Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
03/03/2026 06:26 AM CST

ALVIN H. ARMSTRONG ET AL. V. SIMON D. MAYER ET AL.

FILED JULY 12, 1900. No. 11,303.

1. **Title to Bill:** AMENDMENT: LEGISLATION NOT GERMANE. Where the title to a bill is to amend a particular section, no amendatory legislation not germane to the subject-matter of the original section proposed to be changed is permissible.

2. ———: ———: FORCIBLE ENTRY AND DETAINER: CONSTITUTIONAL LAW. Chapter 82, Laws of 1883, which attempted to amend section 1030 of the Code of Civil Procedure by grafting in the original section the right to appeal from judgments in actions of forcible entry and detainer and forcible detention only, is void as inimical to that part of section 11, article 3, of the constitution, which provides that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title."

3. **Statute:** REMEDY: JURISDICTION: Where a right is given by statute and a specific remedy is provided designating the tribunal for the enforcement thereof, the jurisdiction of such tribunal is exclusive unless the law otherwise provides.

4. **Forcible Entry and Detainer:** STATUTORY ACTION: JUSTICE OF THE PEACE. The action of forcible detainer is purely statutory, and original jurisdiction thereof is conferred upon justices of the peace.

5. **District Court:** ORIGINAL JURISDICTION. District courts have no original jurisdiction of cases in forcible detainer. The jurisdiction of said courts in such actions is by error proceeding only.

6. **Jurisdiction:** CONSENT OF PARTIES. Consent of parties can not confer jurisdiction of the subject-matter.

7. **Supreme Court:** JURISDICTION: ERROR: SUBJECT-MATTER. The supreme court has jurisdiction to review by proceeding in error a judgment rendered by the district court without jurisdiction of the subject-matter.

ERROR from the district court of Lancaster county. Tried below before CORNISH, J. Submitted on motion by defendant in error either to dismiss proceedings in error, or affirm the judgment of the court below or vacate the supersedeas. *Motion overruled.*

Walter J. Lamb and *Robert Ryan*, in support of motion, argued:

The action of forcible entry and detainer is purely statutory and the statute must be strictly complied with. Where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to such subject, the jurisdiction of such tribunal is exclusive unless otherwise expressed or clearly implied from the act. *Hendreschke v. School District*, 35 Nebr., 400; *Macklot v. City of Davenport*, 17 Ia., 379; *Dodson v. Scroggs*, 47 Mo., 285. Such in effect has been the holding of this court. *State v. Palmer*, 18 Nebr., 644; *State v. Chicago, St. P. M. & O. R. Co.*, 19 Nebr., 476; *Cowles v. School District*, 23 Nebr., 655; *State v. Clary*, 25 Nebr., 403; Sedgwick, Statutory and Constitutional Law, 343; *Chandler v. Hanna*, 73 Ala., 390. Is it possible that this court will exercise its appellate jurisdiction in the consummation of a vain purpose? If, upon looking into the record, this court can overlook the transcript from the justice of the peace and thus place itself in such an attitude to this case that a reversal of the judgment of the district court can accomplish nothing, why should this case be permitted to cumber your docket? On behalf of the defendants in error we suggest that we care not if the questions propounded shall be answered in the affirmative, provided this court, in its opinion, will clearly say that the validity and right of enforcement of the judgment of the justice of the peace were in no way impaired by the subsequent proceedings in the district court or in this court, and this we are entitled to, for even if the district court and the justice of the peace had concurrent jurisdiction of the subject-matter, the court which first assumed jurisdiction of the case, conclusively settled the rights of the parties. *Gould v. Hayes*, 19 Ala., 438; *State v. Devers*, 34 Ark., 188; *Averill v. The Steamer Hartford*, 2 Cal., 308; *Parks v. Wilcox*, 6 Colo., 489; *Beeson v. Elliott*, 1 Del. Ch., 368; *Mason v. Piggott*, 11 Ill., 85; *Taylor v. Fort Wayne*, 47 Ind., 274;

Ex parte Holman, 28 Ia., 88; *Barkdull v. Herwig*, 30 La. Ann., 618; *Withers v. Denmead*, 22 Md., 135; *Miller v. County Commissioners*, 119 Mass., 485; *Home Ins. Co. v. Howell*, 24 N. J. Eq., 238; *Rogers v. King*, 8 Paige Ch. [N. Y.], 209; *State v. Yarbrough*, 1 Hawks [N. Car.], 78; *Merrill v. Lake*, 16 Ohio, 373; *Chapin v. James*, 11 R. I., 86; *Thompson v. Hill*, 3 Yerg. [Tenn.], 167; *Griffin v. Birkhead*, 84 Va., 612; *Parsons v. Snider*, 42 W. Va., 517; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S., 294; *Clepper v. State*, 4 Tex., 242.

Charles O. Whedon and *Burr & Burr, contra:*

The law under which the appeal to the district court was taken is not unconstitutional as contended for by defendants in error. *Webster v. City of Hastings*, 59 Nebr., 563. "If the amendatory law might have been made a part of the original act at the time it was passed, it is valid."

It is objected that the act contains more than one subject. In this objection there is no force. *State v. Page*, 12 Nebr., 386; *Miller v. Hurford*, 13 Nebr., 17; *Gatling v. Lane*, 17 Nebr., 80; *Ballou v. Black*, 17 Nebr., 389; *In re White*, 33 Nebr., 812.

NORVAL, J.

This was an action of forcible detainer instituted before a justice of the peace, where the plaintiffs obtained a judgment of restitution for the premises in controversy. The defendants gave a bond for an appeal, and subsequently filed a transcript of the proceedings in the district court and the cause was docketed therein as on appeal. Both parties appeared in said court, and the trial had therein resulted in another judgment for the plaintiffs for restitution of the premises and costs of suit. The defendants having prosecuted a petition in error to this court, plaintiffs have filed a motion to dismiss for want of jurisdiction, or affirm the judgment of the district court, or vacate the supersedeas. The present submission is upon said motion.

The contention of the plaintiffs is that the district court acquired no jurisdiction of the subject-matter by reason of the appeal, and that, therefore, no jurisdiction was conferred upon this court by the error proceeding. The argument is that no appeal can be taken to the district court from a judgment of a justice of a peace in a forcible detainer action, and that the attempt of the legislature to confer the right of appeal in such actions was abortive, on the ground that the legislation is unconstitutional. Prior to 1883, there was in this state no statute which attempted to give the right to an appeal in actions of forcible entry and detainer or forcible detainer. Until that year judgments in such actions could be reviewed alone by proceedings in error. *Dale v. Doddridge*, 9 Nebr., 138.

Chapter 10, title 30, of the Code of Civil Procedure relates to actions for the forcible entry and detention, or the forcible detention only, of real property. This chapter in 1881 comprised sections 1019 to 1032, both inclusive, of said Code. Section 1030 as then existing declared that "exceptions to the opinion of the justice, in cases under this chapter, upon questions of law and evidence may be taken by either party, whether tried by a jury or otherwise." The legislature of 1883 (Session Laws, 1883, ch. 82) passed the following act, which received the approval of the governor:

"An act to amend section 1030 of the Code of Civil Procedure.

"*Be it enacted by the Legislature of the State of Nebraska:*

"Section 1. Exceptions to the opinion of the justice in cases under this chapter upon questions of law and evidence may be taken by either party, whether tried by a jury or otherwise; or either party may appeal from the judgment rendered by such justice by giving bond, with two responsible sureties, to be approved by the justice, conditioned: If the plaintiff appeals to satisfy the final judgment and costs; if the defendant appeals to sat-

isfy the final judgment and costs, and pay a reasonable rent for the premises during the time he wrongfully withholds the same.

"Sec. 2. That section 1030 Civil Code, as heretofore existing, be and the same is hereby repealed."

It is under and by virtue of the foregoing amendatory act that the right to appeal in actions like the present one is claimed; and if this legislation is invalid, the right of the defendants to prosecute an appeal to the district court from the judgment of restitution entered by the justice of the peace did not exist. The title of the amendatory act was "An act to amend section 1030 of the Code of Civil Procedure." Under said title no new legislation was allowed which was not germane to the original section 1030. This is the established doctrine of this court. *City of Tecumseh v. Phillips*, 5 Nebr., 305; *Burlington & M. R. R. Co. v. Saunders County*, 9 Nebr., 507; *State v. Lancaster County*, 17 Nebr., 85; *Miller v. Hurford*, 11 Nebr., 377; *State v. Pierce County*, 10 Nebr., 476; *Trumble v. Trumble*, 37 Nebr., 340; *State v. Tibbets*, 52 Nebr., 228; *Horkey v. Kendall*, 53 Nebr., 522; *Webster v. City of Hastings*, 59 Nebr., 563.

It is plain that the amendatory matter contained in the said act of 1883 is foreign, and not germane, to the subject-matter of the original section 1030 of the Code of Civil Procedure. The scope of said original section was to afford litigants in actions like the one with which we are dealings, the right to take "exceptions to the opinion of the justice * * * upon questions of law and evidence," that his decision might be reviewed by proceeding in error. Said original section contains no provision whatever relating to appeals, while the amendatory legislation has attempted to engraft upon the original section 1030 the right to appeal from judgments of justices of the peace in actions for the forcible entry and detention and forcible detention alone of real property. The amendment was foreign to the original section, and the scope of the amendment was not embraced in the title, "An act

to amend section 1030 of the Code of Civil Procedure"; hence the amendatory law conflicts with article 3, section 11, of the constitution, which declares that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." Section 311 of the Code of Civil Procedure relates to bills of exceptions, and it would hardly be contended that an amendment to that section providing for appeals in civil cases to this court would be germane to said original section 311. Such an amendment would clearly be obnoxious to the constitutional provisions quoted, but no more so than is the legislation under review. It follows that the attempted appeal from the judgment of the justice of the peace was abortive, and the district court thereby did not acquire jurisdiction of the subject-matter of the action.

This brings us to a consideration of another question, which, on the suggestion of the court, has been elaborately briefed by counsel, and that is whether the district courts have original jurisdiction of actions of forcible detainer. Jurisdiction of such actions is conferred upon justices of the peace (Code of Civil Procedure, secs. 905, 1019), and said Code contains no provision conferring original jurisdiction upon the several district courts of the state, to try and determine actions of forcible entry and detainer or forcible detainer only. Section 9, article 6, of the constitution provides that "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide," etc.

It has been held, construing this provision, that where the legislature has conferred a right and provided no special tribunal for its enforcement, the district court has jurisdiction. *Foxworthy v. Lincoln & F. R. Co.*, 13 Nebr., 398. The actions of forcible entry and detainer and forcible detention only are statutory, and the legislature has designated the justices courts as the tribunals in which said actions may be originally brought. These actions are purely statutory and the legislature has pre-

scribed the method of procedure, which must be followed. *Blaco v. Haller*, 9 Nebr., 149; *Blachford v. Frenzer*, 44 Nebr., 829. The language of POST, J., in the opinion in *Hendrischke v. Harvard High School District*, 35 Nebr., 401, is quite apposite here, which we quote with approval. It was there stated: "The rule is well settled that where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to that subject, the jurisdiction thus conferred is exclusive, unless otherwise expressed or clearly manifested." It follows that the jurisdiction of district courts in actions of forcible detainer is merely appellate; that is, to review the judgments of inferior courts in such actions by appropriate error proceedings. *Herkimer v. Keeler*, 81 N. W. Rep. [Ia.], 178; *Small v. Gwinn*, 6 Cal., 447; *Willer v. French*, 27 Ill. App., 76; *Burns v. Nash*, 23 Ill. App., 552; *Dicks v. Hatch*, 10 Ia., 380; *Ginn v. Rogers*, 9 Ill., 131; *McDonald v. Stiles*, 54 Pac. Rep. [Okla.], 487.

The present action of forcible detainer is a creation of the legislature, and did not exist at common law. As is well stated in *Harrow v. Baker*, 2 G. Greene [Ia.], 201, 203: "In England, proceedings of this kind are either by indictment, or by complaint before a justice of the peace, in the nature of a criminal prosecution. That, which by their law is made an offense punishable by fine and imprisonment, is by ours a civil action to obtain possession."

In *Murry v. Burris*, 6 Dak., 170, 175, Tripp, C. J., observed: "Statutes of forcible entry and detainer are of very ancient origin; they date far back into the fourteenth century; they succeeded the wager of battle; they were criminal in character, and were designed to prevent redress of private wrongs by means calculated to disturb the peace and good order of society, in the use of force and violence of a nature to inspire terror and incite personal conflict. These statutes were highly penal in character, and were enforced by indictment of the grand jury or by complaint before a magistrate, and terminated,

when unfavorable to the offender, in a fine to the king, and an ouster from the premises unlawfully entered, as a punishment for the offense, and not as a determination of any right of the parties. No title passed or was affected by these proceedings, which were generally summary in character and were prosecuted in the name of the sovereign. In modern times these statutes have undergone great changes; and while generally the summary character of these proceedings remains, yet so great has been the change wrought by legislation that modern statutes of forcible entry and detainer retain but little of their former force and character beyond the name they bear."

We are forced to the conclusion that the constitution conferred no original jurisdiction upon the district court to try and determine actions of forcible detainer, and that the jurisdiction of said courts as to such actions is by error proceedings alone. The fact that the plaintiff appeared in the district court and tried the cause without raising the question of jurisdiction is immaterial, since consent of parties can not confer upon a court jurisdiction of the subject-matter. The judgment of the district court from which this error proceeding has been prosecuted is *coram non judice.* Such being the case, the motion to affirm must be denied. The supersedeas is of no validity and hence need not be vacated, as it does not stand in the way of the enforcement of any rights of the plaintiffs.

The motion to dismiss the error proceeding for want of jurisdiction must also be denied. It is true where jurisdiction of the subject-matter is lacking an appellate court acquires none by appeal, for the obvious reason that an appeal removes to the appellate court the same cause. But the judgment of the district court is not here on appeal, but by error proceeding. A new action has been commenced in this court to review the judgment of the district court. The supreme court has original jurisdiction to hear and determine the same, notwithstanding the district court was without jurisdiction of the subject-

matter of the action in which it rendered the judgment in question. The motion is overruled.

MOTION DENIED.

FRED A. MILLER, ASSIGNEE, V. CHARLES E. WAITE ET AL.

FILED JULY 12, 1900. No. 9,039.

1. **Statute:** DEED OF ASSIGNMENT: FILING FOR RECORD. The provisions of section 6, chapter 6, Compiled Statutes, 1899, requiring the filing of a deed of assignment for record in the clerk's office of the county in which the assignee resides within twenty-four hours after its execution, is mandatory, and a failure to file such instrument within the time limited by statute avoids the assignment and renders it of no force and effect.

2. **Compliance With Statute.** A substantial compliance with, and conformity to, the statutory provisions regulating the subject of voluntary assignments for the benefit of creditors is a condition essential to effectuate a valid transfer of title to the property assigned to the assignee named in the assignment.

3. **Assignee:** POSSESSORY TITLE: TROVER. An assignee of property assigned for the benefit of creditors who is in the peaceable and undisputed possession thereof has a possessory title therein sufficient to maintain an action for conversion against those who illegally and without authority obtain possession of such property, and unlawfully convert the same to their own use, even though the deed of assignment be invalid for want of being filed for record within twenty-four hours from its execution, as provided by statute.

4. **Pleading:** PETITION: DEMURRER. Where a petition alleges that the plaintiff, as assignee, was in the exclusive, open and notorious possession of property assigned for the benefit of creditors, which property was illegally and unwarrantably taken, and unlawfully converted by defendants to their own use, *held*, upon demurrer to such petition, that the same stated a cause of action, notwithstanding that the petition showed on its face that the deed of assignment under which plaintiff was in possession was not filed for record for ten days after its execution.

5. **Former Opinion Modified.** Opinion in *Miller v. Waite*, 59 Nebr., 319, modified.

ERROR to the district court for Lancaster county.

Tried below before HALL, J. *Judgment of reversal adhered to.*

Mockett & Polk, Stewart & Munger, Darnall & Kirkpatrick, E. M. Coffin, T. J. Doyle, V. H. Stone and *C. S. Rainbolt,* for plaintiff in error.

Willard E. Stewart, E. C. Strode and *Stearns & Tyrrell, contra.*

HOLCOMB, J.

A decision reversing the judgment of the lower court was rendered in this case November 23, 1899, and is reported in 59 Nebr., 319. A rehearing being granted, we again have the case before us for consideration.

