320

4. A note taken for a pre-existing debt or as a renewal of another note is not a payment or discharge of the debt, unless by express agreement it is accepted as such. *Id.*

5. Where one sold land and sent the deed to a bank to be delivered only upon payment of the purchase-money to him, the vendee depositing the entire amount with the bank to be retained until certain liens were discharged, a loss resulting from failure of the bank fell upon vendee. *Hammond v. Edwards* 631

Perpetuities.

The rule against perpetuities is aimed against undue restraints on alienation, and a devise to a named bishop and his successors, without such restraint, does not offend against the rule. *Lamb v. Lynch*..... 135

Physicians and Surgeons.

1. One practicing without first obtaining and registering the certificate required by article 1, chapter 55, Compiled Statutes, is liable to the penalties of section 16 of said article, though the operations were performed and the medicines administered under the direction of a licensed physician. *State v. Paul*..... 369

2. One practicing without a license is liable to the penalties of the statute, though he did not represent or advertise himself to be a regular, legal, or competent practitioner of medicine. *Id.*

Pleading. See ATTACHMENT, 1, 2. INTERVENTION, 2. STATUTES, 6, 7. USURY, 1.

Allegations and Proof.

1. In an action by an agent for commissions it was *held* that plaintiff, under an allegation of defendant's failure to pay, could not recover commissions on unpaid notes, on the theory that the principal had been negligent in their collection. *Westinghouse Co. v. Tilden*..... 129

2. In a civil suit for assault and battery, where the answer is a general denial, evidence of justification is inadmissible. *Barr v. Post* 698

Allegations Undenied.

3. All material allegations of new matter in the answer not denied in a reply must be taken as true. *Burnet v. Cavanagh*, 190.

Amendments.

4. An amendment *held* ineffectual where it alleged a modification of the contract sued on, without stating what the modification was. *Westinghouse Co. v. Tilden*..... 129

5. In replevin in the district court pleadings may be amended in furtherance of justice. *Hudelson v. First Nat. Bank of Tobias* 247

Answer. Estoppel.

6. A party who failed to answer a petition stating a cause of action against him cannot be heard on appeal to question the correctness of the judgment on the petition, though other parties put its averments in issue and it was not sustained by proof. *Gadsden v. Thrush*..... 565

Construction.

7. Against an objection to the introduction of any evidence on the ground that the petition does not state a cause of action, the pleading attacked will be liberally construed. *Norfolk Beet-Sugar Co. v. Hight*..... 162

Pleading—*continued.*

Cross-Petition.

8. In an action for divorce defendant may file a cross-petition and obtain affirmative relief. *Berdolt v. Berdolt*..... 792

Inconsistency.

9. Two inconsistent defenses cannot be enforced. *Columbia Nat. Bank v. German Nat. Bank*..... 804

Invalidity of Statute.

10. Where defendant pleaded plaintiff's non-compliance with a statutory condition precedent to the right to maintain the action, and plaintiff pleaded in avoidance that the alleged statute had never been passed, a motion for judgment in favor of defendant on the pleadings was improperly sustained. *Webster v. City of Hastings*..... 669

Jurisdiction.

11. Want of jurisdiction of the person of the defendant, not appearing from the summons, the return, or the petition, may be pleaded by answer. *Kyd v. Exchange Bank of Cortland*... 557

12. Jurisdiction of the person of defendant *held* not waived by demurring to the original petition generally, if such demurrer is sustained for the reason stated in the order that the court is without jurisdiction, and where the plaintiff waives any error in that order by amending his petition. *Id.*

Petition. Aid by Answer.

13. Generally, a plaintiff is only required to bring his case within the terms appearing on the face of the contract in suit, and need not negative conditions and exceptions indorsed thereon. *Railway Officials & Employés Accident Ass'n v. Drummond*..... 235

14. A petition defective by reason of the omission of material facts will be aided and cured by the averment of such facts in the answer. *Id.*

15. A petition may be attacked at any stage of the proceedings on the ground that it fails to state a cause of action. *Latenser v. Misner*..... 340

16. Where the sufficiency of a petition is assailed for the first time in the appellate court, it will be liberally construed. *Id.*

17. A petition, when assailed for the first time after judgment, will be sustained if the averments therein constitute a cause of action, even though informally or indefinitely stated. *American Fire Ins. Co. v. Landfare*..... 482

Reply.

18. Where, in a suit by a corporation against a subscriber to its stock to recover his unpaid subscription, the defense is that the entire capital stock was not subscribed, a reply which avers that defendant waived non-payment of the

Pleading—*concluded.*

entire stock is good as against a demurrer. *Macfarland v. West Side Improvement Ass'n*..... 277

19. The filing of a reply is a waiver of the right to assail the answer on the ground that the averments are not sufficiently definite and certain. *Welsh v. Burr*..... 361

Striking Out Matter.

20. The court may overrule a motion to strike from the reply evidential facts which, if submitted to the jury, would tend to establish the ultimate facts alleged in the petition. *Hudelson v. First Nat. Bank of Tobias*..... 247

Political Conventions. See ELECTIONS, 3.

Principal and Agent. See INSURANCE, 7. STATE AND STATE OFFICERS, 1. TRUSTS, 3. USURY, 2.

1. Where one sold land and sent the deed to a bank to be delivered only upon payment of the purchase-money to him, the vendee depositing the entire amount with the bank to be retained until certain liens were discharged, a loss resulting from failure of the bank fell upon vendee. *Hammond v. Edwards*..... 631

Action for Commissions.

2. In an action by an agent for commissions it was *held* that plaintiff, under an allegation of defendant's failure to pay, could not recover commissions on unpaid notes, on the theory that the principal had been negligent concerning their collection. *Westinghouse Co. v. Tilden*..... 129

Authority of Agent. Estoppel.

3. A principal is not estopped to deny the authority of his agent to perform a particular act, on the ground that it was within the agent's apparent authority, unless the authority to perform it was apparent to the person dealing with the agent, and by him relied on. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*..... 150

4. Evidence *held* not to show apparent authority in an agent to receive money on a check. *Id.*

5. Instrument *held* to show authority of a person to sign the name of another as an officer of a company, but not as an individual. *Levy v. Cunningham*..... 348

Evidence of Agency.

6. Evidence *held* insufficient to establish agency. *Anderson v. Kreidler*..... 171

Personal Liability of Agent.

7. One who assumes, without authority, to contract for another is not personally liable in an action on such contract unless he is within its terms. *Brong v. Spence*..... 638

Ratification.

8. A principal who accepts the fruits of a contract made by an

Principal and Agent—*concluded.*

agent in excess of his authority is liable to the person with whom such contract was made, though misinformed as to some of its provisions. *Id.*

9. A principal will generally be held to have ratified the unauthorized acts of his agent by knowingly accepting and retaining the benefits thereof. *United States School-Furniture Co. v. School District* 645

10. The unauthorized transaction of an agent must be either adopted or rejected, by his principal, as a whole, and incident to the acceptance of the benefits of an agency is the assumption of its burdens. *Id.*

Principal and Surety. See HUSBAND AND WIFE, 1. REVIEW, 2.

1. The sureties of the auditor of public accounts are not liable for fees which he collected from insurance companies and embezzled, where the law required the insurance companies to pay such fees in advance into the state treasury. *State v. Moore* 82

2. A surety is not released by voluntary forbearance of the creditor, by failure of the creditor to sue the principal debtor, nor by creditor's non-compliance with the surety's request to bring suit. *Bank of Maywood v. Estate of McAllister* 188

3. The district court, upon the trial of an appeal from an inferior court, is without jurisdiction to render against the sureties on the appeal bond the same judgment it enters against appellant. *Miller v Hogeboom* 434

4. One who signs a note as surety is liable for payment thereof precisely to the same extent as his principal. *Kroncke v. Madsen* 609

5. Section 511 of the Code cannot be invoked in determining the liability of a surety to his obligee or payee, but merely requires that a judgment against a principal and surety shall state which is the principal debtor and which the surety, and provides, as between them, the mode of enforcement. *Id.*

6. In an action against the sureties on a note it is error to instruct that they are not liable thereon to the same extent as the principal, and that the contract of the sureties is to pay only when the liability of the principal is ascertained by a judgment against him and his property exhausted. *Id.*

7. Where a bank obtains judgment for the sole purpose of collecting a debt due from one defendant, its right to so proceed is not impaired by the consideration that another defendant, sustaining the relations of surety to the first, will be released by such enforcement by the bank of its right to receive payment. *Solomon v. Schneider* 680

Priority. See RES JUDICATA, 3.

Process. See EXECUTIONS. SUMMONS.

Property.
Right of recaption exists. *Barr v. Post*..... 698

Public Moneys. See OFFICE AND OFFICERS, 1.

Public Policy. See LIMITATION OF ACTIONS, 4.
1. Payment of money by public contractors for lobbying is against public policy. *McDonald v. Buckstaff*..... 89
2. A note reading, "six months after date, if elected county commissioner, I promise to pay," etc., is a contract of wager on the result of an election, and on grounds of public policy will be declared void. *Specht v. Beindorf*..... 553

Quo Warranto.
1. Respondent cannot demand a jury trial as a matter of right. *State v. Moores*..... 1
2. History of quo warranto *held* not to furnish a basis for determination of the question whether a jury trial is demandable as a matter of right. *Id.*
3. Proceeding should not be dismissed because the term of office expired pending litigation, the office being a lucrative one. *Dean v. State*..... 301

Railroad Companies. See MUNICIPAL CORPORATIONS, 12-15.
Evidence *held* to show that a section-hand, in stepping upon a railroad track without looking for approaching trains, was guilty of negligence, which prevented a recovery for injuries resulting from a collision with an engine. *Chicago, B. & Q. R. Co. v. Yost*..... 439

Ratification. See ATTACHMENT, 9. ATTORNEY AND CLIENT, 3. PRINCIPAL AND AGENT, 8-10. VENDOR AND VENDEE, 8.

Real Estate Agents. See FACTORS AND BROKERS. TRUSTS, 3.

Rebuttal. See TRIAL, 3.

Recaption.
Right of recaption of personalty exists. *Barr v. Post*..... 698

Receivers. See EVIDENCE, 13.
Where a litigant consented to the appointment of a receiver, he was not prejudiced by an order continuing the receivership, in view of the fact that a final decree was entered that he had no interest in the subject-matter of the action. *Ellis v. Harris*..... 398

Records. See COURTS, 4. STATE AND STATE OFFICERS, 6.

Reformation of Instruments.
Evidence *held* sufficient to sustain a decree reforming a policy of fire insurance. *Home Fire Ins. Co. v. Gurney*..... 306

Registration. See MECHANICS' LIENS, 4, 5.

Replevin. See JUDGMENTS, 2. JUSTICE OF THE PEACE, 7, 8.

Amendment of Pleading.

1. In the district court pleadings may be amended in furtherance of justice. *Hudelson v. First Nat. Bank of Tobias*..... 247

Bond. Approval. Negligence.

2. Liability of officer approving an insufficient replevin bond. *Shull v. Barton*..... 716

Dismissal.

3. Where the property has been delivered to plaintiff under the writ, a defendant who procures a dismissal of the suit for want of jurisdiction is not entitled to have a jury impaneled to inquire of his rights of property and of possession. *State v. Letton*..... 158

4. Where a writ of replevin is quashed, on motion of the defendant, for defects appearing on its face, a judgment for a return of the property cannot be given, nor for the value thereof and damages. *Reid v. Panska*..... 195

5. Plaintiff cannot take the property under the writ and dismiss the action without defendant's consent. *Houck v. Linn*, 743

6. Where two plaintiffs took the property under the writ, claiming a concurrent right of possession, but through different titles, and one recovered judgment, it was *held* that the other could not dismiss the case, as to himself, without consent of defendant. *Id.*

Property in Custodia Legis.

7. Attached property taken in replevin, a replevin bond having been approved, cannot, pending the replevin action, be lawfully taken by attachment or execution at the suit of the plaintiff who originally attached it. *Shull v. Barton*..... 718

Summons.

8. In replevin in the county court summons must be made returnable within twelve days from its date. *Reid v. Panska*.. 195

Statute.

9. Act of the legislature of 1875 (Code, sec. 193*a*) amending provisions relating to replevin is void, as containing no provision for the repeal of the sections amended. *Id.*

Rescission. See SALES, 6.

Res Judicata. See INSURANCE, 10.

1. In a proceeding to confirm a sale to satisfy a judgment the court cannot inquire into the merits of the judgment. *Hoover v. Hale*..... 67

2. To sustain a plea of prior adjudication the matter in question must be shown to have been within an issue joined and tried in the former action. *Anderson v. Kreidler*..... 171

Res Judicata—*concluded.*

3. A finding that the question of priority of liens between two mortgages was not settled in a prior action *held* supported by the evidence. *Id.*

4. A dismissal which does not involve the merits of the case is not a bar to another suit upon the same cause of action nor to presentation of the claim against the estate of deceased defendant. *Bank of Maywood v. Estate of McAllister*.. 188

5. Where a defendant took part in the trial of an issue on the merits of the case, it was *held* he could not complain that the court had no power to enter a decree on such issue without setting aside a former interlocutory order. *Ellis v. Harris* 398

6. A judgment sustaining an attachment does not determine whether the property was exempt from seizure. *Johnson v. Bartek* 422

7. Where revivor of an action is sought by conditional order, the hearing in pursuance thereof is the proper occasion to try the right of the successor, and by the absolute order the matter becomes *res judicata*, and cannot be retried with the case on its merits. *Missouri P. R. Co. v. Fox*..... 746

Restraint of Trade. See MONOPOLIES.