We were moved to reinvestigate the case solely because of a doubt as to the correctness of the position taken in the first opinion, as to the effect or consequence of a failure to have filed for record the deed of assignment within twenty-four hours of its execution as provided by section 6, chapter 6, Compiled Statutes, 1899. Upon the other propositions announced in that opinion, we are quite satisfied of their correctness.

It was said in the first opinion, p. 320: "Another contention of the defendants is that the assignment was void because of the failure to record the deed within twenty-four hours from the time of its execution. Our view of the matter is that the title to the property passed to the assignee when the deed was delivered. * * * The failure to file a deed of assignment for record within the time fixed by statute would not, *ipso facto,* divest the assignee's ownership of the trust estate." A more careful investigation of the subject in the light of the statutory provisions and prior utterances of this court leads us to the view that, while the conclusion reached was the correct one, we were in error in the position taken on the proposition mentioned, and that in this regard we incorrectly stated the law as applied to the sections of the

statute under consideration. Section 1, chapter 6, Compiled Statutes, being the general statutory provisions regulating voluntary assignments for the benefit of creditors, says: "That no voluntary assignment for the benefit of creditors hereafter made shall be valid unless the same shall be in conformity to the terms of this act." Section 6 provides the manner in which the deed of assignment shall be executed, and *inter alia*, says: "And within twenty-four hours after its execution it shall be filed for record in the clerk's office of the county in which the assignee resides. * * * Within thirty days after its execution it shall be filed for record in every other county in this state in which there shall be situate real property conveyed therein, and such assignment shall be recorded in each such county in the manner aforesaid. A failure to file such assignment for record within the time aforesaid, in any county in which by the terms of this section it is required to be recorded, shall avoid such assignment as to property situate in such county." The language of the statute is plain, strong and unambiguous. It is susceptible of but one construction. That it is mandatory in its character is obvious from its reading, and a failure to conform to its provisions avoids the assignment and renders it without force and effect. A substantial compliance with, and conformity to, the statutory provisions regulating the subject is a condition essential to effectuate a valid transfer of title to the property assigned to the assignee therein named.

The rule of construction herein announced is not a new one in this jurisdiction. In *Wells v. Lamb*, 19 Nebr., 355, in construing the meaning of the word "execution" found in section 6 heretofore quoted, it was held that delivery of the deed of assignment and surrender of control over it was included in the meaning of the word, as well as the act of making and signing the instrument. Says the court, through Judge REESE in the opinion, p. 356: "It could not be claimed that if a debtor should write out and sign an instrument of assignment, but being uncertain as

to the necessity of the step, place it in his pocket or safe, that such assignment would thus be executed, and his right to pay his debts and continue in business would be destroyed. Nor could it be said that if afterwards, but not within twenty-four hours, he should find it necessary to carry out his previously formed purpose, the assignment would have to be rewritten and signed in order that it might be recorded within twenty-four hours after its execution." While the precise point under consideration was not therein raised or decided, it is evident from the language employed that the assignment, to be valid, should be filed for record within the twenty-four hours' time mentioned in the statute.

In *Lancaster County Bank v. Horn*, 34 Nebr., 742, it was held that the provisions as to recording were to be construed as a registry act, and being valid between the parties, if actual notice was imparted to the others of the assignee's possession and title, the failure to record the instrument would not avoid the assignment as to all parties having such actual notice. The rule thus announced has not since been followed, and was in direct terms overruled in the case of *Sager v. Summers*, 49 Nebr., 459.

In *Connor v. Omaha Nat. Bank*, 42 Nebr., 602, 606, in speaking with reference to section 104 of the assignment laws of Wyoming, reading as follows, "An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and incumbrancers in good faith and for value, unless it is recorded and unless the inventory required is filed pursuant to this chapter within twenty days after the date of the assignment," RAGAN, C., uses the following language: "If it can be said that this evidence was sufficient to establish that an inventory was made and filed by France as required by section 100, it still falls far short of establishing that France, within twenty days from the date he made the assignment for the benefit of his creditors, made and filed the inventory required by section 100. The question then is whether the making and filing, within twenty days

from the date of the assignment by France, of the inventory required by section 100 was essential to the validity of such assignment. We think it was. Section 104 of the assignment law of Wyoming expressly declares unless such inventory is made and filed within twenty days after the date of the assignment that the assignment shall be absolutely void." Says the same commissioner, speaking for the court in *Sager v. Summers*, 49 Nebr., 459, 465, with special reference to the proper construction of the provisions of the statute under consideration, and of the rule laid down in *Lancaster County Bank v. Horn, supra:* "The question presented by that case and by this is whether the assignor complied with the law in the execution of his deed of assignment. If he did, it was valid whether the creditors had notice thereof or not. If he did not, it was void, no matter what the knowledge of the creditors of the assignor was, nor what possession the assignee had of the property. It is not the province of the court, by construction, to read into this statute of insolvent debtors provisions which we might be of opinion would mitigate the harshness of its requirements. Our duty in the premises is to ascertain, if we can, and declare the intention of the legislature. It was perfectly competent for the legislature to declare that a deed of assignment for the benefit of creditors should be void unless it was executed and acknowledged in the same manner as an ordinary conveyance of real estate is required to be executed and acknowledged to entitle the latter to be recorded. Nor is it true that a deed of assignment for the benefit of creditors is to be sustained 'if possible.' Of course, it is not to be declared void for any mere technical informality; but to be valid, it must be executed in substantial conformity with the law. This assignment law was not designed for the benefit of creditors, but for the benefit of the debtor; and by complying with its provisions, he is enabled to impound all his property in the hands of an assignee and deprive his creditors of the power to seize it, as at common law they had a right to

do, for the satisfaction of their debts. In other words, the assignment act is a creature of statute, and any one claiming property under it must show at least a substantial compliance with its provisions. The second and third points of the syllabus in *Lancaster County Bank v. Horn*, 34 Nebr., 742, are overruled."

The sixth paragraph of the syllabus in *Maul v. Drexel*, 55 Nebr., 446, holds that "An assignment of personal property for the benefit of creditors should be filed in the office of the county clerk of the county where the assignor resides within twenty-four hours after its execution, and is not void because not filed for record with the register of deeds within that period." Says NORVAL, J., writing the opinion, p. 455: "This assignment conveyed no real estate, as the assignors owned none, but personal property merely, and is not invalidated because not recorded by the register of deeds. It was filed in the office of the county clerk of Douglas county within twenty-four hours after its execution, which is in compliance with the strict letter of the statute, and is sufficient."

In harmony with the now settled rule of this court upon the subject are the following: *Summers v. White*, 71 Fed. Rep., 106, wherein the assignment laws now under consideration were similarly construed; *Lookout Bank v. Noe*, 86 Tenn., 22; *New v. Reissner*, 56 Ind., 118; *Eden v. Everson*, 65 Ind., 113; *Driesbach v. Becker*, 34 Pa. St., 152; *Cannon v. Deming*, 3 S. Dak., 421; *Gridley v. Meyers*, 76 N. W. Rep. [Minn.], 41.

The views hereinbefore expressed, to the effect that a deed of assignment is avoided by reason of a failure to file the same within twenty-four hours after its execution, leads us to no different conclusion than heretofore reached as to the final disposition of the case at bar, and the judgment of reversal must remain undisturbed.

The case comes to us for a review of the ruling of the trial court on the demurrer interposed to the plaintiff's petition. The petition shows that the deed of assignment was executed August 1, 1894, and filed for record August

11, following, and alleges that the plaintiff was in exclusive control, and peaceable and undisputed possession of the property therein mentioned, of which, it is alleged, the defendants, and each of them, illegally and without authority obtained possession, and unlawfully and illegally converted the same to their own use. This the demurrer admits to be true. It can not be said the plaintiff's possession was wrongful. As between him and his assignor, the assignment is valid and he is held to account for the disposition he makes of such property. He can neither dissipate it, convert it to his own use, nor dispose of it otherwise than in the execution of the trust with which he is charged. If, in the execution of the trust he has assumed, he converts the property into money, and applies the proceeds to the satisfaction of the assignor's debts, as contemplated by the deed of assignment, he doubtless would be protected in such acts and the assignment would be upheld. While the assignee is executing the trust sought to be conferred upon him by the assignment, his possession of the assigned estate can be disturbed only by those having a legal and valid claim thereto. *Seal v. Duffy*, 4 Pa. St., 274; *Weber v. Samuel*, 7 Pa. St., 499.

In the opinion heretofore rendered it is said, p. 321: "According to the allegations of the petition, the seizure of the stock of merchandise in question was a lawless act, —an act done without color or claim of right; and the plaintiff might, therefore, on his mere possessory title, sue the defendants for conversion. Whatever may be the infirmities of Miller's title, the defendants, even if they were creditors of the Muir-Cowan Company, could not lawfully seize the assigned property without legal process. The judgment of the district court is reversed, and the cause remanded for further proceedings." We think the views thus expressed correctly state the law. The judgment of reversal is adhered to.

STATE OF NEBRASKA V. EDWARD ROSEWATER, AND THE BEE PUBLISHING COMPANY, A CORPORATION.

FILED JULY 12, 1900. No. 11,399.

1. **Bee Publishing Company:** SAME FACTS. Contempt proceedings were instituted against the Bee Publishing Company, as owner, and Edward Rosewater, as editor-in-chief, of the *Omaha Daily Bee*, on account of certain articles published in said paper. At the request of the defendant Rosewater, separate trials were accorded to each defendant. An opinion and judgment, finding the defendant company guilty as charged, and imposing a fine of $500, was rendered June 7. *Held*, That the essential facts in each case are the same, and that the views expressed and the conclusions reached in the trial of defendant company are controlling of the present case.

2. **Evidence:** GUILT ESTABLISHED. Evidence examined, and found to establish the defendant's guilt of the offense charged in the information.

ORIGINAL proceeding in contempt. See pp. 283-292 for evidence and argument. *Defendant convicted.*

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy,* for the state.

Edward Rosewater, for himself.

Defendant Rosewater answered, denying the charge *in toto* and entering a several plea of not guilty.

HOLCOMB, J.

With the obvious design of influencing the judges and controlling the decision of this court in a case then pending, a series of articles were from time to time published in the *Omaha Daily Bee,* which led to the institution, by the attorney general, by direction of the court, of proceedings for contempt. The defendant company is the owner and publisher of the paper, and the defendant, Edward Rosewater, is the editor-in-chief, having the supervision

and management of said newspaper publication. Issues were joined and a hearing had. At the request of the defendant Rosewater, a separate trial was accorded him. An opinion, written by Mr. Justice SULLIVAN, in the case of the Bee Publishing Company, was rendered June 7, 1900. 60 Nebr., 282. The defendant company was adjudged guilty of constructive contempt, and a fine of $500 imposed as a penalty therefor. The law of the case and the facts, with minor exceptions, are equally applicable to each defendant. The former opinion dealt exhaustively with the principles of law involved, and fully covers every salient feature of the case, thereby rendering it of no useful purpose to again review the case in detail, nor does the writer hereof feel at all able to add anything of value to the views therein expressed. We only refer to that case for a fuller exposition of our views on the subject briefly discussed herein.

We are told that the liberty of the press is involved, and that this proceeding is an arbitrary exercise of power, curtailing that freedom which is necessary for the conservation of public interests, and a free discussion of all questions of public concern. With the same speciousness and plausibility of reasoning, it might as well be argued that the liberty of the individual is endangered who corruptly tampers with a jury to secure an unrighteous verdict, or attempts to improperly influence the decision of a court in a case then pending before it. The issue involved is not one of the liberty of an individual or of the press, but the right of every litigant to have his case heard free from baneful external influences sought to be exerted from selfish or other improper motives. It is injecting into the case a harmful and disturbing element to the prejudice of the rights of the litigants, and inconsistent with the due and orderly administration of justice.

Again it is said, the right to criticise judges and courts for the manner in which official duties are discharged should be respected, and such criticism be not made the basis of proceedings of this character. This view, like

wise, is fallacious, to which recourse is had to cloud the mind rather than to obtain a clear perception of the nature and true character of the case at bar. It should be understood that no question of criticism of the court, or of any of its judges, enters into the case. A most critical examination of the record, and the articles upon which the proceedings are founded, will disclose nothing justifying the assumption that criticism of the court, or of the judges thereof, is any part of the foundation of the proceedings. No criticism was made and none attempted. The court had taken no action which might be made the basis of criticism. The time for action by the court in the case referred to had not then arrived, and the conclusions we afterwards reached were, we doubt not, satisfactory to those responsible for the publication of the articles under consideration. The publications in question do not refer to actions taken by the court, or by any of the judges, but were directed solely to actions to be taken and conclusions to be arrived at in the future, and it was undertaken, by this reprehensible method, to prejudice the mind of the public, and extort a particular decision in a case then pending for determination.

This was palpably an attempt to obstruct and interfere with the due administration of justice, and its tendency was to deprive one of the litigants of the constitutional right to a fair trial by a tribunal wholly free and untrammeled by attempts of coercion or intimidation or threats of public odium and derision.

On this branch of the case we reiterate what was said in the former opinion, viz., "Our decisions and all our official actions are public property, and the press and people have the undoubted right to comment on them and criticise and censure them as they see fit. Judicial officers, like other public servants, must answer for their official actions before the chancery of public opinion; they must make good their claims to popular esteem by excellence and virtue, by faithful and efficient service and by righteous conduct. But while we concede to the press

the right to criticise freely our decisions when made, we deny to any individual or to any class of men the right to subject us to any form of coercion with the view of affecting our judgment in a pending case."

The essential facts constituting the offense charged in the information are either admitted, or established by the evidence beyond controversy. The views expressed and the conclusions reached in the separate trial of the case against the corporation must, in the main, control in the present instance.

Mr. Rosewater states in his testimony that the first of the articles published, entitled "Worthy of Serious Consideration," was written by him after reading the brief of the respondents in the case then pending. He testifies, and we have no reason to doubt the truth of his statement, that the other articles, appearing thereafter, were published without his knowledge, nor had he any personal connection therewith. The first article, standing alone, would not, perhaps, be so aggravated in its character as to require judicial notice. It was not so serious a breach of the proprieties which should obtain during the pendency of an important trial in a court of justice as some of those which followed. Yet it was this, the first article, which set the precedent, and was the initiatory step and beginning of a series of wrongful acts, which, following one after the other, disclosed a manifest purpose to warp the judgment, and control, by unlawful methods, judicial action, and which finally led to the unanimous opinion of the court that such reprehensible course of action should not, in justice to the inviolable rights of citizens, be permitted to pass unnoticed and unchallenged.

The first article is of the same purport, and is evidently intended to accomplish the same final object and purpose as those which followed it. That it, as well as the others, was contemptuous and calculated to obstruct the due administration of justice, and impair the rights of litigants, has already been, and we doubt not, correctly determined.

We do not desire to impute to the defendant actions wrongful in their character not fully justified by the evidence, and any circumstance lessening the degree of the offense, or in mitigation of its character, is given full consideration. The offense is established, and that the defendant should be held accountable therefor, we entertain no reasonable doubt.

In view of the evidence as to defendant's participation in the wrongful acts made the basis of this proceeding, and the conclusions reached in the trial first had, and the fine imposed upon the corporation defendant in that case, we are not disposed to inflict further punishment in this, or do more than to make it manifest that the rights of litigants will be firmly and vigorously protected, while their cases are before us for decision in this tribunal. This each litigant has the undoubted right to ask, and even demand, and to accomplish which it is our duty to invoke, on all proper occasions, the power conferred by law upon this court.

The defendant Rosewater is found guilty as charged in the information. We are content to impose no fine upon him for this, the first offense. He is adjudged to pay the costs of the prosecution.

JUDGMENT ACCORDINGLY.

NORVAL, C. J., took no part in the opinion.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1900.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.
HON. J. J. SULLIVAN, } JUDGES.
HON. SILAS A. HOLCOMB, }

TUCKER BOLIN V. JOHN W. FINES.

FILED SEPTEMBER 19, 1900. No. 10,098.

1. **Evidence:** TRIAL TO COURT: ADMISSION: IMPROPER RULING NOT REVERSIBLE ERROR. The admission of incompetent or improper evidence, in a cause tried to the court without the assistance of a jury, is not alone ground for the reversal of the judgment rendered therein.

2. **Judgment:** SUFFICIENT EVIDENCE. The judgment in such case must be predicated upon sufficient competent evidence.