Review. See INSTRUCTIONS.

Appeal Bonds.

1. A practicing attorney is not a proper surety on an appeal undertaking, but if he execute the same, the bond is not thereby rendered invalid. *Chase v. Omaha Loan & Trust Co*.. 359

2. A bond for appeal from a county court is not required to be signed by the appellant, but is sufficient if executed by a good and sufficient surety. *Id*..... 358

3. A county judge has no authority to eliminate from the files an appeal undertaking which he has approved, because the bond was signed by a practicing attorney. *Id*..... 359

4. When an insufficient appeal bond is filed, the appropriate practice is to move in the appellant court for an order requiring a renewal of the bond by a time to be designated by the court, and in default thereof that the appeal be dismissed. *Id.*

5. The district court, upon the trial of an appeal from an inferior court, is without jurisdiction to render against the sureties on the appeal bond the same judgment it enters against appellant. *Miller v. Hogeboom*..... 434

Assignments of Error.

6. When, in passing upon assignments of error properly made, it is disclosed that they are not well taken because of an unassigned error, of which the defendant in error must avail himself to defeat the assignments made, and which

Review—*continued.*

the court must pass upon to decide the case, such error will be corrected. *Adams v. Nebraska Savings & Exchange Bank*.. 121

7. An assignment that evidence appearing on a certain page of the bill of exceptions was erroneously admitted may be disregarded, in absence of an objection on such page. *Globe Oil Co. v. Powell*..... 463

8. To obtain a review of the admission of evidence the ruling must be assigned in the petition in error. *Security Abstract of Title Co. v. Longacre*..... 469

9. A joint assignment of errors in a petition in error, made by two or more parties to an action, will be overruled unless it can be sustained as to all who join therein. *Wollam v. Brandt* 527

10. An assignment of error assailing all the instructions is unavailing where one of them is correct. *McIntyre v. Union P. R. Co*..... 587

11. Excess in the amount of recovery cannot be considered when not assigned as error in the petition in error. *Hammond v. Edwards*..... 631

12. An assignment of error directed to a group of rulings on a certain class of evidence raises only the question of the admissibility of such evidence as a whole, and presents no question peculiar to one ruling of the group. *Nye & Schneider Co. v. Snyder*..... 754

13. Error in the assessment of the amount of recovery is not presented, in an action based on contract, by an assignment that the verdict is not sustained by the evidence. *Id*..... 755

Bill of Exceptions. Affidavits.

14. Affidavits in support of a motion for continuance will not be reviewed in the supreme court unless embodied in a bill of exceptions. *Reid v. Panska*..... 195

15. Affidavits used on the hearing of a motion in the district court cannot be considered on review in the appellate court unless embodied in a bill of exceptions. *Smith Bros. Loan & Trust Co. v. Weiss*..... 210

16. In absence of a bill of exceptions the judgment below may be affirmed where the only assignments relate to rulings on evidence and to the sufficiency of evidence. *Village of Arlington v. Barothy* 656

17. The entire omission from the bill of exceptions of evidence necessary to sustain an essential controverted averment of appellant's petition necessitates the affirmance of the judgment of the district court. *Hoffman v. Becker*..... 678

Costs.

18. A motion in the lower court to retax costs is unnecessary to review a judgment awarding an attorney's fee in an action on an insurance policy. *American Fire Ins. Co. v. Landfare*.. 483

Review—*continued.*

Dismissal.

19. Proceeding in quo warranto should not be dismissed because the term of office expired pending a review of the case, the office being a lucrative one. *Dean v. State*..... 301

Evidence.

20. A finding, verdict, or judgment based on conflicting evidence will not be disturbed on review. *Combination Gas-Machine Co. v. King*..... 179
Burnett v. Cavanagh 190
Smith v. Myers 503
Emory v. State 550
Hammond v. Edwards 631
Brong v. Spence 638
First Nat. Bank of Omaha v. Hahn..... 679
Gates v. Johnson 808

21. Reviewing court will not reverse the judgment in a case tried to the court without a jury merely because of the admission of improper evidence. *Lunney v. Healey*..... 313

22. In a trial to the court without a jury the admission of incompetent evidence is harmless error, where findings sustained by competent evidence demand the judgment rendered. *Harvey v. First Nat. Bank of Omaha*..... 320

23. Where a cause is tried without a jury, it will be presumed that the court considered only competent evidence in reaching a conclusion. *Thomas v. Nebraska Moline Plow Co*..... 383

24. Admission of immaterial evidence which does not prejudice the rights of the party complaining is not ground for reversal. *Burnet v. Cavanagh*..... 190

25. Admission of incompetent or immaterial testimony which is not prejudicial is not ground for reversal. *McClellan v. Hein* 600

26. The admission of immaterial evidence, when prejudicial, is ground for reversal. *Omaha Nat. Bank v. Robinson*..... 590

27. Admission of evidence not specially assailed in the petition in error will be disregarded on review. *Burnet v. Cavanagh*, 191

28. Error cannot be predicated upon the refusal to eliminate from the record the testimony which the party complaining himself introduced. *Chicago, R. I. & P. R. Co. v. Buel*..... 205

29. A party cannot obtain a reversal on account of the admission of incompetent evidence which he brought out on the cross-examination of the witness of his adversary. *Id.*

30. Error cannot be predicated upon admission of evidence in support of an issue withdrawn from the jury by an instruction. *American Fire Ins. Co. v. Landfare*..... 482

31. Where a judgment or final order results from the trial of an issue of fact, the supreme court will not, in an error

Review--*continued.*

proceeding, in absence of a motion for a new trial, examine the evidence and pass upon its sufficiency to justify the conclusion reached. *Wollam v. Brandt*..... 527

32. A judgment sustained by the evidence will be affirmed on a record presenting no disputed question of law. *Johnson v. Thompson* 552

33. The rejection of evidence, cumulative in its nature and which tends to prove a fact already established and not in issue in the case, if error, is without prejudice. *Barr v. Post* 699

34. A judgment will not be reversed for the erroneous admission of evidence, when the facts have already been testified to without objection. *Id.*

Exceptions.

35. The taking of an exception is an act of counsel, but evidence of such act is its notation of record. *State v. Bartley*..... 810

36. Journal entry *held* to disclose an exception to a ruling on the motion for a new trial. *Id.*

37. To obtain a review of the proceedings of the trial court an exception to the final judgment is unnecessary. *Id.*

Final Order.

38. Where intervener's petition in replevin was dismissed after a finding for plaintiff, it was *held* that intervener might appeal from the judgment. *Moline v. Hamilton*..... 132

39. A decree finding a defendant entitled to a foreclosure against property which had been conveyed to him, and retaining the case for further proof as to the consideration and the amount due, *held* not appealable. *Ellis v. Harris*.. 398

Harmless Error.

40. Error in entering a judgment for a stated sum upon an insurance policy in favor of two joint plaintiffs, the insured and the owner of a mortgage on the insured premises, where the latter alone was entitled to recover the full amount of the loss, is harmless. *American Fire Ins. Co. v. Landfare* 483

41. Where the verdict returned is clearly right and is the only one warranted by the evidence, the judgment will be affirmed, although errors may have intervened at the trial. *United States School-Furniture Co. v. School District*..... 645

Issues. Pleading.

42. An interest in the intervener is a traversable fact, and in a case appealed from the county court the assertion of such interest in the petition of intervention in the county court does not excuse the failure to plead it, and so tender an issue in the district court. *Moline v. Hamilton*..... 132

Jurisdiction.

43. The supreme court does not acquire jurisdiction of an ap-

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peal unless the transcript is filed within six months after rendition of the decree. *Albers v. City of Omaha*..... 357

44. Jurisdiction of the district court to review a judgment of an inferior court or board does not attach until a duly authenticated transcript of the record below has been filed. *New Home Sewing-Machine Co. v. Thornburg*..... 636

45. One seeking review by a proceeding in error must file a transcript and petition in error within a year after rendition of the judgment assailed, but amendments to the transcript may be filed afterward. *Moss v. Robertson*..... 774

Motions.

46. It is not error to deny a motion which cannot be allowed substantially in the form in which it is presented. *Hudelson v. First Nat. Bank of Tobias*..... 247

Objections.

47. An objection that by the default of one of two joint appellants the appeal failed as to both, not examined, because preserved only by objecting to the evidence on the trial. *Moline v. Hamilton*..... 132

Parties. Joinder. Judgments.

48. All parties to a joint judgment should be made parties to a proceeding in error, but where there is no objection on account of non-joinder until after submission of the cause to the appellate court, defect of parties is waived. *Bates-Smith Investment Co. v. Scott*..... 475

49. A judgment against two defendants, where a several judgment might have been proper, may be affirmed as to one defendant though the court had no jurisdiction of the other. *Id.*

50. Where two defendants join in a motion for a new trial, and also file a joint petition in error, the judgment will be affirmed unless the record discloses error prejudicial to both. *Brong v. Spence*..... 638

Pleading.

51. It is not reversible error to overrule a motion to strike from the reply evidential facts which, if submitted to the jury, would tend to establish the ultimate facts alleged in the petition. *Hudelson v. First Nat. Bank of Tobias*..... 247

52. Where the sufficiency of a petition is assailed for the first time in the appellate court it will be liberally construed. *Latenser v. Misner*..... 340

Reason for Ruling.

53. A judgment should not be reversed for a correct ruling, though an erroneous reason was given. *Pease Piano Co. v. Cameron* 564

Revivor.

54. Where a party dies after judgment has been rendered

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against him, the administrator may prosecute error without procuring an order of revivor. *Webster v. City of Hastings* 245

Right of Appeal.

55. One whose claim against the state has been disallowed by the auditor of public accounts may appeal to the district court. *State v. Cornell*..... 143

Special Findings.

56. Rulings of the trial court as to submission of questions for special findings of the jury will only be reversed for an abuse of discretion. *American Fire Ins. Co. v. Landfare*..... 483

Stare Decisis.

57. The judgment below may be affirmed upon a record presenting no proposition of law which has not been settled by repeated decisions. *Stevens v. State*..... 556

Supersedeas.

58. After giving the undertaking prescribed by section 591 of the Code and obtaining leave of court, plaintiff may enforce a judgment recovered by him on a contract for payment of money, though defendant executed a sufficient supersedeas bond for the purpose of staying proceedings pending review of the judgment. *Bodewig v. Standard Cattle Co.*. 217

59. Where plaintiff has complied with the provisions of section 591 of the Code permitting enforcement of his judgment notwithstanding the execution of a supersedeas bond, defendant is not entitled to an order restraining enforcement of the judgment pending review. *Id.*

Transcripts. Cross-Appeal.

60. A cross-appellant may maintain his appeal on appellants' transcript, a duplicate transcript being unnecessary. *McDonald v. Buckstaff*..... 88

61. Alleged error in an order modifying a decree by appointing a master to sell land instead of the sheriff may be disregarded where the decree and the order were omitted from the transcript for review. *La Selle v. Nicholls*..... 458

62. Instructions are part of the record and need not be embodied in the bill of exceptions. *State v Bartley*..... 810

Trial.

63. Refusal of the court, after final submission, to open the cause for reception of additional testimony, *held* not reversible error. *McCloud-Love Live Stock Commission Co. v. Doud* 270

Revivor.

1. Where a party dies after judgment has been rendered against him, the administrator may prosecute error without procuring an order of revivor. *Webster v. City of Hastings* 245

Revivor—*concluded.*

2. Service of a conditional order of revivor must be made in the same manner as a summons, and it seems that service upon the attorney of record is insufficient unless a summons may be so served. *Missouri P. R. Co. v. Fox*..... 746

3. The hearing in pursuance to a conditional order of revivor is the proper occasion to try the right of the successor. *Id.*

4. When a cause has been revived by conditional order duly made absolute, it is not essential that amended or supplemental pleadings be filed alleging the capacity of the new party. *Id.*

5. After a conditional order has been made absolute it is proper to refuse the adverse party leave by supplemental pleadings to tender an issue based on the matter of revivor. *Id.*

Reward.

A ministerial officer who, in the performance of his duties as such, recovers and returns to its owner stolen property is not entitled to recover a reward offered by the owner for such recovery and return. *Miller v. Hogeboom*..... 434

Salaries of Officers. See STATE AND STATE OFFICERS, 8-10.

Sales.

Agreement to Discontinue Business.

1. One who sold his laundry and good-will agreeing not to engage in the laundry business for five years may be restrained by injunction from violating his agreement. *Downing v. Lewis* 387

Conditional Sales. Notice.

2. Actual notice is as effectual to bind a purchaser and give the condition of a sale force against him as is the filing of the contract in the manner and place prescribed by statute. *Combination Gas-Machine Co. v. King*..... 180

3. Instrument in suit *held* to be a contract for conditional sale of a stock of merchandise. *Richardson Drug Co. v. Plummer* 523

4. In a contract for conditional sale of a stock of merchandise a provision against depleting the stock while any portion of the purchase-money remained unpaid *held* not to authorize buyer to purchase new goods on credit of seller. *Id.*

Fraud. Commercial Agency.