3. **Replevin:** FAILURE TO PROSECUTE: STATUTE: HEARING OF DEFENDANT: PLAINTIFF'S RIGHT. A plaintiff in replevin who fails to prosecute his suit, or against whom judgment has been entered, is not entitled to introduce evidence upon the hearing accorded the defendant under the provisions of section 1041 of the Code of Civil Procedure to determine the latter's right of property or right of possession of the chattels taken under the writ and delivered to plaintiff.

4. **Dismissal on Defendant's Motion:** HEARING ON MERITS. Where a replevin action is dismissed on motion of the defendant for

jurisdictional defects, he is not entitled by virtue of section 1041 of the Code of Civil Procedure to have his right of property or right of possession of the chattels replevied determined in that action.

ERROR to the district court for Hall county. Tried below before KENDALL, J. *Reversed.*

W. A. Prince and *Dryden & Main,* for plaintiff in error.

W. H. Thompson, contra.

NORVAL, C. J.

This is the third appearance of this case in this court. The former decisions are reported in *Fines v. Bolin,* 36 Nebr., 621, and in *Bolin v. Fines,* 51 Nebr., 650. The action was instituted before a justice of the peace by John W. Fines to recover possession of a quantity of corn which he claimed under and by virtue of a chattel mortgage executed by one Oscar Dewitt. A trial before the justice resulted in a judgment in favor of plaintiff, from which Bolin appealed to the district court, where judgment was rendered in his favor. In error proceeding prosecuted to this court said judgment was reversed, and the cause remanded for further proceedings. 36 Nebr., 621. After said reversal, and the lodging of the mandate in the district court, the defendant filed a motion therein to quash the replevin writ because of the insufficiency of the affidavit on which the same was issued. This motion was overruled, and the second trial in the district court resulted in a judgment in favor of plaintiff, which, on appeal to this court, was reversed and the action dismissed on the ground that the affidavit in replevin was so defective in substance as to not confer jurisdiction to issue the replevin writ. Subsequently, on motion of defendant, a modification was entered by this court remanding the cause to the district court with direction to dismiss the action and proceed in accordance with the provisions of section 1041 of the Code of Civil Procedure,

Pursuant to the mandate, the court below sustained the motion to quash the replevin writ and dismissed plaintiff's cause of action, and a trial of the defendant's right of property and right of possession was had. The court rendered judgment against the defendant on the following special findings:

"1st. I find that the corn in dispute was turned over to the defendant, Tucker Bolin, by one Oscar Dewitt for the purpose of satisfying plaintiff's mortgage, and to preserve it from Dewitt's other creditors, and that the defendant gave no consideration for the corn, but held it for the purpose of satisfying the said mortgage only, and had no right to the corn, either of ownership or possession, adverse to the plaintiff.

"2nd. I find the value of the corn when taken under the writ to have been $165.00.

"3rd. I find the value of the said mortgage and the note secured thereby upon the corn when the corn was taken to have been $168, and that the same was due and unpaid and was due when the writ of replevin in this case was issued.

"4th. I find that the defendant has suffered no damage by reason of the taking of the said corn."

The record before us discloses that while the action was dismissed for want of jurisdiction, yet the cause was litigated as fully by each party as though no order of dismissal had been entered, each producing his proofs, and that plaintiff, over objection of defendant, was allowed to place in evidence the note and chattel mortgage under which he claimed the right of possession of the property, and was likewise allowed to introduce testimony conducing to show that the bill of sale under which defendant asserted ownership and possession was executed by the mortgagor, Oscar Dewitt, for the purpose of defrauding his creditors. The reception of this testimony is now assigned for error. But the ruling assailed is not sufficient ground for a reversal, since the cause was tried without the assistance of a jury, and the principle

is a familiar one, that the admission of incompetent and improper evidence, in a cause tried to the court without the intervention of a jury, is not cause for reversal. *Stover v. Hough*, 47 Nebr., 789; *Stabler v. Gund*, 35 Nebr., 648; *Whipple v. Fowler*, 41 Nebr., 675; *Tolerton v. McLure*, 45 Nebr., 368; *Sharmer v. McIntosh*, 43 Nebr., 509. The reason for the rule is that no prejudice could result from the admission of the testimony, since the court, when it comes to render judgment, is presumed to reject and disregard all incompetent and improper proofs, and must predicate or ground its decision upon the material and pertinent evidence adduced. The findings and judgment under review are abundantly supported by the proofs if the evidence introduced by the plaintiff was proper to be considered, but are wholly unsupported if the testimony on behalf of the defendant alone should be considered and weighed. The question is squarely presented whether the plaintiff had the right to introduce any evidence on the further hearing of the cause as to the defendant's right of property and right of possession to the chattels seized under the writ.

Section 1041 of the Code of Civil Procedure, relating to replevin in justices' courts, declares: "If the property has been delivered to the plaintiff, and judgment be rendered against him, or if he otherwise fail to prosecute his action to final judgment, the justice shall, on application of the defendant, or his attorney, impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that the said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled only to the possession of the same, at such time, then in either case they shall assess such damages for the defendant as are right and proper, for which, with costs of suit, the court shall render judgment for the defendant," etc. Section 191*a* of said Code provides, *inter alia*, that in the cases mentioned in said section 1041 judgment shall be

for a return of the property, or for its value in case a return can not be had, or the value of defendant's possession, and for damages for withholding the property, and costs of suit. It will be observed that these sections require the court, on application of a defendant in replevin whose property has been delivered to the plaintiff, in case judgment has been rendered against the latter, or he has failed to prosecute the suit to a final determination, to call a jury to pass upon the defendant's right of property and right of possession at the commencement of the action, and if the jury determine either in his favor, to render judgment for a return of the property, or, in case there can be no return, for its value or the value of the possession thereof, with damages and costs. There is no provision in either section which authorizes the plaintiff in replevin, who has failed to prosecute his suit or against whom judgment has been pronounced, to litigate the defendant's right of property and right of possession thereto. A plaintiff in replevin must maintain his case on the strength of his own title or claim, and if he fail to establish either title or right of possession in himself, it is wholly immaterial to him whether the defendant has or has not any title or right of possession. This is the universal rule. To permit a plaintiff who has failed to prosecute his replevin suit to introduce testimony to show that defendant had no title or right of possession to the property, as that the same was in a third party, to prevent an alternative judgment from being entered against the plaintiff for a return of the property seized under the writ or for its value, or for the value of the defendant's possession, would be unjust, and would allow plaintiff to introduce testimony which would not be admissible had his suit not been dismissed and there had been a trial upon the merits. When a defendant in replevin is accorded a hearing under said section 1041 of the Code, such adjudication does not determine the merits of the cause, since the judgment rendered in his favor would not bar the plaintiff from subsequently bringing replevin for the

property. Cobbey, Replevin, sec. 1192, and cases cited in note. Where plaintiff's replevin suit has been dismissed, he is no longer an actor. *Swain v. Savage*, 55 Nebr., 687. When the defendant in replevin invoked the proceedings provided in said section 1041, the verdict and judgment must be based upon his proofs alone. If the defendant established a *prima facie* right to the property, he is entitled to an alternative judgment for the return thereof, or its value, or the value of his possessory right. The findings of the trial court are not sustained by competent evidence, and the judgment entered thereon should be reversed.

As already stated, after the last opinion in *Bolin v. Fines*, 51 Nebr., 650, was filed, that decision was modified by this court by directing the trial court to dismiss plaintiff's action and to take such further steps in the cause as were provided by section 1041 of the Code of Civil Procedure. This modification, in so far as it directed the district court to proceed under said section, was improvidently entered, since, in any action like the present, where plaintiff's suit is dismissed on motion of defendant because the writ was unauthorized and issued without jurisdiction, the latter is not entitled to have determined therein his right of posession to the chattels taken under the writ and delivered to plaintiff. *State v. Letton*, 56 Nebr., 158; *Reid v. Panska*, 56 Nebr., 195.

The judgment is, therefore, reversed, and the action dismissed.

REVERSED AND DISMISSED.

SULLIVAN, J., dissenting.

I dissent from the conclusions of the majority. While the first finding of the district court was probably induced by an erroneous view of the law, an examination of the record shows that the material conclusion stated is sustained by undisputed proof. In other words, it was conclusively proven that plaintiff, by virtue of his mort-

gage, had a valid lien on the property in controversy and was entitled to the immediate possession thereof. The other findings are supported by sufficient competent evidence. It thus appears that when the action was commenced, the plaintiff had a mortgage lien on the corn; that he was legally entitled to its possession, and that the amount of his lien exceeded the value of the property. It also appears that, pending the litigation, the corn was sold by agreement of parties. In the opinion of the majority there was error in receiving evidence of plaintiff's right under the mortgage and in making the same a factor in the judgment rendered. I think the action of the court was strictly in accordance with the statute under which the proceeding was had. Section 1041 of the Code provides, in cases where the plaintiff, after obtaining possession of the property, fails to prosecute his action to final judgment, that a jury shall be impaneled on the application of the defendant "to inquire into the right of property and right of possession of the defendant to the property taken." It is further provided that the jury shall find whether the defendant had the right of property, or right of posession only, at the commencement of the suit, and that if they find either in his favor, they shall ascertain and fix his damages. Section 191*a* of the Code provides that in the cases mentioned in section 1041 the judgment shall be for a return of the property or for its value or the value of defendant's possession, in case a return can not be had, and for damages and costs. From these statutory provisions it is apparent that where the plaintiff has obtained possession of the property and fails to prosecute his suit, or is unsuccessful in its prosecution, there must be a judgment against him for a return of the property, if the jury upon inquiry find that the defendant had the right of possession when the action was commenced. There must also be, in such case, an alternative judgment for the value of the property or for the value of defendant's possessory interest, and for damages and costs. The merits of the controversy must be determined.

The condition of the undertaking is "that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him" (Code of Civil Procedure, sec. 1037); and upon this undertaking no action can be maintained until "an execution, issued on a judgment in favor of the defendant in the action, shall have been returned that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county." Code of Civil Procedure, sec. 1045. A plaintiff whose action is dismissed at his instance, or over his objection, is not out of court. By the order of dismissal he loses the right to an affirmative judgment establishing his interest in the property; he loses the right to recover damages and also the right to recover costs, at least such as had accrued up to the time the order of dismissal was made. His action being dismissed, he ceases to be a pursuer and assumes an attitude of defense. The defendant then becomes an actor. He becomes entitled to a judgment against the plaintiff if the jury shall find upon inquiry that he had the right of property or right of possession when the action was commenced. In the language of the statute, "if they find either in his favor, they shall assess such damages as they think right and proper." This language clearly implies that they may find neither in his favor; that the plaintiff may defeat his claim by showing right of property and right of possession in himself or in a stranger when the chattels were replevied. The majority hold that only the defendant's right of property and right of possession are to be inquired into, and that the facts are to be ascertained by listening only to the evidence of the defendant. How the rights of the defendant are to be determined without at the same time determining the rights of the plaintiff is difficult to understand; how it can be decided in an action where both parties are before the court that one of them is owner of the property without deciding that the other is not such owner, and so adjudicating the entire matter, seems quite incomprehensible. If there is

not to be a trial on the merits that will settle, once for all, the controversy between the parties, why impanel a jury to inquire into the right of property and right of possession? As the finding, in the absence of any evidence, would have to be for the defendant, the investigation by the jury would seem to be a needless and idle ceremony. If the plaintiff must stand mute during the trial; if he can not possibly succeed in the action; if the finding and judgment must necessarily be for the defendant, the function of the jury in the case is merely to announce to the court a conclusion already ascertained and inexorably fixed by the law. In my opinion, the defendant's right to a judgment for anything does not stand confessed. The law contemplates that he shall make proof, and that the plaintiff may defend. It would, it seems to me, be a monstrous perversion of justice to permit a defendant to recover a judgment for the value of property of which he had neither the title nor rightful possession, merely because, through some irregularity in the proceedings, the plaintiff's action was dismissed. The objection suggested in the opinion of the court, that to permit the action to proceed on the merits, would be to cast the burden of proof on the defendant, is a slight and altogether insufficient reason for declining to follow the plain and imperative provisions of the law. In this case, it being established by the findings of the court that the plaintiff was entitled to the possession of the corn when the action was commenced, and that the value of his special interest exceeded the value of the property, the defendant failed to fulfill either condition upon which his right to a judgment depended. There is no reversible error in the record, and the judgment should be affirmed.

FRANK J. PERSONS ET AL. V. MARGARET MCDONALD ET AL.

FILED SEPTEMBER 19, 1900. No. 9,285.

1. **Contract:** PRINCIPAL: ATTORNEY. A contract, to be binding upon a principal when executed by another person, must be made in the name of the principal.

2. ——: ——: ——. If one contract in his own name, describing himself as attorney for his principal, the contract is the obligation of the attorney, and not of the principal.

3. **Cases Distinguished.** *McWilliams v. Lawless*, 15 Nebr., 131, and *Wheeler v. Walden*, 17 Nebr., 122, distinguished.

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

Lane & Murdock, for plaintiffs in error.

D. W. Merrow, contra.

NORVAL, C. J.

This suit was for the specific enforcement of an alleged contract, of which the following is a copy:

"SOUTH OMAHA, NEB., December 7, 1887.

"Received from G. M. Southmayd fifty ($50) dollars as part payment on the east fifty feet of lots 13 and 14 in block 79, in South Omaha. The consideration for the said lots is to be five thousand ($5,000) dollars, one-half of which price is to be paid on delivery of deed for the same, which deed is to be made and delivered on the first day of January, A. D. 1888. Should the said G. M. Southmayd fail to pay the amount above specified at the time mentioned, then this contract is at an end. And is null and void without notice. JOHN T. CATHERS,

"In presence of *Attorney for Edward Clark.*

"C. E. LANE."

A general demurrer to the petition was interposed by

the defendant, which was sustained by the court below, and the action dismissed. Plaintiffs prosecute error. The amended petition discloses that plaintiffs are the owners of said instrument, and that the defendants are the grantees of Clark. While many points are argued in the briefs of counsel for the respective parties, the only question it is deemed necessary to decide is whether the instrument upon which the suit is founded is the contract of Clark. It will be observed that Edward Clark did not sign the writing, and his name nowhere appears in the body thereof, nor does it upon its face purport to be the obligation of Clark. The instrument is signed "John T. Cathers, Attorney for Edward Clark." This purports to be the contract of Cathers alone, and not of Clark. The words "Attorney for Edward Clark" are merely *descriptio personæ*. A contract of sale or a deed of conveyance executed by an agent, in order to bind the principal, must be executed in his name. *Morgan v. Bergen*, 3 Nebr., 209; *Lessee of Anderson v. Brown*, 9 Ohio, 151; 1 Am. & Eng. Ency. Law, 1035; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass., 101; *Lutz v. Linthicum*, 8 Pet. [U. S.], 165; *Chamberlain v. Pacific Wool-Growing Co.*, 54 Cal., 103; *Hayes v. Brubaker*, 65 Ind., 27; *Spencer v. Field*, 10 Wend. [N. Y.], 88.

The cases of *McWilliams v. Lawless*, 15 Nebr., 131, and *Wheeler v. Walden*, 17 Nebr., 122, are distinguishable from the one at bar. In the first case the application to purchase the land was made to the Burlington & Missouri River Railroad Company in Nebraska, which application was accepted by the company, and its land commissioner gave to the applicant a receipt for the money paid on the purchase, signed "J. D. McFarland, Land Commissioner." Blank contracts were sent by the railroad company to the purchaser, who signed and returned the same, and also sent to the company another payment on the land, and a receipt therefor, signed "J. D. McFarland, Land Commissioner," was sent to the purchaser. The entire transaction showed that the contract to sell was that of

the railroad company, the principal, and not the obligation of its agent. In *Wheeler v. Walden, supra,* although the lease was signed "D. A. Waldon, Agent," the instrument in the body thereof purported to be the contract of the principal, M. A. Walden.

The instrument in the case at bar, not being the contract of Edward Clark, it can not be specifically enforced against his grantees. The demurrer was properly sustained, and the judgment is accordingly

AFFIRMED.

SCHOOL DISTRICT OF CENTRAL CITY, NEBRASKA, ET AL. V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED SEPTEMBER 19, 1900. No. 9,999.

Statutes: AGGREGATE SCHOOL TAX. Under section 24, subdivision 14, chapter 79, Compiled Statutes, 1895, the aggregate school tax for all school purposes in any one year is restricted to a sum not exceeding two per cent on all the taxable property of the district.