5. Where one buys property on credit, with the intention at the time of not paying therefor, he is guilty of actionable fraud. *McCready v. Phillips*..... 446

6. A sale made on faith of a commercial agency's report as a whole and not particularly on faith of a statement of proposed buyer to the agency, *held* not rescindable merely because such statement was false. *Poska v. Stearns*..... 541

Sales—*concluded.*

Title. Seller's Declarations.

7. Competency of seller's declarations as to title, where the conveyance is assailed as fraudulent. *Kyd v. Cook*..... 72

8. After conveyance of property, declarations of seller in disparagement of the buyer's title are not admissible in evidence, but an exception to the rule arises where the conveyance is assailed as fraudulent. *Id.*

Warranty. Action for Breach. Damages.

9. In an action for breach of warranty that cement sold to plaintiff was fit for use in plastering a dwelling, unskillfulness in applying the cement is no defense where instructions furnished by defendant were followed. *Nye & Schneider Co. v. Snyder*..... 755

10. In an action for breach of warranty that cement sold to plaintiff was fit for use in plastering a dwelling, expense of patching plaster in attempts to remedy defects, expense of cleaning floors marred by falling plaster, expense of removing casings preparatory to replastering, expense of replastering and of replacing casings, and loss of use of the house, are elements of damage. *Id.*

School Lands.

Mill dam and race *held* to be easements upon the fee of school land which had been leased by the state. *Hoover v. Hale*... 67

Schools and School Districts.

1. No recovery can be had on a contract with a district school board providing for payments of an indebtedness in time warrants. *Pomerene v. School District*..... 126

2. A school district may not incur indebtedness in the erection of a schoolhouse and issue in evidence thereof warrants payable at a future date and bearing interest. *Id.*

Search-Warrant.

A justice of the peace may depute a person to serve a search-warrant. *Miller v. Hogeboom*..... 434

Set-Off and Counter-Claim. See VENDOR AND VENDEE, 8.

1. A claim owing to a firm of which defendant was a member cannot be set off against debts owing by defendant individually. *Olson v. Lamb*..... 105

2. For facts to constitute a counter-claim, they must arise out of the transaction set forth in the petition as the foundation of the plaintiff's action, or be connected with the subject-matter of that action. *Barr v. Post*..... 699

Sheriffs and Constables. See ATTACHMENT, 9. REWARD.

Promise to Return Money.

1. Liability of officer who receives from defendant the amount of a judgment, releases a levy, promises to return the money

Sheriffs and Constables—*continued.*

when a supersedeas has been executed, and fails to keep his promise. *Kyd v. Exchange Bank of Cortland*..... 557

Release of Attached Property. Exemption.

2. An officer sued for releasing attached property which he had taken from plaintiff's debtor may defend himself by showing that the property was specifically exempt. *Johnson v. Bartek*..... 422

Replevin Bonds. Approval. Negligence.

3. A sheriff, from whom attached property was replevied, cannot maintain an action against the replevying officer for negligently approving an insufficient replevin bond, the creditor, and not the sheriff, being the real party in interest. *Shull v. Barton*..... 718

4. Failure of a coroner to cause the surety on a replevin bond to justify as "bail on arrest," in accordance with section 189 of the Code, which had been repealed, is not conclusive evidence of the officer's negligence in approving the bond, nor of his failure to perform an official duty. *Id*..... 716

5. Where a replevin bond when approved is good, subsequent insolvency of the surety will not render the officer liable. *Id.*..... 717

6. The mere taking of an affidavit of a surety on a replevin bond that he is the owner of realty, not exempt from execution, and of twice the value of the replevied property, will of itself not protect the officer from liability for approving the bond, where it proves insufficient. *Id.*

7. The officer, before approving a replevin bond, in the absence of his own knowledge, should make such investigation and inquiry concerning the financial standing and solvency of the surety as a reasonably prudent man would make before extending credit to the surety to the amount of the bond. *Id.*

8. If an officer negligently approve a replevin bond signed by insolvent or insufficient sureties, and damages result, he is liable. *Id.*

9. When the sureties on a replevin bond are excepted to, the officer approves the bond at his peril. *Id.*

10. A coroner's causing the surety on a replevin bond to justify according to the provisions of a repealed statute is not of itself a protection to him from liability for negligently approving an insufficient replevin bond. *Id.*

11. That an officer acts in good faith in approving a replevin bond will not of itself protect him from liability for negligence. *Id.*

12. Evidence *held* to establish that a coroner was guilty of negligence in approving an insufficient replevin bond. *Id.*

13. Where a creditor attaches personalty as that of his debtor,

Sheriffs and Constables—*concluded.*

and it is taken in replevin from the sheriff, the statutory bond being given and approved, and the creditor, pending the replevin suit, causes the same property to be taken on execution for the same debt for which he had attached it, such seizure on execution is a defense for the coroner in a suit against him by the creditor for negligently approving the replevin bond, and in such a suit the creditor cannot deny that the seizure on execution was void. *Id.*

14. Two or more creditors who have lost their several claims against a debtor and their attachment liens against his property, because an officer negligently approved an insufficient bond in a replevin suit, by which the attached property was taken from the sheriff, cannot join as plaintiffs in a suit against such coroner for damages for negligently approving such replevin bond. *Id.* 718

15. A sheriff, from whom attached property was replevied, may maintain an action on the replevin bond. *Id.*

Services After Term Expires.

16. A sheriff who, during his term of office, commenced the execution of an order of sale may complete the service after his term of office expires. *Holmes v. Crooks* 466

Wrongful Attachment. Damages.

17. Measure of damages for wrongful attachment. *Kyd v. Cook*.. 72

Signatures. See PRINCIPAL AND AGENT, 5.

Special Assessments. See MUNICIPAL CORPORATIONS, 8-11.

Special Findings. See TRIAL, 10.

Specific Performance.

Where the parties agree that time of making deferred payments is of the essence of their contract for the sale of realty, and provide forfeiture in case of default, the contract may be enforced according to its terms. *Whiteman v. Perkins* 181

Stare Decisis. See REVIEW, 57.

State and State Officers.

1. Agent's claim for compensation for making collections for the state *held* improperly allowed under facts stated in the opinion. *State v. Kennard* 254

Auditor. Fees. Liability of Sureties.

2. The sureties of the auditor of public accounts are not liable for fees which he collected from insurance companies and embezzled, where the law required the insurance companies to pay such fees in advance into the state treasury. *State v. Moore* 82

Claims Against State. Duty of Auditor. Mandamus. Appeal.