ERROR to the district court for Merrick county. Tried below before SULLIVAN, J. *Affirmed.*

E. E. Ross and *W. T. Thompson,* for plaintiffs in error.

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

NORVAL, C. J.

In 1896 the county board of Merrick county, at the instance of the board of education of the school district of Central City, levied on the property embraced in said district a tax of 20 mills on the dollar valuation for general school purposes and likewise a tax of 10 mills on the dollar valuation to pay interest on outstanding school district bonds and to create a sinking fund for their ultimate

redemption. The Chicago, Burlington & Quincy Railroad Company, being a taxpayer of the district, paid to the county treasurer the taxes so levied to the amount of 20 mills on the assessed valuation of its property, and then instituted this suit to enjoin the collection of the tax in excess of 20 mills, claiming that the same is illegal and void. The defendants filed an answer to the petition, to which the plaintiff interposed a general demurrer, which was sustained by the court, and a perpetual injunction against the collection of the tax in excess of 20 mills was granted. The defendants have prosecuted a petition in error.

The sole question presented by the record is whether or not the county board of Merrick county possessed the power to levy, in any one year, a tax of more than 20 mills on the dollar of the taxable property of the school district of Central City for school purposes. Said school district is governed, for the most part, by the provisions of subdivision 14, chapter 79, Compiled Statutes, 1895. Section 23 thereof provides "that the board of education shall annually, during the month of June, report to the county commissioners an estimate of the amount of funds required for the support of the schools during the fiscal year next ensuing, the amount of funds required for the purchase of school sites, the erection of school buildings, the payment of interest upon all bonds issued for school purposes, and the creation of a sinking fund for the payment of such indebtedness; and the county commissioners are hereby authorized and required to levy and collect the necessary amounts the same as other taxes; a duplicate of said certificate shall be filed by the board with the city council." Section 24 of subdivision 14 declares "that the aggregate school tax shall in no one year exceed two per cent, and in cities of the first class having over twenty-five thousand (25,000) population the school tax shall not exceed fifteen (15) mills upon all the taxable property of the district," etc. By section 26 it is made the duty of the board of education to provide for the pay-

ment of interest on school bonds before the same become due, and immediately after the expiration of one-half of the time for which said bonds are issued to create a sinking fund for the ultimate redemption of said bonds when they shall have become due. By section 1 of subdivision 15 of said chapter 79 authority is conferred on each school district to issue bonds for the purpose of purchasing a site for, and erecting thereon a schoolhouse or schoolhouses, and furnishing the same. Section 13 of subdivision 15 provides: "It shall be the duty of the board of county commissioners in each county to levy, annually, upon all the taxable property in each school district in such county, a tax sufficient to pay the interest accruing upon any bond issued by such school district, and to provide a sinking fund for the final redemption of the same, such levy to be made with the annual levy of the county, and the taxes collected with other taxes, and when collected shall be and remain in the hands of the county treasurer, a specific fund for the payment of the interest upon such bonds, and for the final payment of the same at maturity," etc. The contention of the defendant is that said section 13 is a special provision relating to the raising of a revenue to pay the bonds issued by school districts and interest thereon, and that section 24 of subdivision 14 relates to school revenues in general, and contains no limitation upon the power to levy taxes for the payment of school district bonds or interest thereon. The district court ruled that the limitation contained in said section 24 applied to all school district taxes; and this construction of the several statutory provisions is not only a reasonable one, but is in line with the decisions of this court. *Wheeler v. City of Plattsmouth*, 7 Nebr., 270; *Burlington & M. R. R. Co. v. York County*, 7 Nebr., 487; *Union P. R. Co. v. Dawson County*, 12 Nebr., 254. These authorities are decisive of the question presented, and they lead to an affirmance of the decision of the district court.

JUDGMENT AFFIRMED.

SULLIVAN, J., not sitting.

EDWARD A. BANGS, TRUSTEE, APPELLANT, V. ROBERT GRAY ET AL., APPELLEES.*

FILED SEPTEMBER 19, 1900. No. 9,267.

1. **Evidence:** FINDING: MORTGAGE DEBT: PAYMENT. Evidence examined, and *held* sufficient to sustain the finding that the mortgage debt was paid in full to the duly authorized agent of the owner of the note and mortgage.

2. **Testimony of Deceased Person:** INTERESTED WITNESS. 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 in regard to the facts testified to by such person deceased.

3. **Release of Mortgage:** PENALTY: DEMAND: CONDITION PRECEDENT. Before a mortgagor can recover the penalty prescribed by section 29, chapter 73, Compiled Statutes, for failure to discharge a real estate mortgage after full payment thereof, a prior demand upon the mortgagee or his agent for such release or discharge must have been made. Such demand is a condition precedent to a right of action.

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

S. L. Geisthardt, for appellant.

J. H. Haldeman and *R. B. Windham, contra.*

NORVAL, C. J.

In 1885 one Robert Gray, of Cass county, borrowed of the Connecticut River Savings Bank, of Charleston, N. H., the sum of $2,000, giving as security for the payment thereof a mortgage on certain real estate situate in this state. This loan was made through one Benjamin A. Gibson of said county. At that time, and from thence until 1895, one George Olcott was the treasurer and manager of said bank, also the trustee of the estate of Anna C. Webber, deceased. After said loan was consummated, the note and mortgage were sold and transferred by said

*This case is reported in 83 N. W. Rep., 680, as *Olcutt v. Gray.*

bank to said Olcott as such trustee. The real estate so mortgaged was transferred by mesne conveyances to one Addison P. Weston, who paid the principal of said note, at or soon after its maturity, to said Gibson. Several years after said payment the attorney of said Weston demanded of one Seth W. Eddy, who, it is alleged, was at such time the agent of said bank, a release of said mortgage, and, such demand remaining uncomplied with on the part of said bank for more than seven days, action was commenced by him against it to recover the statutory penalty; also to have entered a decree canceling said mortgage of record. The bank answered, disclaiming any interest in said mortgage, and alleging the transfer by it of said mortgage to Olcott as trustee as aforesaid. Olcott then commenced action to have said mortgage foreclosed. Olcott and Weston both died, and the actions were revived in the names of their respective personal representatives. The actions were consolidated, and, on trial, the issues in both cases were found in favor of the personal representatives of Weston and judgment entered accordingly; whereupon appeal to this court was taken by the defeated parties.

In the foreclosure case it is alleged that there is no evidence to support the findings of the court, to the effect that at the time said principal was paid by Weston to Gibson the latter was agent of Olcott to receive such payment; and further, that upon the receipt of such principal, it or its equivalent was paid by Gibson to Olcott. Without specifically pointing out such evidence, we would say that we are of opinion that there was evidence to support both such findings of the lower court, and the judgment will not for that reason be disturbed by this court. It is further argued that the findings are based upon the evidence of Gibson, introduced by Weston, and that the record shows that Gibson was incompetent as against Olcott, he having a direct legal interest in the action. Whether the ground for this objection exists or not, Gibson's testimony was made competent through the action of the ad-

verse party in introducing the deposition of Olcott, after Gibson's testimony had been introduced, and the representatives of Olcott can not, therefore, complain of such ruling of the trial court. *Kroncke v. Madsen*, 56 Nebr., 609. The decree denying foreclosure of the mortgage must, therefore, be affirmed.

The judgment of the lower court in favor of the personal representative of Weston against Bangs, who succeeded Olcott as trustee of the Weber estate, so far as it awarded such personal representative a judgment for $100 against said Bangs for failure to release such mortgage, must be reversed, for the rason that there is no evidence to support the finding. All evidence is to the effect that the demand was made by the attorney of Weston upon Eddy as agent of the bank, and not as the agent of Olcott; and the demand was that such bank release such mortgage, and that at such time Olcott, as trustee, was the owner of said mortgage. This being the case, no proper demand was made upon Olcott, as is required by section 29, chapter 73, Compiled Statutes, 1897, and such a demand is a condition precedent to a right of action. There is evidence of record to sustain a finding that at the time said demand was made upon Eddy he was not only the agent of the bank, but also of Olcott; but we do not think such fact is material, for the reason that the demand was not made upon Eddy as agent of Olcott, but upon him as the agent of the bank, and as the statute is highly penal in its nature, a strict compliance with its requirements must be exacted.

The judgment of the district court allowing Pollard, executor of Weston, a recovery against Bangs, trustee, for the statutory penalty of $100 for failure to release said mortgage, is reversed; but in all other respects, the decisions in both cases are

AFFIRMED.

AUGUST CARSTENS, APPELLEE, V. JAMES W. ELLER, APPELLANT.

FILED SEPTEMBER 19, 1900. No. 9,274.

1. **Appraisal of Real Estate:** CONSENT TO SUSTAINING OF MOTION: ESTOPPEL. A plaintiff, by consenting to the sustaining of defendant's motion to vacate an appraisal of real estate, is not thereby estopped from denying that a subsequent appraisal is too low, whereby the same property was valued at one-half the sum fixd by the first appraisers, where it is not shown that there had been no depreciation in the market value of the property after the making of the first appraisement.

2. **Authority of Deputy Sheriff.** A deputy sheriff may act for his principal in appraising property for sale under a decree of foreclosure.

3. **Sale Under Vacated Appraisal.** Property can not be offered for sale, or sold, under an appraisement which has been set aside by the court.

4. **City Lots:** SEPARATE SALE: NOTICE. Under a decree of foreclosure which requires that city lots shall be sold separately it is not necessary that the published notice of sale should specially state that the lots will be offered for sale separately, when such notice contains the information that the lots will be sold in the manner provided by the decree.

5. **Second Appraisement.** An officer is not required to make a second appraisement of real estate until he has twice offered the property for sale.

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

James W. Eller, appellant, for himself.

Connell & Ives, contra.

NORVAL, C. J.

This appeal is taken from an order confirming the sale of real estate made under a mortgage foreclosure. A decree was entered herein on July 30, 1892, which, on appeal, was affirmed at the January term, 1895. 45 Nebr.,

515. An order of sale was issued October 10, 1895, and each of the twenty-four lots was appraised at $200, by the deputy sheriff and two freeholders called by him. The defendant filed a motion to set aside the appraisement for the reason that the appraisers were called by the deputy sheriff, and because the appraisement was too low. The lots were sold to the plaintiff for $134 each, who subsequently moved for a confirmation of the sale, and the defendant filed objections to the confirmation. The court below, the plaintiff consenting thereto, vacated the appraisement and set aside the sale. Thereafter, on January 18, 1896, a new order of sale was issued, the lots were reappraised by the deputy sheriff and two freeholders, by him summoned for that purpose, at $100 each. The property was advertised, and there having been no bidders, the order of sale was returned indorsed "Not sold for want of bidders." July 27, 1896, plaintiff obtained a *pluries* order of sale, under which the lots were sold by the deputy sheriff to the plaintiff for the sum of $67 each. This sale was confirmed, defendant objecting thereto and to the appraisement, and a deed was ordered to be made to the purchaser.

It is urged that the appraisal is too low, and that plaintiff is estopped to deny it. This argument is based upon the fact that the lots were appraised at a lower sum under the second appraisement than under the first, and that the first appraisement having been set aside as being too low with the assent of plaintiff, he is in no position now to assert that the lots were not valued too low under the last appraisement. The argument is novel, but is without substantial foundation. The record fails to show that the first appraisement was vacated on account of the low valuation of the lots, but rather that said appraisement was vacated because the defendant asked it and the plaintiff consented thereto. Moreover, it is not disclosed that the lots were of the same value when they were last appraised as when the first appraisement was made. The defendant merely showed that the lots were

unimproved and were in the same condition when the two appraisements were made. But this was insufficient to establish that there had been no depreciation in the market value of the lots, or to impeach the second appraisement. Had the first appraisal been vacated with the assent of the plaintiff, on the ground that the valuation placed on the lots was too low, which is not shown to have been the case, it is manifest that such ruling would not preclude the plaintiff from denying that the second appraisement was too low where the market value of the property was not shown to have been the same at the time of the respective appraisements.

The next objection, that the second appraisement is invalid because made by the deputy sheriff, is without merit. *Nebraska Loan & Building Ass'n v. Marshall*, 51 Nebr., 534. It is, however, argued that by consenting to the sustaining of the motion to vacate the first appraisement, one of the objections thereto being that it was made by the deputy sheriff, the plaintiff is estopped from urging that the deputy sheriff could properly make the last appraisement. This claim is untenable, since the motion to set aside the first appraisement was predicated on more than one ground, and the order fails to disclose the ground on which the first appraisement was set aside.

Equally without merit is the third point made by the defendant, that the property should have been sold under the first appraisement, since the same had already been vacated on motion of defendant. Ordinarily, an officer can make only one appraisement of real estate until he has twice unsuccessfully offered the property for sale. Code of Civil Procedure, sec. 495; *Burkett v. Clark*, 46 Nebr., 466. But this rule does not obtain where an appraisement has been set aside by the court.

Another argument is that the published notice of sale was insufficient, because not in accord with the decree, in that the notice did not state that the lots would be offered separately, nor that the property was to be sold under foreclosure of mortgage. The decree provided that

the lots should be appraised and sold separately. They were separately appraised and offered and sold separately. The published notice stated "the above described lots to be sold in the manner provided in said decree." This was sufficient. It was unnecessary that the notice of sale should specifically state that the lots would be offered for sale separately. The published notice was in substance specific.

The fifth objection is obviously barred upon a misapprehension of the record. It in no manner refers to the advertisement and sale in question, but relates to a prior advertisement under which the property was offered, although not sold for want of bidders.

It is also insisted that too long a time intervened between the date of the last appraisement and the first publication of the notice under which the lots were sold. The last appraisal was made January 29, 1896, and the property was advertised immediately thereafter. March 16, 1896, defendant moved to set aside the appraisement, which motion was not passed upon until April 27. A new order of sale was issued July 27, published notice of the sale began on August 5, and the sale was held September 8. It is not disclosed in what manner defendant was prejudiced by the lapse of time between the appraisement and the advertisement under which the sale was made.

The sale is likewise assailed because there was no appraisal made under the last order of sale. The property had been offered for sale only once under the last appraisement. Hence no new appraisement was necessary. *Burkett v. Clark*, 46 Nebr., 466.

No reversible error is revealed by the record, and the order of confirmation is

AFFIRMED.

GEORGE MCCLAVE, APPELLANT, V. SUSANNA MCCLAVE ET AL., APPELLEES.

FILED SEPTEMBER 19, 1900. No. 9,276.

1. **Trial Court:** FINAL DISPOSITION OF CAUSE: REQUEST TO PROCEED IN CAUSE: REVIEW. The failure of a trial court to make a complete and final disposition of a cause can not be reviewed until it has been asked to so proceed in the case.

2. **Advancement by Father to Son:** DEDUCTION FROM DISTRIBUTIVE SHARE. Advancements made by a father to a son may properly be deducted from the distributive share of the latter in the estate of the deceased father.

3. **Partition of Real Estate.** In partition of real estate, the court may allot particular portions of the land to particular individuals.

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

Mockett & Polk, for appellant.

F. M. Hall and *Samuel J. Tuttle, contra.*

NORVAL, C. J.

This is an appeal from an order made by the lower court in an action therein commenced to have partition of the estate of one William McClave, who, in 1888, died intestate, being a resident of the state of Ohio, and owning at the time of his death real estate situate therein, and in Lancaster county in this state. He left a widow and numerous heirs, among the latter being Stewart McClave. Against the said Stewart McClave, Robert E. Moore and Sarah J. Alloway held judgments, which, upon the death of William, became liens upon his share in said estate situate in this state. In the action for partition, it was shown, on trial, that deceased had, during his lifetime, advanced to said Stewart McClave some $2,800, which the court properly found should be de-

ducted from his share in said estate. The lower court, upon sufficient evidence, found the value of the real estate in Ohio and of that in Nebraska, and the value of said Stewart's share in each, and deducted the value of his share in the Ohio property (which did not equal the amount of the advancement) from such advancement, and the balance of such advancement was deducted from the value of his interest in the Nebraska land. The court then found that it was possible to, and did, allot to said Stewart McClave a specific tract of said Nebraska land, free and clear of the dower interest of the widow, and of another life estate owned by one of the parties to the action, and directed the commissioners thereafter to be appointed to make to said Stewart McClave a deed to said particular tract of land, which was, in the order of the court, described by metes and bounds. The court then found the amount due said Moore and Alloway respectively from said Stewart McClave, and the order of priority of their liens upon such specific tract of land, and directed that, unless payments of such judgments be made, said land be sold, and the proceeds of such sale be applied to the satisfaction of such judgments. No further order was made in the premises, and from the order so made an appeal to this court is taken by the plaintiff in partition.