3. Where the auditor refused to pass upon a claim, he may

State and State Officers—*concluded.*
be compelled by mandamus to do so, but the court will not examine into the merits of the claim in such a case. *State v. Cornell* 143

4. Under the constitution every claimant against the state has the right to have the auditor examine and pass upon his claim, and to appeal to the district court from an adverse decision. *Id.*

5. The power of the auditor to pass on claims against the state and the right of claimants to appeal are not affected by statutes requiring the approval of other officers before payment of such claims. *Id.*

6. The auditor is required to keep a record of his action on claims, and a memorandum made on a voucher returned to claimant is not such a record. *Id.*

7. The auditor may correct his records to show what was actually done. *Id.*

8. For the manner in which a state officer, whose salary is definitely fixed by statute, discharges the duties of his office, he is not accountable to the auditor of public accounts. *Cornell v. Irvine* 657

Compensation of Officers.

9. A commissioner of the supreme court, in addition to his salary as such, may receive from the state compensation for lectures delivered by him before the law class of the state university. *Id.*

10. Where a state officer has rendered services outside of, and not incompatible with, his duties as such officer, it is not proper for the auditor of public accounts to refuse to issue a warrant in payment of such extra services merely because the said state officer's salary, already paid, was for the period during which the said extra services were rendered. *Id.*

Treasurer. Action on Bond.

11. In an action on the bond of the state treasurer, the verdict, insomuch as it was necessarily based on a negative finding upon one of the issues in relation to an alleged failure or default of the treasurer in the performance of the obligations of his official bond, determined not sustained by sufficient evidence, contrary to the evidence, the instructions of the court, and the law. *State v. Bartley* 811

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See EVIDENCE, 24. TABLE, *ante*, p. lv. TAXATION, 12.

1. Section 32, chapter 43, Compiled Statutes, directing that certain fees due from insurance companies be paid to the auditor of public accounts, was modified by the constitution of 1875 so as to require such fees to be paid in advance into the state treasury. *State v. Moore* 82

Statutes—*concluded.*

2. Act of the legislature of 1875 (Code, sec. 193*a*) amending provisions relating to replevin is void, as containing no provisions for the repeal of the sections amended. *Reid v. Panska* 195

3. Where from the journals of both houses and from the copy of the bill sent to the governor, and by him approved, and which was attested by the proper officers of both houses, it is shown that a certain bill was properly passed, that fact cannot be disproved by the introduction in evidence of what it is agreed between the litigants was the bill originally introduced and memoranda thereon indorsed tending to show that the bill approved and attested was not the one really passed. *In re Granger*..... 260

4. The certificate of the presiding officer of a branch of the legislature that a bill has duly passed the house over which he presides is merely *prima facie* evidence of that fact, and evidence may be received to ascertain whether or not the bill actually passed. *Webster v. City of Hastings*..... 669

5. Where it appears from journals of the respective houses that a bill did not pass, the presumption in favor of the certificate of the presiding officers that the bill did pass is overthrown, and the act is invalid. *Id.*

6. Where it is claimed a statute or ordinance is invalid because in substance violative of the fundamental law, it is sufficient to allege generally that the act is invalid. *City of York v. Chicago, B. & Q. R. Co*..... 572

7. Where the claim is that a statute or ordinance is invalid because not regularly passed, the defect in the proceedings must be specifically pleaded. *Id.*

8. The Code, in all its provisions and all proceedings under it, must be liberally construed with a view to promote its object and assist parties in obtaining justice. *State v. Bartley* 810

Stockholders. See BANKS AND BANKING. CORPORATIONS, 11.

Summons. See JUSTICE OF THE PEACE, 2.

In replevin in the county court summons must be made returnable within twelve days from its date. *Reid v. Panska*.. 195

Supersedeas. See REVIEW, 58, 59.

Supreme Court. See COURTS, 1, 2.

Taxation. See MUNICIPAL CORPORATIONS, 8-16.

1. Lienor's discharge of a prior valid tax is not a voluntary payment. *New England Loan & Trust Co. v. Robinson*..... 51

2. In the absence of an express statute to the contrary the rule *caveat emptor* applies to a purchaser at a tax sale. *Norris v. Burt County*..... 295

Taxation—*continued.*

3. A tax based on an assessment *en masse* of contiguous lots which are so situated as to be incapable of separate valuation is not void, and affords no just ground of complaint to the owner whose personalty was liable for the tax at the time the same was levied. *Spiech v. Tierney*..... 515

4. Where land owned by one person is assessed with the land of another, under one aggregate valuation, so that neither owner can determine the amount for which his property is liable, the entire tax is void. *Id.*

Assessor. Irregularities.

5. The failure of an assessor to attach his oath to, and return the same with, the assessment roll is a mere irregularity which does not affect the validity of the tax. *Id.*..... 514

Equalization. Increase of Valuation.

6. Where a board of equalization, without authority, increases the valuation of real estate as fixed by the assessor, the taxes apportioned against such real estate will be valid only to the extent that they are based on the original assessment. *Id.*

Description of Property.

7. Where part of a city lot is condemned by a railroad company for its right of way, the remainder is sufficiently described, for purposes of taxation, as a fractional lot. *Id.*

8. A tax is void for uncertainty which is assessed and levied against an entire city lot under the description, "part of lot 5, in block 41." *Id.*

Lien of Taxes. Collection.

9. The revenue law of 1871 declared real estate taxes to be a perpetual lien on land against which they were levied, and by subsequent legislation this lien has been preserved and continued in force. *Id.*

10. It was made the duty of the county treasurer by section 50 of the act of 1871 to collect delinquent real estate taxes by seizure and sale of the owner's chattels, if any could be found, but the failure of the treasurer to discharge such duty by distraining the personalty of a life tenant did not divest the lien of the taxes from the reversioner's interest in the land. *Id.*

11. Since 1877 the county treasurer has possessed no authority to sell personal property for taxes assessed against real estate prior to that time. *Id.*

Wrongful and Void Sales. Liability of County and of Treasurer.

12. Section 131, art. 1, ch. 77, Compiled Statutes, fixing liability of county and treasurer for wrongful tax sales, applies only to sales made after it took effect. *Norris v. Burt County*.... 295

13. A county cannot be compelled to indemnify a purchaser at a void tax sale made prior to June, 1871, unless the sale

Taxation—*concluded.*

resulted from the mistake or wrongful act of its treasurer. *Id.*

14. The rights and liabilities of a county and a purchaser at tax sale of land against which no valid delinquent tax existed are to be determined by the statutes in force when the void sale occurred. *Id.*

15. The liability of a county to a purchaser at tax sale of land against which no valid delinquent tax existed is not a common-law liability but a statutory one. *Id.*

16. That plaintiff did not own tax certificates, *held* proper matter of defense in a suit against a county treasurer for redemption money. *Levy v. Cunningham*..... 348

Time to Enforce Lien.