It is claimed by appellant that the action of the lower court, so far as it proceeded in the action, should be reversed for the reason that it failed to set aside the dower or life estate of the widow, and of another of the parties, a widow of one of the heirs. We do not think that question is properly before the court for decision. If the plaintiff desired the court to set aside the dower interest of the widow, he should have asked the lower court to proceed further in the premises, and if the lower court should refuse to so proceed, he had his remedy. There is nothing of record to show that the lower court refused to proceed further in the premises.

It seems that the interest of Stewart McClave in the

Ohio land had, as shown by the record, been previously sold on attachment proceedings issued out of a competent tribunal in that state, and appellant claims that for that reason no deduction should have been made from the amount of the advancement, so far as the value of his interests in Ohio are concerned. We fail to understand the force of the argument. These interests represented two funds. Upon one of them Moore and Alloway had a lien, upon the other they had none. The estate of William McClave had a first lien upon both of the funds for the amount of such advancement. This being the case, equity would require that the estate first exhaust the fund upon which Moore and Alloway had no lien, and that was done in this case. If the lien of the estate proves to be superior to that of the attaching creditor in Ohio, that is the misfortune of such creditor, but certainly it constitutes no error on the part of the trial court in this action. The statute gave the right to allot particular portions of the land to particular individuals. Code of Civil Procedure, sec. 813.

We have carefully read the proceedings of the lower court, and, as far as it has proceeded in the premises, find no error, and for that reason the order appealed from is

AFFIRMED.

DWIGHT NEWMAN, APPELLANT, V. FRANK PHILLIPS, APPELLEE.

FILED SEPTEMBER 19, 1900. No. 9,287.

Evidence: FINDING. Evidence examined, and found to support the finding of the court.

APPEAL from the district court of Dawson county. Heard below before GREENE, J. *Affirmed.*

Warrington & Stewart and *E. A. Cook*, for appellant.

E. D. Owens, W. D. Giffin and *Geo. C. Gillan, contra.*

SULLIVAN, J.

This is an appeal from a decree of foreclosure. Appellant contends that the mortgage debt has been paid, and that the finding of the trial court to the contrary is not supported by sufficient evidence. We have read the record with a good deal of care, and are disposed to think that the right result has been reached; that the only issue raised by the pleadings has been correctly decided.

The judgment of the district court is

AFFIRMED.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. CARLOS C. BURR ET AL., APPELLANTS.

FILED SEPTEMBER 19, 1900. NOS. 9,280 AND 9,281.

1. **Foreclosure:** RECEIVER: RENTAL: AUTHORITY OF RECEIVER: REDUCTION OF RENT. In an action to foreclose a real estate mortgage, the district court has power to appoint a receiver, whose duty it is, under ordinary circumstances, to rent the mortgaged property, if it is rentable. And the duty to rent implies authority to reduce rents, at the expiration of existing leases, if such reduction is necessary to secure tenants and make the property productive.

2. **Evidence:** FINDING. Evidence examined, and found to support the findings of the court.

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

S. B. Pound and *Roscoe Pound,* for appellants:

Lambertson & Hall, contra:

The trial judge is the proper judge of the weight and

credibility of the evidence. *Worthington v. Worthington*, 32 Nebr., 334.

SULLIVAN, J.

These cases were commenced by the Northwestern Mutual Life Insurance Company to foreclose two real estate mortgages. By agreement of the parties, William P. McLaren was appointed receiver in each case and, having qualified as required by the statute, entered upon the discharge of his trust. The mortgaged property, being business blocks in the city of Lincoln, was occupied by tenants whose leases expired after the actions were instituted and the receiver appointed. McLaren renewed some of these leases and reduced the rents. Whether he had authority to make such reductions and, if so, whether he acted wisely in the premises are the questions here presented for decision.

A receiver may be appointed in cases of this kind; and it is his duty to make rentable property productive. This implies, of course, the necessity of reducing rents whenever business conditions, or other circumstances, require a reduction. The trial court found from the evidence in these cases that the receiver managed the property in his hands with prudence and fidelity, and that in reducing rents, he only did what was necessary to secure tenants and obtain an income from the mortgaged premises. We think the finding is supported by sufficient evidence and that the order confirming the receiver's report should be

AFFIRMED.

PASSUMPSIC SAVINGS BANK, APPELLEE, V. JOHN C. MAULICK ET AL., APPELLANTS.

FILED SEPTEMBER 19, 1900. No. 9,278.

1. **Foreclosure of Real Estate Mortgage:** AUTHORITY OF SHERIFF TO SELL: DECREE: ORDER. In an action to foreclose a real estate mortgage the sheriff's authority to sell the mortgaged property is derived from the decree of foreclosure and not from the order of sale issued by the clerk of the court.

2. **Judicial Sale:** RATIFICATION. It is ordinarily the duty of a court, where a judicial sale is made in conformity with its decree, to ratify such sale.

3. **Defective Process:** SEAL OF COURT. A process, defective for want of the seal of the court out of which it issued, may be cured by amendment.

4. **Authority of Deputy Sheriff.** A deputy sheriff may perform, for his principal, any act necessary to be done to carry into effect a decree for the sale of property.

APPEAL from the district court of Custer county. Heard below before GREENE, J. *Affirmed.*

C. L. Gutterson, for appellants.

Kirkpatrick Bros., contra.

SULLIVAN, J.

This is an appeal from an order of the district court confirming a sale of real estate made by the sheriff of Custer county in execution of a decree of foreclosure. A reversal is claimed upon two grounds. The order of sale was not issued under the seal of the court, and it is insisted that it was therefore void and did not confer upon the sheriff power to advertise and sell the mortgaged property. Conceding this position to be sound, it does not follow that the order of confirmation should be set aside. The sheriff's authority was not derived from the order of sale, but from the decree. If the sale was made in pursuance of the decree, it was the duty of the court

to ratify it regardless of irregularities in the process issued by the clerk. The issuance of the order of sale was unnecessary and the infirmity in question was without prejudice to the rights of the appellant. *Rector v. Rotton*, 3 Nebr., 171; *Fried v. Stone*, 14 Nebr., 398; *Johnson v. Colby*, 52 Nebr., 327; *Amoskeag Savings Bank v. Robbins*, 53 Nebr., 776; *Jarrett v. Hoover*, 54 Nebr., 65; *Bristol Savings Bank v. Field*, 57 Nebr., 670. In the first point of the syllabus to *Johnson v. Colby, supra*, it is said: "A decree of foreclosure is sufficient authority in itself for its execution. No order of sale need issue, and if one be issued, a sale made thereunder will not be set aside for formal defects in the order, or for failure of the officer to follow entirely the command of the order, provided he follow the law and the decree." It may be further remarked that the defect in the process was entirely cured by the amendment of it after the sale had been made. *Taylor v. Courtnay*, 15 Nebr., 190.

The second objection to the confirmation is that the record is contradictory as to whether the sheriff or his deputy acted in making the appraisement of the property described in the decree. We think it is of no consequence which of them acted. Either was authorized to do any act necessary to be done in carrying the decree into execution. *Nebraska Loan & Building Ass'n v. Marshall*, 51 Nebr., 534; *Maginn v. Pickard*, 57 Nebr., 642.

The order of confirmation is

AFFIRMED.

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

FILED SEPTEMBER 19, 1900. No. 11,288.

1. **Res Adjudicata:** SUBSEQUENT PROCEEDINGS. The determination of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, ordinarily, will not be re-examined in a subsequent appellate proceeding.

2. **Official Bond:** JUDGMENT AGAINST OFFICERS: EVIDENCE AGAINST SURETIES. A judgment against an officer is *prima facie* evidence against his sureties when sued upon an official bond, both actions being grounded upon the same alleged delinquency.

3. **Conclusive Evidence:** AGREEMENT TO ABIDE. Such an adjudication is conclusive evidence of the liability of the sureties only in case they agreed to abide by any judgment that might be rendered against their principal.

4. **Cases Overruled.** The second point of the syllabus to *Thomas v. Markmann*, 43 Nebr., 823, and the first point of the syllabus to *Lewis v. Mills*, 47, Nebr., 910, are overruled.

5. **County Judge:** EMBEZZLEMENT: OFFICIAL MISCONDUCT. A county judge who receives money in his official capacity and converts the same to his own use, is guilty of official misconduct.

6. **Trover:** PLEADING: GENERAL DENIAL: EVIDENCE: PAYMENT: ACCORD AND SATISFACTION. In an action grounded upon an alleged conversion of money, neither payment nor accord and satisfaction can be shown under a general denial.

7. ——: ——: ——: DATE OF CONVERSION. In an action against the sureties on an official bond for money converted by their principal during his official term, where the answer is a general denial, it is error to exclude evidence tending to show the date when the conversion actually occurred.

8. **Excessive Judgment.** REMITTITUR. Judgment rendered for too large a sum and plaintiff allowed to remit excess.

ERROR to the district court for Douglas county. Tried below before SCOTT, J. *Affirmed upon filing of remittitur.*

E. J. Cornish, for plaintiffs in error.

Isaac Adams, contra.

SULLIVAN, J.

This proceeding in error brings here for review a judgment of the district court in favor of Bert Glendore Wheeler, a minor, and against George E. Barker and William S. Rector. The action was instituted by Miss Wheeler's guardian to recover of the defendants, as sureties upon the official bond of James W. Eller, a sum of money which, it is alleged, Eller received in trust for the plaintiff, and converted to his own use while acting

as judge of the county court of Douglas county. After stating that the money in question was paid into court by the administrator of the estate of Bert G. Wheeler, deceased, in pursuance of an order of the court, and that such money belonged to the plaintiff, and was received by Eller as county judge, the petition charges "that said Eller wrongfully, fraudulently and corruptly and in gross violation of his duties as such county judge, after having obtained possession of said funds as aforesaid, thereafter converted said sum of $1,935.92, the amount belonging to this plaintiff, to his own use, and that ever since said date, said Eller has retained all of said last mentioned sum, save $485.92, though payment thereof has been frequently demanded by plaintiff's guardian." The defendants answered, admitting that the plaintiff was an infant; that Eller was county judge of Douglas county during 1892 and 1893, and that they were sureties upon his official bond. The other averments of the petition were denied in general terms.

The first contention of defendants is that the money which Eller was charged with having converted to his own use was not received by him in his official capacity, and that, therefore, the misappropriation of it did not constitute a breach of his official bond. This precise question has been already considered and decided by this court in this case. By the former decision it is settled, so far as this litigation is concerned, that "where a county judge orders an administrator to pay money into court and the latter does so and the county judge receives the money, it is, on his part, an official act and he is liable therefor upon his official bond." *Wheeler v. Barker*, 51 Nebr., 846. The doctrine thus declared appears to be sound. At any rate it is the law of the case and will not be re-examined at this time. *Ripp v. Hale*, 45 Nebr., 567; *Coburn v. Watson*, 48 Nebr., 257; *Omaha Life Ass'n v. Kettenbach*, 55 Nebr., 330; *Hayden v. Frederickson*, 59 Nebr., 141; *Home Fire Ins. Co. v. Johansen*, 59 Nebr., 349.

To show that Eller had converted the plaintiff's money,

there was produced at the trial and received in evidence the record of a decree rendered by the district court of Douglas county in an action brought by the plaintiff against Eller alone. The sureties contend that the judgment against their principal is not admissible against them and does not tend to establish their liability, while the guardian insists that it is not only competent, but indisputable proof. We think the record was sufficiently identified; that it was properly received and that it constituted *prima facie* evidence of the alleged conversion. In *Fire Association of Philadelphia v. Ruby*, 49 Nebr., 584, it was held that a judgment of amercement against an officer is *prima facie* evidence against his sureties when sued upon their bond. This decision seems to be supported by the preponderance of adjudged cases and it will be adhered to. *Graves v. Bulkley*, 25 Kan., 249; *Fay v. Edmiston*, 25 Kan., 439; *Lipscomb v. Postell*, 38 Miss., 476; *Charles v. Hoskins*, 14 Ia., 471; *Stephens v. Shafer*, 48 Wis., 54; *Beauchaine v. McKinnon*, 55 Minn., 318; *Norris v. Mersereau*, 74 Mich., 687. *Thomas v. Markmann*, 43 Nebr., 823, and *Lewis v. Mills*, 47 Nebr., 910, holding that such a judgment is conclusive upon the sureties, appear to be, in part at least, based upon *Pasewalk v. Bollman*, 29 Nebr., 519, which merely decides that a surety who agrees to pay any judgment that may be recovered against his principal must, in the absence of fraud or collusion, abide by his contract. That the court in the last mentioned case clearly recognized the distinction between agreements of sureties to be bound by judgment against their principals and general undertakings to answer for official misconduct is shown by the following statement in the opinion: "In the case of most official bonds the sureties do not promise to pay any judgment rendered against the principal, hence a judgment against the official on such a bond is not conclusive upon the sureties where the latter had no notice of the suit." The defendants in the present case did not agree to satisfy any judgment that might be recovered against their principal. Their undertaking

was, in general terms, that he would perform his official duty. Upon the question of whether he had been guilty of misconduct in office, they were entitled to be heard. It is contrary to natural justice that they should be concluded by a judgment to which they were not parties, and by which they did not agree to be bound. While *Thomas v. Markmann, supra,* and *Lewis v. Mills, supra,* are not without the support of respectable authority, we are of opinion that they extend the liability of the surety beyond the terms of his agreement and disregard entirely the strict rule of construction applicable to such contracts. To the extent that those cases are in conflict with *Fire Association of Philadelphia v. Ruby, supra,* they are overruled.

A further contention of defendants is that the evidence given at the trial does not establish a breach of the condition of the bond in suit. We think it does. The petition alleged that Eller, as county judge, received the plaintiff's money, and afterwards converted it to his own use. The answer merely denied this charge; it did not plead payment or accord and satisfaction. If Eller received the money and misappropriated it during his term of office, or failed to turn it over to the proper person at the close of his term, he was guilty of official misconduct. The decree in the case brought by the plaintiff against Eller alone was rendered on December 18, 1897, and is based in part upon the following findings:

"2. That on the 29th day of March, 1892, said defendant while acting as judge of said court and as such court and judge thereof, obtained possession of the sum of $1,935.19 belonging to plaintiff, said money being inherited by plaintiff from her deceased father, Bert G. Wheeler, whose estate was then in process of settlement in said county court.

"3. That of said money the sum of $1,450, defendant ever since said last mentioned date, has failed, neglected and refused to pay to the guardian of plaintiff, or any part thereof."

These findings show that Eller received the plaintiff's money by virtue of his office, and that he retained the greater portion of it after he ceased to be county judge. According to these findings, Eller must have been guilty of conversion on or before January 3, 1894. It was lawful for him, as judge of the county court, to receive the money, but it was not lawful for him to retain it after the expiration of his official term. The evidence on the part of the plaintiff conclusively established a conversion, and, the defendants having failed to plead or prove anything in avoidance, the only controverted question was the amount of their liability. While there is evidence in the record tending to prove that Eller obtained the plaintiff's money with intent to cheat and defraud her, it is not certain that he actually appropriated any part of such money to his own use before the end of his term. The defendant offered to show that there was no default on the part of their principal prior to January 4, 1894, but the trial court rejected the evidence on the theory that the decree against Eller fixed indisputably the liability of his sureties and the extent of such liability. The proffered evidence should have been received; it was error to exclude it. Notwithstanding this error, the plaintiff was entitled on May 11, 1899, the day the verdict was returned, to a judgment for $1,985.13; and the judgment for that amount with interest will be affirmed if there be a remission of the excess within sixty days. In case the plaintiff does not file a remittitur for such excess with the clerk of this court within the time aforesaid, the judgment will be reversed.

JUDGMENT ACCORDINGLY.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. CARLOS C. BURR ET AL., APPELLANTS.

FILED SEPTEMBER 19, 1900. No. 9,282.

1. **Foreclosure of Mortgage:** REMISSION OF RENT: ABATEMENT OF RENT. Whether a court, in an action to foreclose a real estate mortgage has power to render a remission of rent already due, or an abatement of rent to become due, under a lease made by the landowner, *quære.*

2. **Exercise of Power to Remit or Abate Rent.** If such power exists, it can not be exercised merely for the benefit and advantage of a solvent tenant.

3. **Remarks of Judge:** REASONS FOR HOLDING: EVIDENCE. What the presiding judge may say, on the hearing of a motion or trial of a cause, respecting his reasons for granting an order in the case at chambers, is not evidence; and such statement can not be considered for any purpose.

4. **Evidence:** FINDING. Evidence examined, and found not to support the finding of the court.

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

S. B. Pound and *Roscoe Pound,* for appellants:

The reduction of the rent of J. H. Harley was a proceeding utterly void. It was the act of a judge at chambers. The judges of the several district courts as such have no inherent authority at chambers whatever, but only such as the statutes give them. *Browne v. Edwards & McCollough Lumber Co.,* 44 Nebr., 361. The statutes enumerate ten purposes for which a district judge may sit at chambers within his district. Two only of these may be construed as referring to receivers. These are: 6, hearing an application for the appointment for a receiver, or to discharge one already appointed, or to modify the order appointing one, and 9, to discharge such other duties or to exercise such other powers as may be conferred upon a judge in contradistinction to a court. Obviously the

order in question can not be justified under the sixth subdivision. The ninth subdivision raises the question, what are the powers of a judge as distinguished from a court in this connection? We submit that section 272 of the Code determines this. That section reads as follows: "Every order appointing a receiver shall contain special directions in respect to its powers and duties, and upon application of any party to the suit, after due notice thereof, such further directions may be made in that behalf by the court or judge as may in the further progress of the cause become proper."

Laying aside the question whether the order in controversy was a "direction" within the meaning of the Code, it is manifest that the power of a judge, as such, is limited to giving such directions upon application of parties to the suit, after due notice. In the case at bar the application was made by a tenant, and there was no notice of any kind to the defendant, which was the party chiefly interested. The order was made *ex parte*, at once, on presentation of the application. Such a proceeding is not merely unauthorized by the section quoted, it is contrary to its letter and to its spirit. Due notice must be taken as meaning due notice to all parties whose rights may be affected. The provisions of the Code as to notice in receivership proceedings are very strict and were intended to prevent abuses which obtained under the old practice.

A court will not, at the instance of a receiver, order a remission of arrears or a reduction of rents; nor, on the motion of a receiver, order that any of the arrears of rent of tenants be forgiven. *Woodward v. Woodward*, Hayes & Jones [Irish], 126; *Robinson v. Shearer*, Hayes & Jones [Irish], 799; *Ficener v. Bott*, 47 S. W. Rep. [Ky.], 251.

Lambertson & Hall, contra:

It was stated by Judge Hall that the order was made at chambers, and was done on an *ex parte* showing, not a part of the record. "I questioned at the time whether

or not the owners of the property ought to be notified and have a hearing on it, but the representation so made at the time struck me with sufficient force to act on it, and that he was an officer of the court and it was then the power of the court to enforce or modify as the case may require, and taking into account those things I knew—I thought I ought to enter the order. Now, what the legal effect of that is, I don't know. If I am called to pass on it now, I will enter an order that the receiver be protected, and you can take your exceptions."

SULLIVAN, J.

This action was instituted by the Northwestern Mutual Life Insurance Company against the appellants to foreclose a real estate mortgage upon business property in the city of Lincoln. At the commencement of the suit, William P. McLaren, in pursuance of a stipulation of the parties, was appointed receiver, and entered immediately upon the discharge of his trust. No fault is found with the decree of foreclosure, and the only question brought here for decision arises on an exception to an order of the court confirming the receiver's report. It appears that the mortgaged property had been rented by the owner, the Lincoln Land and Improvement Company, to J. H. Harley and that the lease, by its terms, was to run until 1899. It also appears that, at Harley's request, and without notice to any one except Stephenson, the receiver's agent, one of the judges of the district court for Lancaster county, made, at chambers, the following order:

"It having been made to appear to the undersigned one of the judges of said court by petition duly filed and proofs made, that J. H. Harley, the tenant in possession of the first floor and basement of the building situated on eighty feet of the north end of lot 12, in block 56, in the city of Lincoln, and the areaway about said building, is unable to pay as rent for said premises the sum of $200.00 per month, and it further appearing to the court

that a reduction of $50.00 per month for six months is reasonable and proper, and notice hereof having been duly served on Elmer B. Stephenson, receiver of said premises:

"It is therefore ordered that the rent from said premises be reduced to the sum of $150.00 per month for a period of six months from the first day of September, 1896, until a further order shall be made in the premises, and the receiver is directed to collect the reduced rent of $150.00 per month, from said tenant.

"Witness my hand, this 21st day of September, 1896.

"CHAS. L. HALL, *Judge.*"

Acting on the assumption that the foregoing order was valid, the receiver collected, and in his report accounted for, rent from Harley after September 1, 1896, at $150 a month. It is not insisted by counsel for the appellee that the order made by Judge Hall at the instance of Harley, conferred upon the receiver any authority to reduce the rent; but it is contended that the approval of McLaren's report by the court was the legal equivalent of a prior adjudication, authorizing an abatement of rent. The money due upon the lease belonged to the landowner, and it is doubtful whether the court might, under any circumstances, abrogate his contract and order a remission of arrears, or a reduction of the amount which the tenant had agreed to pay. It has been said that the authority of the court with respect to rents, in cases of this kind, is nothing more than a power to collect the amount due according to the terms of the lease. *Robinson v. Shearer*, Hayes & Jones Rep. [Irish], 799; *Commissioners v. Harrington*, 11 L. R. [Irish], 127; *Ficener v. Bott*, 47 S. W. Rep. [Ky.], 251. Whether this is a correct statement of the law we do not now decide. The remission of rent in this case was unwarranted, conceding that the authority exists whenever property is sequestered for the benefit of a mortgagee. Mr. Harley was solvent, and there is in the record no evidence which would justify the conclusion

that a reduction of the rent due from him would be advantageous to either the owner of the land or the owner of the mortgage. What the presiding judge said, at the hearing, respecting his reasons for granting the order at chambers, is not evidence and can not be considered for any purpose; but, if it were competent, it would not change our conviction that the action of the trial court was unwise and improvident. The order confirming the receiver's report is reversed to the extent that it sanctions an abatement of the rent due upon the Harley lease. The cause is remanded with direction to the district court to cause the receiver to collect and account for the balance due upon the lease according to its terms; and the court is further directed to credit such balance upon the decree in this case.

JUDGMENT ACCORDINGLY.

LLOYD CARDWELL V. STATE OF NEBRASKA.

FILED SEPTEMBER 19, 1900. No. 11,277.

1. **Instructions.** Instruction copied in the opinion examined, and found applicable to the evidence, and to correctly state the law.

2. ———. Instructions requested which are covered substantially by those already given may properly be refused.

3. ———. An instruction requested not applicable to the evidence is properly refused.

4. **Rape:** SEXUAL ACT ADMITTED: FAILURE OF PROSECUTRIX TO COMPLAIN: THREATS OF PRISONER: EVIDENCE: VERDICT. In a prosecution for rape, the defendant claimed that the act of sexual intercourse, which was admitted, was voluntary and with the consent of the prosecutrix; the state's evidence tended to prove that, at the time the act was committed, the defendant threatened to kill the prosecutrix if she did not submit, and that she submitted to the act through fear for her life or of great bodily injury, and that defendant after the act threatened to kill her if she said anything about it to any one; that the prosecutrix, through fear, by reason of such threats, remained silent for

several days before complaining of the alleged outrage, and during such time remained at the home of the defendant; the jury found the defendant guilty as charged. *Held*, That, under all the facts and circumstances as disclosed by the record, the verdict was supported by the evidence, and was sufficient to establish the commission of the crime as alleged.

5. **Jury Triers of Fact.** The jury are the triers of fact, and it is for them to ascertain the truth of the matters in controversy upon which there is a contradiction and conflict in the evidence.

6. **Statements of Prosecutrix in Presence of Defendant.** Statements made by the prosecutrix in a conversation with, and in the presence of, the defendant regarding the alleged offense, *held* properly admissible in evidence.

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

W. W. Wood, for plaintiff in error.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy, contra.*

HOLCOMB, J.

Exceptions are taken to a certain instruction given by the court on its own motion, and to its refusal to give others requested by the defendant on the trial of the action. We find no substantial basis for the exceptions thus taken. The instruction given and excepted to, fairly states the law and was applicable under the evidence. It is as follows:

"If you believe from the evidence in this case that an act of sexual intercourse did take place between the defendant and the prosecuting witness, as averred in the information, then the question as to whether or not she did voluntarily consent to such act, is a question of fact for you to determine from the evidence in this case. The defendant insists that she did voluntarily consent thereto, and that he used no force or coercion of any kind to compel such consent, but that she submitted to his desires upon his request alone; while the prosecution insists

that she did not voluntarily consent, but that she resisted to the full extent of her ability, and only yielded when her will was overpowered, and if she finally consented to her fate, it was against her will and for fear of more serious consequences. You are to say from the evidence which, if either, is right, and if, after giving due weight to all the evidence, you find that the prosecuting witness did voluntarily consent to such act of intercourse, and not under coercion, you should acquit. But, if you find from the evidence, beyond a reasonable doubt, that the act was by force, or that the prosecuting witness submitted through fear of receiving great bodily injury at the hands of the defendant and that the act was against her will, and find the other facts averred in the information established beyond a reasonable doubt, you should convict."

We do not agree with contention of counsel that the instruction fails to say that the act must be against the will of the prosecutrix.

The instructions asked and refused were substantially covered by other instructions given, and the giving thereof would have subserved no beneficial purpose. The last instruction requested and refused was not applicable under the evidence, even if it were a correct expression of the law, which is doubted by the writer. We think the instructions as a whole fairly stated the law, and were eminently fair to the defendant. He has, in our opinion, no cause for complaint on account of the giving or refusal to give the instructions of which complaint is made, and his objections in respect to the same are overruled.

The objection that the verdict and judgment are not sustained by sufficient evidence presents a more serious question. The defendant was found guilty and sentenced to imprisonment for the crime of rape. On the trial of the case, the defense was conducted on the theory that sexual intercourse with the prosecutrix, which was admitted, was had voluntarily and with her consent. The theory of the prosecution was that the act was accom-

plished by force and against the will of the pr
who was overcome with fear by threats alleged
been made by the defendant to take her life if sh
submit to his desires. The salient features as d
by the testimony are about as follows: The pr
had no settled home; was about nineteen year
and most of the time worked for others as a d
when not at work, she stayed with her stepmot
was also an aunt, her father at the time being s
from her stepmother. The defendant's father v
making his home with the stepmother, and at h
tation the prosecutrix went to the home of the de
about eighteen miles in the country, to assist i
hold work during the anticipated illness of def
wife in childbirth. While driving to defendant'
and when within about two miles thereof, the
committed. At the time it was quite dark. Th
cutrix testifies in substance that the defendant n
indecent proposal which she refused, saying, "
I'm not that kind"; that the defendant said he v
of those kind of fellows when he went after anyt ng he
was going to have it; that he then took out a knife and
threatened to kill her if she did not submit; that he took
her out of the buggy and threw her on the ground; that
he held her down so she could not get up, and that she
bit him; that after the act, he "picked me up and put me
in the buggy." He then said, "If you dare to tell my
wife or any one else, I will kill you." When asked what
effect, if any, it had on her when he drew the knife and
threatened her, she answered, "I was afraid of my life."
She went with the defendant to his home, where she
stayed about eleven days before saying anything to any-
one about the alleged outrage. She then first mentioned
it to the mother of defendant's wife, who lived near the
defendant. It is contended by defendant that she re-
mained, not only silent, but friendly with him, until after
he had told his wife, and that thereafter she first com-
plained to the wife's mother. The evidence of the pros-

ecutrix is in a manner corroborated by a witness on behalf of the state, who testified that, in a conversation with the defendant a short time after the occurrence, in a mutual exchange of confidences, the defendant said, "I brought May [the prosecutrix] home the other night to help my wife. * * * I got a bottle of alcohol and weakened it little, * * * and gave her a drink * * * She got to feeling pretty good and I asked her to let me have some. She fought pretty hard and slapped me and she threatened to have me arrested, * * * and I kept on working her and finally got her worked, finally got her wore down so she could not help herself, * * * she was trembling all over. * * * After we got up I told her that if she told my wife, I would kill her."

Opposed to this view of the case was the evidence of the defendant, to the effect that the act was voluntary on the part of the prosecutrix; also, her action and conduct after the commission of the alleged offense, which seem almost inexplicable; the evidence of other witnesses as to undue familiarity of the prosecutrix with other men; the testimony of one that she had admitted to him that she had had intercourse with another man; and that of one other witness that he had had intercourse with the prosecutrix. This evidence was denied in rebuttal, and the state offered evidence tending to impeach some of defendant's witnesses as to their reputation for truth and veracity.

The evidence was conflicting and of a most contradictory character. Much of it was obviously false and willfully so. The jury heard all of the testimony. They had an opportunity of seeing the different witnesses, hearing them testify, observing their demeanor on the witness stand, and, from all the circumstances connected with the trial, were enabled to attach such weight to the testimony of each as it seemed fairly entitled to. They were the triers of fact, and their judgment should not be disturbed if supported by sufficient competent evidence. The case was submitted to them fairly and im-

partially by the court. They were the searchers of the truth as to the matters in controversy, and having found it, declared it in their verdict.

It is contended by the defense that, because of the conduct of the prosecutrix after the alleged offense, the delay in making disclosure, and other circumstances in relation thereto, the evidence is insufficient to sustain a verdict and judgment for the crime of rape. We are cited to the cases of *Mathews v. State*, 19 Nebr., 330, and *Richards v. State*, 36 Nebr., 17, in support of counsel's contention. In the *Mathews Case* it was held, first, that where the offense is explicitly denied by the defendant, there must be corroborating testimony; and, second, that the evidence in that case, admitting all that was said by the prosecutrix to be true, was not sufficient to establish the crime charged. The testimony in that case applied solely to the resistance offered, and there was no claim that the prosecutrix was overcome by threats, or that she submitted through fear of death or great bodily harm. The case at bar is distinguishable from the one referred to, in that corroborating evidence is not wanting, and that the failure to make greater resistance is claimed to have been prevented by reason of threats made by the defendant; that the fear of the prosecutrix of death or great bodily harm by reason of such threats, not only precluded more active resistance, but forced unwilling submission on her part.

In the *Richards Case* no complaint was made for nearly seven months after the alleged offense, and not until concealment was no longer possible because of the pregnancy of the prosecutrix. It is there held that the charge, under such circumstances, could not be sustained unless accompanied by strong corroborating proof of the commission of the crime. The case at bar does not come within the rule announced in that case.

It is to be conceded that it appears passing strange and almost unaccountable that the prosecutrix should remain at defendant's house for the time she did. She was, how-

ever, without a home. The situation at her stepmother's, as developed by the evidence, was not such as to justify her in expecting aid and sympathy in her troubles there. She apparently had no place to which she might go with any assurance of shelter or protection. The threats made by the defendant, if true, might reasonably be expected, under the peculiar circumstances of the case, to serve as a much more powerful restraint on her actions and words than would ordinarily be the case. Her dread of violence and probable death may have been, and probably was, sufficient to overcome the desire and tendency naturally arising to make swift complaint, and bring the ravisher of her person to merited punishment. Accepting her version of the matter, her after conduct is not inconsistent with defendant's guilt of the offense in the manner charged.

While there is some evidence of friendliness and familiarity with the defendant after the transaction, this is strenuously denied by the prosecutrix, and her testimony in this regard is not without color of support. It is shown on rebuttal that one of the defendant's witnesses had said, "I mistrusted there was something wrong and I made Lloyd [the defendant] tell me all about it after we got to the timber, and he told me what he had done."

While there are circumstances connected with the case, as disclosed by the record, which render it difficult to ascertain the truth as to the charge laid against the defendant, we are of the opinion, from an examination of the entire record, that there is sufficient competent evidence to support the verdict of the jury, and establish the commission of the offense charged.

The next complaint is that the court erred in the admission of certain of the testimony of a Mrs. Doty, who testified on behalf of the state, the objectionable testimony relating to certain statements with reference to the alleged offense made by the prosecutrix in a conversation with the witness. The record discloses that these statements were made in a conversation participated in

by the defendant, his wife, the prosecutrix and the witness testifying. It was with, and in the presence of, the defendant, regarding the transaction, and was, we think, competent evidence in the case.