17. An action to enforce a tax lien is barred in five years, and where a void tax deed has been issued to the lien claimant, the issuance of the deed and the failure of the title which it assumes to convey are concurrent events. *Carson v. Broady* 649

18. When the right to enforce a tax lien is barred, the lien itself is extinguished and ceases to be a charge upon the land. *Id.*

Telegraph Companies.

1. A telegraph company is liable for all damages sustained by reason of its failure to correctly transmit and deliver a message received by it, notwithstanding an agreement printed on its blanks to the contrary. *Western Union Telegraph Co. v. Beals*..... 415

2. Where the message, "Attach property of A for seven hundred ninety dollars," read when delivered, "Attach property of A for even hundred ninety dollars," recipient was not negligent in interpreting the amount $190. *Id.*

Tenants in Common. See PARTITION.

1. A tenant in common who leases the interest of his co-tenant and remains in possession after his term will be presumed to be holding under the lease. *Carson v. Broady*.... 649

2. The purchase by a tenant in common of an outstanding title to, or incumbrance on, the joint estate inures to the common benefit, and the purchaser is entitled to contribution from his co-tenant, but this rule is not applicable to the purchase of a title or incumbrance by one of the parties before becoming a tenant in common with the other; and in such case, the acquisition being neither actually nor constructively for the benefit of any future co-owner, the right of contribution does not arise. *Id*..... 648

Tender.

1. A tender by vendee *held* too late, where it was made after

Tender—*concluded.*

vendor brought suit for specific performance. *Whiteman v. Perkins* 181

2. In an action on land contracts to enforce a vendor's lien an alleged tender by the defendant should be kept good by bringing the money into court. *Clark v. Neumann*..... 374

Text-Books. See INSTRUCTIONS, 45.

Torts. See DAMAGES, 5.

Transcripts. See REVIEW, 43-45, 60-62.

Treasurers. See STATE AND STATE OFFICERS, 11. TAXATION.

Trial. See CRIMINAL LAW, 1, 8-10. INSTRUCTIONS.

1. Refusal of the court, after final submission, to open the cause for reception of additional testimony, *held* not reversible error. *McCloud-Love Live Stock Commission Co. v. Doud* 270

2. It is within the discretion of the court to permit plaintiff to adduce further evidence in chief after he introduced rebuttal evidence. *McClellan v. Hein*..... 601

3. Correct practice requires rebuttal evidence to be confined to that which explains, disproves, or counteracts evidence of the adverse party, but evidence which would have been proper in chief may, in the discretion of the court, be admitted in rebuttal when proper for that purpose. *Id.*

Abandonment of Issue. Evidence.

4. It is error to submit to the jury the determination of an issue relevant only to a count which had been abandoned by plaintiff. *Columbus State Bank v. Crane Co*..... 317

5. Error cannot be predicated upon admission of evidence in support of an issue withdrawn from the jury by an instruction. *American Fire Ins. Co. v. Landfare*..... 482

Findings.

6. Findings in a suit in equity should respond to all material issues presented by the pleadings. *Clark v. Neumann*..... 374

Jury.

7. Where there is misconduct on the part of a juror during the trial, attention should be called thereto at the first opportunity. *Nye & Schneider Co. v. Snyder*..... 754

Offer of Proof.

8. It is not error to reject an offer of proof not within the limits of the question on which the offer is based. *Barr v. Post*, 699

Opening and Closing.

9. Where a plaintiff is required to introduce any evidence in support of his case, he is entitled to first introduce his testimony before the jury, and also the right to open and close the argument. *Welsh v. Burr*..... 361

Trial—*concluded.*

Special Findings.

10. It is within the discretion of the trial court to submit or withhold questions for special findings of the jury; and its ruling in that regard will not be molested unless an abuse of discretion clearly appears. *American Fire Ins. Co. v. Landfare* 483

Striking Out Evidence.

11. Where evidence is received without objection, it is discretionary with the court to sustain or overrule a motion to strike it out as incompetent. *McClellan v. Hein*..... 600

Verdict.

12. A verdict in plain disregard of the instructions is contrary to law. *Westinghouse Co. v. Tilden*..... 129

Trover and Conversion. See ATTACHMENT, 9.

Trusts. See EXECUTIONS, 10. INSURANCE, 12. MONOPOLIES.

1. While a constructive trustee, for actual fraud, may be denied reimbursement, this rule will not be extended to a case where the circumstances raising the trust were not directly the result of the fraud, and if there was fraud in collateral matters this may be compensated in the accounting. *Olson v. Lamb* 105
2. A constructive trustee who is charged with rents should be credited with his reasonable expenditures, and may be allowed a reasonable compensation for managing the property. *Id.*
3. Where a firm of real estate brokers undertook to find purchasers of land for one who held title thereto merely for convenience of transfer for the benefit of associates interested therein, such firm is not, in equity, entitled to a decree subjecting unsold portions of such land, or such associates personally, to liability for the payment of commissions on the theory that the services of the firm in finding purchasers as undertaken were rendered in the execution of a technical trust. *Marshall v. Goble*..... 274
4. After a plaintiff has fairly collected a debt justly due him from a debtor, it is his right to dispose of the amount so collected in any manner he sees fit, without thereby subjecting himself to liability to other creditors of the same debtor. *Solomon v. Schneider*..... 680

Usury. See BANKS AND BANKING, 4.

1. Notes made and payable in another state and stipulating for a higher rate of interest than is lawful in Nebraska will be enforced according to their terms, in the absence of a plea of usury. *McCready v. Phillips*..... 446
2. Where an agent, for the purpose of making loans of money, exacts, directly or indirectly, for its use interest in excess

Usury—*concluded.*

of the legal rate, the transaction will be *held* usurious. *Hare v. Hooper*..... 480

3. Evidence *held* to sustain a finding that the contract in suit was tainted with usury. *Id.*

Value. See WITNESSES, 1.

Variance. See JUSTICE OF THE PEACE, 5.

Vendor and Vendee. See COVENANTS. EXECUTIONS, 17, 18. JUDGMENTS, 7. TRUSTS, 3.

1. Where one sold land and sent the deed to a bank to be delivered only upon payment of the purchase-money to him, the vendee depositing the entire amount with the bank to be retained until certain liens were discharged, a loss resulting from failure of the bank fell upon vendee. *Hammond v. Edwards*..... 631

Forfeiture. Time.

2. Where the parties agree that time of making deferred payments is of the essence of their contract, and provide for forfeiture in case of default, the contract may be enforced according to its terms. *Whiteman v. Perkins*..... 181

3. An attempted forfeiture of a land contract will not be effective when both parties subsequently deal with the contract and the land as though there had been no rescission. *Clark v. Neumann*..... 374

Fraud. Damages. Set-Off.