We find no error in the case warranting a reversal of the judgment of the trial court, and the same is accordingly

AFFIRMED.

RUDA HAHN V. STATE OF NEBRASKA.

FILED SEPTEMBER 19, 1900. No. 11,195.

1. **Information in Burglary:** OWNERSHIP OF PREMISES. In an information for burglary, it is proper to allege ownership in the person having the visible occupancy and control of the premises burglarized.

2. ———: ———. Where a building in possession of and occupied by a person having the general charge and control thereof has some of the rooms therein let to lodgers, and for other purposes, the whole of the building is considered in law as the dwelling-house of such person, in whom ownership should be alleged in an information for burglary.

3. ———: ———: BASEMENT: HALLWAY: LODGERS. Where a building thus occupied has a basement, some of the rooms of which are let to lodgers, and for other purposes, and a hallway leading to the different rooms is in possession of and used by the person in charge of the building, in common with those occupying the rented rooms in such basement, and a burglary is committed by breaking in at the door of such hallway, *held*, that ownership was properly charged as being in the person in possession, and having charge and control of the premises.

4. **Breaking and Entering:** HALLWAY OF BASEMENT: INTERNAL CONNECTION WITH BUILDING: OWNERSHIP. Breaking into a basement hallway, *held* to be a burglary of the dwelling-house of the person residing in the building, and having the general charge and control thereof, although such basement is not connected internally with other portions of the building.

5. **Evidence:** VERDICT: JUDGMENT. Evidence examined, and found to support the verdict and judgment.

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

James E. Philpott, for plaintiff in error.

T. C. Munger, Constantine J. Smyth, Attorney General, Willis D. Oldham, Deputy, and *Paul Pizey,* for the state.

HOLCOMB, J.

The defendant, plaintiff in error, was informed against for burglary of a dwelling-house, the ownership of which was alleged to be in one Melvern Richardson. A trial resulted in a verdict of guilty and sentence of imprisonment in the penitentiary. It is claimed by his counsel that the evidence fails to support the verdict and judgment, in that the ownership of the property was not proven as alleged. This contention arises from, and is based upon, the character of the possession and occupancy, by the said Richardson, of the building alleged to have been broken into.

Briefly speaking, the evidence discloses that the building was a three-story brick with stone basement, occupied by, and in possession of, said Richardson, who had charge of it on behalf of non-resident owners. Parts of the building were let to others for different uses. The party in possession for the owners had living apartments in the first story. There was an internal communication by means of a stairway between the first story and basement, which, at the time of the offense, was closed by locking the door of the room in the first story into which the stairway led, and which was used as a teaching room. The entrance into the basement being used at the time was from the exterior of the building by means of a door and hallway directly under the steps which led into the first story. There were several rooms in the basement on both sides of the hallway. Three of the rooms on one side were occupied by a family as living rooms. On the

other side of the hall were two rooms used as a kitchen and dining room, where a number boarded, and which were rented and managed by a person living in another building across the street. Some two or more rooms in the basement were unoccupied, except as to the possession and occupancy thereof by the person having general charge and control of the entire building. The hallway was used in common by the said Richardson and those having rented the rooms as before mentioned. The burglary was committed by breaking into this hallway.

The vital question is, therefore, whether, under the facts thus proven, the ownership of the property was properly laid in the said Richardson. It is insisted by counsel for defendant that, because the basement rooms were not connected internally with the rooms on the first floor, and that a part of them were let to others for the purposes mentioned, the ownership of the building burglarized should be alleged to be in one or the other of the two parties occupying the basement rooms as herein mentioned.

Without determining the legal effect of closing and keeping locked the door which connected, by an inside stairway, the rooms in the basement with those on the first floor, we think it appears from the evidence that the person living in, and having general charge and control of, the building was the owner thereof in contemplation of law, when applied to the crime of burglary, as in the case at bar. She was in the undisputed and rightful possession of the building. She had the charge and control of the entire building, except only the rooms let to others. Such rooms did not constitute separate and distinct apartments. The basement hall, leading to the different rooms therein, was used in common by the owner and those occupying the rented rooms. The owner's possession of the hall and rooms not rented in the basement was as complete as if no rooms therein were rented. The building may, we think, fairly be said to be her dwelling-house. Says Judge MAXWELL, in his excellent work on

Criminal Procedure, "The actual occupant, lawfully in possession of the building, and having the exclusive use and control of the premises, no doubt is the proper party in whom to allege ownership"; citing 2 Bishop, Criminal Procedure, sec. 137. Says the same author also, in this connection, "The object is to describe the place where the offense was committed, not to determine the ownership of the property. Ownership as against the burglar means any possession which is rightful." Maxwell, Criminal Procedure, pp. 104, 105.

In *Winslow v. State*, 26 Nebr., 308, it is held in the first paragraph of the syllabus that "the name of the owner of the building broken into should be given, and for this purpose the person in the visible occupancy and control of the premises at the time of the burglary may be set out as the owner, whether he be the owner of the title or a tenant."

Where a dwelling-house occupied by the owner has some of the rooms therein let to lodgers, the whole is considered in law as his dwelling-house, and ownership in an information for burglary should be laid in the owner of the premises. 2 Bishop's New Criminal Law, sec. 106; Bishop, Statutory Crime, sec. 287, and cases there cited.

As to the suggestion that breaking into the hallway in the basement of the building was not a burglary of the dwelling-house of the occupant in possession, because the means of communication then existing between it and other parts of the house were only through an outer door, we think this fact does not deprive the entire building of the character of the dwelling-house of the occupant. It was a part of one building under the same roof, and the mere fact of the outer entrance would not change its character. While, as said in the case of *Rex v. Sefton*, Russ. & Ry. [Eng.], 203, it may be "thought a case of much nicety," we regard the authorities as uniform in holding that the person inhabiting and in possession, either exclusively or in common with others, and having

the general charge and control of such building, will be deemed the owner thereof within the meaning of the criminal law relating to burglary. *Quinn v. People*, 71 N. Y., 561; *People v. Snyder*, 2 Parker's Cr. Rep. [N. Y.], 23; 2 East P. C., 506, 780; 2 Russell, Crimes [9th ed.], 16.

The judgment of the trial court is supported by the evidence and is

AFFIRMED.

THOMAS FLYNN, APPELLANT, V. EDWARD RILEY ET AL., APPELLEES.

FILED SEPTEMBER 19, 1900. No. 9,237.

1. **Homestead:** ABANDONMENT: QUESTION OF FACT. Whether one has actually abandoned a homestead is a question of fact to be determined from all the evidence pertinent.

2. **Finding of Fact** : REVIEW. A finding of fact by a trial court will not, on appeal, be overturned unless clearly erroneous.

3. **Evidence:** JUDGMENT. Evidence examined, and found to sustain the judgment of the trial court.

APPEAL from the district court of Platte county. Heard below before SULLIVAN, J. *Affirmed.*

B. P. Duffy and *Wm. O. O'Brien*, for appellant.

Albert & Reeder, contra.

HOLCOMB, J.

The plaintiff and appellant, by injunction proceedings, endeavors to restrain the defendants as creditors and sheriff from selling real estate levied upon, under writs of attachment, which he claims as exempt under the homestead law. Upon a trial of the case in the district

court it was found that the land was not a homestead, and judgment was entered accordingly. An appeal has been taken to this court.

There is no serious conflict or contradiction in the testimony, the sole and only question being, what is the proper conclusion to be drawn from the evidence. In substance, the evidence proves, or tends to prove, that the plaintiff was the owner of a farm of one hundred acres near the city of Columbus, which had been occupied by him and his family for a number of years as a homestead. In the fall of 1888 he moved with his family to Columbus, taking with him all of his personal property. Here they resided until June, 1895, or about six and one-half years. During the time of his residence in the city, the farm was occupied and cultivated by different parties, who rented it from the owner. After moving to Columbus, the plaintiff at first lived in rented property. After a year or two he entered into a contract for the purchase of residence property, in which he resided during the remainder of the time he resided in the city. Some payments were made upon the contract of purchase, but it was not finally consummated, and the interest of the plaintiff in the premises was relinquished about the time he removed to his farm in 1895. During the time of his residence in the city he was engaged in business, and generally voted at state and city elections. He did not remove to the farm until after the attachments were levied under which a sale is sought to be enjoined.

His contention is that he removed to the city for the purpose of educating his children, and that he never intended to, nor did he in fact, abandon his homestead right to the farm. While his testimony on the trial of the case tends to prove that no abandonment of the homestead occurred, we think that a consideration of all the evidence in the case throws some doubts on his after assertions, and from it the conclusion may fairly be reached that there was not only an abandonment of, but an intention to abandon, the homestead on the farm and

establish another in the city. The question whether there was actually an abandonment of the homestead is one of fact, to be determined from all the evidence pertinent; and a finding of fact by the trial court, having the opportunity to see and hear the witnesses, observe their demeanor and other circumstances affecting their credibility, will not, under the uniform rulings of this court, be overruled unless clearly erroneous. *Thomas v. Long*, 41 Nebr., 55; *Bickel v. McAleer*, 35 Nebr., 515.

The controversy is entirely one of fact, and the judgment of the trial court, being supported by sufficient evidence, should be and is

AFFIRMED.

SULLIVAN, J., not sitting.

KATE SCHABERG, ADMINISTRATRIX OF THE ESTATE OF H. H. SCHABERG, DECEASED, V. JOHN W. MCDONALD, RECEIVER GERMAN NATIONAL BANK OF LINCOLN, NEBRASKA, SUBSTITUTED IN PLACE OF KENT K. HAYDEN.

FILED SEPTEMBER 19, 1900. No. 10,957.

1. **Claim Against Decedent's Estate:** PRESENTATION FOR EXAMINATION AND ALLOWANCE. A claim against the estate of a deceased person must be presented for examination and allowance to the probate judge or commissioners appointed for that purpose within the time allowed by statute, as fixed by order of the probate court.

2. **Limitation.** The failure to exhibit a claim within the time limited by the court for that purpose forever bars such claim against such estate, either as a demand or as being used as a set-off in any action whatever.

3. ———. Where a claim against the estate of a deceased person is properly presented for examination and allowance within the time limited by order of the probate court, it is not barred, even though action thereon be not taken until after the time mentioned in such order for the presentation of claims against such estate.

4 **Jurisdiction.** The probate judge, or commissioners if appointed, have power and authority to allow a claim against the estate of a deceased person duly exhibited or presented for allowance within the time limited by order of the court, after the expiration of such time limit.

5. **Substitution.** Where, during the proceedings in the trial of a case in the district court, the plaintiff, the receiver of an insolvent bank, dies, and a successor is appointed, and such facts are suggested to the court supported by affidavit, with a request for the substitution of the successor, and defendant files objections to such substitution, *held*, that the issuance of summons or conditional order of revivor was thereby waived, and that upon the hearing of such application and objections a positive order substituting such successor as plaintiff in the action was proper, no sufficient reason why the same should not be done having been shown on the objections raised.

6. **Statute:** PARTY IN INTEREST. Under the provisions of section 45 of the Code, a party may continue as plaintiff in an action, and prosecute the same to final judgment, after he has transferred to another (and during the pendency of the action) his interest in the subject of the controversy.

7. **Stockholders in Insolvent Bank:** RECEIVER, SUIT BY: DEFENSE. It is no defense to a stockholder in an insolvent national bank, who is sued by the receiver on his individual liability upon an assessment ordered by the comptroller of the currency, to say that the receiver has unlawfully disposed of such claim, and that the creditors of such bank will not receive of the proceeds thereof as much as they are entitled to have.

8. **Receiver's Sale:** DEFINITION: FORCE AND EFFECT. A sale made by a receiver of a national bank under an order of a court of competent jurisdiction is a judicial sale, and the approval thereof by the court has the force and effect of a judgment, and such proceedings are not subject to collateral attack.

9. **Jurisdiction of U. S. Court.** The United States circuit court having jurisdiction over a receiver and questions growing out of the administration of the assets of an insolvent bank, this court will not interfere with such jurisdiction or the carrying out of its orders and judgments.

10. **Authority of Receiver.** A receiver has authority to institute proceedings and collect assessments ordered by the comptroller of the currency against stockholders of an insolvent national bank on their individual liability, and satisfaction of a judgment obtained in such proceedings satisfies and obliterates the obligation, regardless of the disposition made of the proceeds of such assessment by the receiver of such national bank.

ERROR to the district court for Lancaster county. Tried below before CORNISH, J. *Affirmed.*

F. A. Boehmer and *George E. Tobey,* for plaintiff in error.

Walter J. Lamb, contra.

HOLCOMB, J.

It is contended by the administratrix, plaintiff in error, that the claim against the estate she represents was allowed by the probate court without jurisdiction, and is void because the order of allowance was entered after the time fixed by statute and the order of the court for the presentation of claims against the estate for adjustment and allowance has expired. It is admitted that the claim against the estate was presented and filed in court for allowance within the time limited. The record before us shows not only the presentation and filing of the claim before the expiration of the time allowed for such purpose, but also the interposition of objections by the administratrix against its allowance. After the claim was filed and objections to its allowance entered, for some reason not appearing from the record, which to us seems inexplicable, the case remained unheard in the probate court for an unreasonable period of time, when it was finally adjudged to be a just claim and indebtedness against the estate, and accordingly approved and allowed.

We can not agree with contention of counsel that this delay in the time of hearing the claim barred it under the provisions of law fixing the time in which claims are to be presented for examination and allowance. We do not think a fair interpretation of the statute warrants the conclusion that the claim must not only be presented, but in fact approved and allowed, within the time fixed in the notice for the presentation of claims against an estate. What the law does require is that a claim shall

be presented for adjustment and allowance within the time limited, or else it is barred by the statute. This has been the purport and effect of the rulings of this court heretofore in construing the statute referred to. *Huebner v. Sesseman*, 38 Nebr., 78; *Stichter v. Cox*, 52 Nebr., 532.

From an examination of the different sections of the statute bearing on the matter, we are led to the conclusion that a claim presented in time may properly be acted upon and allowed by the probate court, even though the time has passed for the presentation for allowance of such claims. It is provided by section 214, chapter 23, Compiled Statutes, that "it shall be the duty of the probate judge to receive, examine, adjust and allow all claims and demands of all persons against the deceased, giving the same notice as is required to be given by commissioners in this subdivision."

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

Section 223 reads as follows: "At the expiration of the time limited, or as soon thereafter as they shall have time to complete the hearing of the claims presented, the commissioners shall make up a report of their doings to the probate court, embracing lists of the claims presented or exhibited in set-off, and stating how much was allowed and how much was disallowed, together with the final balance, whether in favor of the creditor or the estate, and the report shall state particularly the manner of giving notice to the claimants."

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

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

Other sections provide for an appeal and the hearing thereof. It will be noticed that by section 223, quoted above, it is clearly contemplated that the commissioners may hear and determine controverted claims pending before them after the time limited for filing claims has expired. This same authority doubtless rests in the probate judge, in the absence of the appointment of a commission. The statute makes no exception for delays caused by litigation over disputed claims, and to give to the section the construction contended for would irrevocably bar all claims which, by reason of litigation, or otherwise, were not approved within the time limited. While in some states such claims are required to be presented and proved within a specified time, this grows out of specific provisions of statute; and where such is required, exceptions are made as to claims in litigation, and usually proceedings in equity are permissible for the purpose of establishing a meritorious claim not presented and proven within the required time.

As we understand the language of section 226, it is a claim that is not exhibited to the judge or commission, i. e., presented to them in due form for allowance within the prescribed time, that is barred, and not one which, presented in time but because of a controversy, was not finally adjusted until after the time mentioned. In this case, the claim was filed for allowance within the proper time, objections were interposed, and the hearing continued from time to time as heretofore stated. We think the claimant brought himself within the provisions of the statute in properly filing his claim with the probate judge for allowance, and that the delay resulting from the controversy over its merits did not deprive the judge of power and authority to act when action was finally

taken and the claim allowed. The order of the probate court barring claims against the estate applied only to those not presented for examination and allowance within the time fixed by a former order, and did not apply to claims duly presented and then pending, awaiting final determination. The contention of administratrix in this respect can not be upheld.