4. Evidence *held* sufficient to sustain a verdict for slight damages in an action by vendee of land for false representations by the vendor as to quantity. *Hankins v. Majors*..... 299

5. Where one buys property on credit, with the present intention of not paying therefor, he is guilty of actionable fraud, and in such a case the fraud does not consist in the unfulfilled promise to pay but in the expressed or implied false representation of the intention to pay. *McCready v. Phillips*, 446

6. In an action for damages by a vendor for fraud practiced by vendee, the evidence establishing that the fraud did not induce the plaintiff to part with his land for less than he was willing to take uninfluenced by the fraud, but consisted in inducing him to sell at an acceptable price, the vendee intending to evade payment, *held*, that the measure of damages is the price agreed upon less what the vendor may have received, and not the value of the land less such receipts. *Id.*

7. In an action for damages by a vendor for fraud practiced by vendee, instructions and rulings on evidence *held* to be free from prejudicial error. *Id.*

8. An action for damages for deceit inducing a contract ratifies the contract, and the defendant may set off against the

Vendor and Vendee—*concluded.*

damages awarded plaintiff any sums due defendant growing out of the transaction and accruing under the contract. *Id.*

9. Evidence *held* sufficient to establish that plaintiff was induced to make an exchange of lands by false representations. *Smith v. Myers* 503

Occupying Claimants.

10. Where time was the essence of a contract providing for forfeiture in case of default, the vendee, as against the rights of vendor, *held* not within the letter or spirit of the "Occupying Claimants Act." *Whiteman v. Perkins* 181

Rights of Occupant.

11. Where grantor remains in possession of real estate after the execution of the deed therefor, one purchasing is charged with notice of the right, title, or interest of such occupant in the property. *Smith v. Myers* 503

Separate Contracts. Actions.

12. Four separate and complete written agreements, contemporaneously executed, claiming no relationship with one another, and each evidencing the sale of one-quarter of a certain section of land, cannot, in an action to enforce a vendor's lien, be treated as interdependent parts of a single, indivisible contract. *Clark v. Neumann* 374

Venue.

Where defendant procures the release of a levy by paying to the sheriff the amount of the judgment upon his promise to refund the money when the judgment has been superseded, a suit against the sheriff for such money is an action against an officer for an act done under color of his office, and must be brought in the county where the cause of action or some part thereof arose. *Kyd v. Exchange Bank of Cortland* 557

Wager. See PUBLIC POLICY, 2.

Waiver. See CORPORATIONS, 13. PLEADING, 10.

Warranty. See SALES, 9, 10.

Water Companies.

A city ordinance authorizing a corporation to erect and maintain for twenty-five years a system of water-works *held* valid. *City of North Platte v. North Platte Water-Works Co...* 403

Waters.

Mill dam and race *held* to be easements upon the fee of school land which had been leased by the state. *Hoover v. Hale....* 67

Wills. See PERPETUITIES.

1. Courts cannot award costs or attorney's fees to an unsuc-

Wills—*concluded.*

cessful contestant solely because he acted in good faith and probable cause for the contest existed. *Wallace v. Sheldon*.. 56

2. The court having of its own motion instructed the jury as to the bearing of the testator's conduct, previously to executing a contested will, on the question of his mental condition at the time of such execution, it was error to refuse an instruction, correct in law and applicable to the evidence, as to the bearing of his subsequent conduct on the same issue. *Lamb v. Lynch*..... 135

Witnesses. See EVIDENCE, 16.

Competency.

1. Where the owner resided on land taken for right of way and is familiar with the value of the land, he is a competent witness on the question of such value. *Chicago, R. I. & P. R. Co. v. Buel*..... 205

2. In case evidence of a person deceased shall have been taken and read in evidence by his representatives in regard to any transaction or conversation, then an interested witness may be examined alone in regard to the facts testified to by such person deceased. *Kroncke v. Madsen*..... 609

3. Under section 329 of the Code evidence concerning transactions and conversations between a witness directly interested in the result of the suit and a person deceased is incompetent, as against the latter's representatives, with certain exceptions. *Id.*

4. Every person is *prima facie* a competent witness. *Sorensen v. Sorensen* 729

5. The incompetency of one as a witness, or the incompetency of his evidence, must be found in express law and not based on strict or technical construction, and where there is reasonable doubt, the witness and the evidence are competent. *Id.*

6. In a contest between the alleged widow of intestate and his nephew, for the right to nominate an administrator, her own testimony as to a conversation between herself and decedent, constituting a present verbal contract of marriage, or common-law marriage, *held* incompetent under section 329 of the Code. *Id.*

Credibility. Interest.

7. A jury is not bound to accept as true everything testified to by a witness, though unimpeached. *Chezem v. State*..... 497

8. It is not error to instruct the jury that they must alone determine the credibility of witnesses, and that in doing so it is proper to consider the interest, if any, of a witness in the result of the suit, and his demeanor upon the stand. *Id.*

Witnesses—*concluded.*

Cross-Examination.

9. Exclusion of certain testimony during cross-examination *held* not erroneous. *Bates-Smith Investment Co. v. Scott*.... 475

10. Cross-examination of witness *held* proper. *McClellan v. Hein* 600

11. In a civil suit for damages for assault and battery, where plaintiff offers no evidence that he has paid or become liable for services rendered by a physician, it is not error to refuse to permit the physician to be asked on his cross-examination whether he has rendered plaintiff a bill for his services and whether he has been paid for such services. *Barr v. Post*..... 699

12. The latitude which a cross-examination may take is a matter resting largely in the discretion of the trial court, and error is more likely to be committed by undue restriction than by extension of it. *Id.*

Examination.

13. An answer should be excluded when it is clear from what preceded that it would be secondary evidence, and not a matter of personal knowledge, though the question apparently calls for matter within the knowledge of the witness. *Pease Piano Co. v. Cameron*..... 561

14. Refusal to permit a witness on re-direct examination to answer a certain hypothetical question, *held* not prejudicial error. *Barr v. Post*..... 699

Impeachment.

15. In a proper case one accused of a crime should be permitted to introduce testimony to impeach a witness examined by the state on rebuttal. *Argabright v. State*..... 363

Non-Experts.

16. Non-experts may give their opinions as to a person's sanity only after narrating the facts by them observed on which they base their opinions. *Snider v. State*..... 309

Words and Phrases.

1. "Accident." *Railway Officials & Employés Accident Ass'n v. Drummond* 235

2. "Evidence." *Columbia Nat. Bank v. German Nat. Bank*..... 803

3. "Filed with the register of deeds." *Watkins v. Bugge*..... 615

4. "Representative." *Sorensen v. Sorensen*..... 734

5. "Testimony." *Columbia Nat. Bank v. German Nat. Bank*... 803

6. "Thereupon." *Kaufmann v. Drexel*..... 229