It is next urged that error was committed in the trial of the case on appeal to the district court in entering an order of substitution or revivor in the name of McDonald as the successor of Hayden, receiver of the German National Bank. The claim against the estate was presented and prosecuted to that point by Hayden as receiver of the said bank, then insolvent, for an assessment on stock held by the deceased at the time of the failure of the bank. After the case had been appealed to the district court by the administratrix and issues formed by the pleadings, it was suggested to the trial court, by affidavit, that the receiver, Hayden, had recently died, and that McDonald had been appointed receiver as his successor, and asked that McDonald be substituted as plaintiff in the proceedings. The exact nature of the proceedings does not appear from the record, and no conditional order of revivor appears to have been entered or supplemental proceedings filed by the new receiver showing his right to be substituted as plaintiff. One of the two methods should ordinarily be followed. *Missouri P. R. Co. v. Fox*, 56 Nebr., 746; *Rakes v. Brown*, 34 Nebr., 304; *Fox v. Abbott*, 12 Nebr., 328. The record, however, shows that the administratrix appeared and filed objections to the substitution requested, and that, on the hearing of the application and objections, the objections were overruled, and McDonald ordered substituted as the plaintiff in the action. The appearance and filing objections would be a waiver of the issuance of summons or conditional order of revivor, and the court thereby acquired jurisdiction over the parties and was authorized to pass upon the application. The objections were simply open

statements, unsupported by affidavit or otherwise, and, while formally denying the appointment of McDonald, were principally directed to the claim of the defendant that, the receiver having sold the assets of the bank, there was nothing further to be done and no trust to execute, and that no receivership in fact existed. The suggestion of the death of the receiver and the appointment of a successor having been supported by affidavit, and objections having been interposed, it became the duty of the defendant to show some sufficient cause why the action should not be revived in the name of the successor of the deceased person, and having failed to do this, the court was authorized to enter the positive order as prayed for. *Missouri P. R. Co. v. Fox, supra.* Since the order of substitution, all subsequent proceedings have been in the name of McDonald, receiver, as successor of Hayden, the original plaintiff. Although the proceedings on the suggestion of the death of the plaintiff receiver, and the appointment of his successor, in whose name it was asked to have the action proceed, were informal and irregular, we think that when the final order was made all parties were properly before the court, and that its action was based upon a sufficient showing and should now be upheld. The second objection is, therefore, not sustained.

Lastly, it is urged that the judgment can not be sustained because it was made to appear that during the pendency of this action in the district court, the claim which was the subject-matter of the controversy had been by the receiver, upon an order of the United States district court, with other assets of the bank, sold to a third party, and the receiver no longer had any interest in the controversy; also, that a claim or demand of this character, being in the nature of a trust fund for the benefit of all the creditors of the bank, was not the subject of sale and transfer, nor could it be compromised or compounded. By the stipulated facts it appears that upon an order of the judge of the circuit court for the

district of Nebraska the receiver was ordered to dispose of all of the remaining assets of the bank, "including choses in action for assessments upon stockholders or judgments obtained upon liability of stockholders"; that in pursuance of such order the claim in controversy was by the receiver sold to one Schlesinger for the sum of $115, being about one-fifth of its face value.

Under the provisions of section 45 of the Code, the right of the receiver to continue as the plaintiff in the action is established, notwithstanding the sale of his interest in the subject of the controversy. It is there provided in plain terms that "in case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action." *Dodge v. Omaha & S. W. R. Co.*, 20 Nebr., 276. The transfer of the claim in controversy comes within the provisions of the part of the section quoted.

As to the claim of the administratrix, that the money due on the claim in controversy is a trust fund for the benefit of creditors and that such claim can not be sold, transferred, compounded or otherwise disposed of, but must be collected and the proceeds distributed among the creditors, it seems to us that this contention, conceding it to be correct, can not be urged successfully as a defense to this action. It is not a defense to the stockholder's individual liability to say that if his assessment is paid, the creditors of the bank will not receive of it all they are entitled to. The principle sought to be applied is for the benefit of the creditors of the bank in a proper case, and is not available as a defense by a shareholder to thereby escape liability on his assessment. The alleged transfer in nowise changes, increases or lessens the liability of the estate. If it be true that the sale is void for the reasons urged, then the right of the receiver to collect the money for the benefit of the creditors remains unquestioned, and if the sale be valid, the authority of the receiver to continue as

plaintiff is given by the statute referred to. If such sale is irregular or voidable only, then it is to be treated as a valid sale until, by proceedings in the proper tribunal whence the order of sale emanated, the irregularity is corrected. In no view of the case is it a matter which vitally concerns the stockholder who is liable for the assessment, or materially affects the merits of the obligation resting upon him under his shareholder liability. It becomes a material and vital question only as between the creditors and the receiver of the bank who administers the insolvent estate for their benefit, and the rights and obligations of these parties can not be tried in the present suit.

A sale made by a receiver of a national bank under an order of a court of competent jurisdiction is a judicial sale, and approval thereof by such court has the force and effect of a judgment, and such proceedings are not subject to collateral attack. *In re Third Nat. Bank*, 9 Biss. [U. S.], 535; *Bradly v. Williams & Co.*, 3 Hughes [U. S. C. C.], 26; *Libby v. Roseckrans*, 55 Barber [N. Y.], 202; *Greeley v. Provident Savings Bank*, 103 Mo., 212; *Koontz v. Northern Bank*, 16 Wall. [U. S.], 196.

The United States circuit court having jurisdiction over the receiver and the questions growing out of the administration of the assets of the insolvent bank, this court will not interfere with such jurisdiction, or the carrying out of its orders, judgments and decrees. *Mead v. Weaver*, 42 Nebr., 149; *Hough v. Stover*, 46 Nebr., 588; *Tzschuck v. Mead*, 47 Nebr., 260; *Prugh v. Portsmouth Savings Bank*, 48 Nebr., 414; *Central Nat. Bank v. Stevens*, 169 U. S. 432.

It is urged that the claim having been, as claimed, illegally sold, payment by the estate would not release it from future demands by the creditors of the bank upon the same assessment. The claim is founded upon an assessment ordered by the comptroller of the currency upon the stock of the insolvent bank, owned by the deceased. It was presented and filed against the estate

because of the liability thus owing. The litigation following is for the purpose of testing such liability and none other. Its satisfaction upon final judgment would, in fact and upon principle, absolve the estate from any further liability. The liability of the estate can not be enlarged or diminished by the application made by the receiver of the proceeds derived therefrom. The order of the comptroller directing the assessment is conclusive. *National Bank v. Case*, 99 U. S., 628. The right of the estate to a discharge from such liability is all it is entitled to. The receiver's authority to institute the proceedings and enforce payment is unquestioned, and a satisfaction of a judgment obtained in such proceedings would obliterate the obligation, regardless of the disposition made by the receiver of the proceeds of such assessment. *Scott v. Armstrong*, 146 U. S. 499; *Kennedy v. Gibson*, 8 Wall. [U. S.], 498; *Stanton v. Wilkeson*, 8 Ben. [U. S. D. C.], 357.

No reversible error appearing from the record, the judgment of the trial court is

AFFIRMED.

MARY J. HYDE, APPELLEE, V. GEORGE W. HYDE, APPELLANT.

FILED SEPTEMBER 19, 1900. No. 9,277.

1. **Homestead Right:** STATUTE. The right to claim the statutory homestead exemptions as the "head of a family" depends upon, and is defined by, the provisions of section 15, chapter 36, Compiled Statutes, 1899, entitled "Homesteads."

2. **Definition of Family.** DAUGHTER OVER AGE. By the provisions of the above section, a daughter over age is a member of the family so as to entitle the father to claim the benefit of the homestead exemption as the "head of a family" only when it appears that she is under his care and maintenance, and is unable to take care of, or support herself.

3. ———: ———: QUESTION OF FACT. In a controversy as to whether a person is the "head of a family" and entitled to his homestead exemptions, based upon the alleged fact that he has living, and dependent upon him for support, a daughter over the age of her majority, the question must be determined from the facts and circumstances as shown by the evidence.

4. ———: ———: ———: ACTUAL AND NECESSARY DEPENDENCE. In such a case, there must be an actual and necessary dependency, by reason of the inability of the dependent to care for or support herself.

5. **Evidence:** FINDING OF TRIAL COURT. Evidence examined, and found to support the finding and judgment of the trial court, holding that appellant is not the head of a family, nor entitled to the exemptions claimed.

6. **Appeal:** QUESTION NOT PRESENTED TO TRIAL COURT. A question not presented by the pleadings and evidence on the trial of a case will not on appeal be considered in this court.

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

Bell & Robinson, for appellant.

B. D. Hayward and *Paul, Haggart & Paul, contra.*

HOLCOMB, J.

The appellee, Mary J. Hyde, obtained a decree of divorce from the appellant, and with it a judgment for alimony in the sum of $700. By a general execution the judgment was partially satisfied, after which proceedings in garnishment were instituted to reach $200 claimed to be due to appellant from an insurance company, for the loss of a dwelling-house situated on a piece of land occupied by him under the United States timber culture act. Appellant appeared in garnisment proceedings and moved to discharge the garnishment, claiming that he was the head of a family, and, as such, occupied the land mentioned; and that the money arising from the loss of the building was therefore exempt. Issues were formed and a trial had, resulting in a finding and judgment by

the trial court to the effect that he was not the head of a family, and the money not exempt, and its payment ordered to appellee.

From the evidence and pleadings it appears that appellant's claim of being the head of a family was based upon the alleged fact that a daughter, some twenty-six years old, was residing with him and dependent upon him for her support. This was denied by the appellee, and from the evidence the conclusion is deducible, as reached by the trial court, that she was not a member of his family, or dependent upon him for her support. The testimony bearing upon this point is contradictory, and, we think, fairly well balanced. From the evidence, it appears that the daughter is somewhat eccentric and below the average in intelligence. Upon this point, however, it is shown that, a few years since, she was examined for, and obtained, a second grade teacher's certificate in the county of her residence, and that she possessed some degree of efficiency as a stenographer. She had been staying at many different places, being at appellant's home occasionally before his wife was divorced from him. It also appears that for a short time she was supported by, and worked for, the county at the county poor-house. After a divorce was obtained by his wife, appellant prevailed on his daughter to return to his home, where she worked for a while and then again left. There is some testimony tending to show that she worked for wages. She at least claimed that wages were due her, which appellant refused to pay. For some time at least, prior to the decree of divorce, it does not appear that this daughter had been a member of the family, or was regarded as requiring the support of her father, because of inability on her part to care for and support herself. As suggested by counsel for appellee, the appellant appears to have assumed the role of provider and protector of his adult daughter, so as to be in a position to claim the statutory exemptions as the head of a family, and prevent the collection by his divorced wife of her judgment

for alimony. Under the circumstances, the transactions have the appearance of a claim of homestead exemptions, more for the benefit of himself, than for the benefit of any person dependent upon him for support. It can hardly be said, from a perusal of all the testimony, that the daughter resided on the premises with her father, or was under his care or maintenance, or was unable to care for and support herself. Before the appellant can rightfully claim his statutory exemptions as the head of a family, he must come within the purview of some of the provisions of section 15, chapter 36, Compiled Statutes, 1899, entitled "Homesteads." In the present case, appellant's right to be classed as the head of a family would depend upon the following: Has he residing "on the premises with him" and "under his care and maintenance" a daughter who has attained the age of her majority and is unable to take care of and support herself? The proper answer to this question must be determined from the facts and circumstances as disclosed by the evidence. Waples, Homestead & Exemption, p. 59, says: "'Dependent for support' means actual and necessary dependence by persons unable to earn a livelihood, who have some natural claim." In support of the rule the author cites the following authorities: *Decuir v. Benker*, 33 La. Ann., 320; *Cox v. Stafford*, 14 How. [N. Y.], 521; *Whalen v. Cadman*, 11 Ia., 226; *In re Lambson*, 2 Hugh. [U. S. C. C.], 233. The finding and judgment of the trial court is, we think, supported by sufficient evidence, and should be permitted to stand.

It is argued in brief of counsel for appellant that, aside from the question as to appellant being the head of a family by reason of the dependency of his daughter upon him for support, he is entitled to the exemptions claimed because of a vested homestead right acquired in the land upon which the dwelling-house stood, during the time he was living thereon with his now divorced wife. We observe nothing in the record, either in the pleadings or evidence, that raises a question of this character. The

pleadings and evidence seem to have centred entirely around the proposition that he was the head of a family and entitled to the exemptions claimed by reason of the residence with, and dependency upon, him of his daughter, and the trial was had upon that issue. This being the case, we are not now called upon to enter upon an investigation of a matter neither raised by the pleadings nor the evidence.

Our views of the case being as indicated, it follows that the judgment of the trial court should be affirmed, which is accordingly done.

AFFIRMED.

HENRY E. CLIFFORD V. COUNTY OF HALL.

FILED SEPTEMBER 19, 1900. No. 9,161.

1. **County Judge:** SUPREME COURT REPORTS: OWNERSHIP. Under the provisions of section 20, chapter 19, Compiled Statutes, 1899, the various reports of the supreme court, distributed and received by the county judges of the different counties of the state, as therein mentioned, belong to the office, and not to the individual; the right of possession and custody thereof being in the incumbent of the office, and passing from the outgoing to the incoming officer.

2. **Interest of County:** REPLEVIN. A county as a municipal corporation has no such interest in or right of possession to the reports of the supreme court, distributed to county judges in accordance with law, as will authorize it to maintain replevin proceedings against one who wrongfully retains possession of the same.

ERROR to the district court for Hall county. Tried below before THOMPSON, J. *Reversed.*

Henry E. Clifford, for himself:

There is no law authorizing or requiring that the county judge should turn over to his successor in office

said reports, and wherever the legislature has designed that any books furnished to any officer should be turned over to his successor in office, it has said so in express terms. See Compiled Statutes, 1895, ch. 47, sec. 4; Code of Civil Procedure, sec. 1089.

Fred W. Ashton, contra:

The plaintiff in error's second defense is that the county of Hall has no right of possession; and can not maintain this action. Let us see. The county judge is a county officer. His office is permanently located at the county seat, and in the county court house. His records are furnished by the county. When a vacancy occurs in the office, the county board fills the vacancy by appointment. It would seem that the records of this office, of all others, belong to the county, and the moment a volume of the state reports is sent to the county judge it becomes the property of the county.

HOLCOMB, J.

The plaintiff in error, defendant in the trial court, for three terms of two years each, was the county judge of Hall county, the defendant in error. At the expiration of his term of office he retained possession of eighteen volumes of the Nebraska reports, received by him in his official capacity as county judge, during his term of office as aforesaid. The county demanded possession of the books as owner thereof, which was resisted by the defendant, and replevin proceedings were thereupon instituted. The essential facts are stipulated by the parties. It is conceded that the property in controversy came into the possession of the defendant as county judge, and during his incumbency of the office as such, under the provisions of section 20, chapter 19, Compiled Statutes, 1899, which reads as follows: "The supreme court reports shall be deposited in the state library. Copies thereof shall be distributed to each judge of the supreme, dis-

trict, and county court, to each state and territorial library, to each officer of the executive department of this state, and to each judge of the United States district and circuit courts of this state; and to the library of congress, two copies." A proper construction of the provisions of this section, as affecting the office mentioned, is all that is necessary in determining the case. In doing this we have endeavored to apply only the general rule as to construction of statutes, and give to the language used its plain and obvious meaning. In *State v. Moore*, 45 Nebr., 12, it is said: "In the interpretation or construction of statutes, ascertainment of the intention of the legislature is the end or purpose to be accomplished." It appears clear to us that the legislature intended to distribute, and possibly donate, these reports to the several officers named, in an official and not individual capacity; that the books are distributed or allotted to the offices of the various county judges, to be used by the person occupying each office, as fully and effectually as it was clearly its intention to have like copies donated to the various libraries therein specifically mentioned. In *Follmer v. Nuckolls County*, 6 Nebr., 204, in the second paragraph of the syllabus, the following language is used: "As a primary rule, the intention of the legislature is to be collected from the words; if the words are not explicit, it may be gathered from the occasion and necessity of the law. Words are to be interpreted with reference to the general object and scope of the statute." It is to be presumed that the legislature intended to serve some wise and beneficial purpose when making the provisions which it did upon this subject. It certainly would require a difficult and uncertain process of reasoning to arrive at the conclusion that the legislative intendment was that each officer temporarily filling the different positions for which provisions are made in said section should have at his command only that portion of the complete set of the reports which happened to be published while he was in office. These pub-

lications serve their highest degree of usefulness only when all the volumes issued up to any given time are collected and arranged consecutively in one library, and it is evident that the legislature so intended. It is not necessary for us to here determine whether it was the intention of the legislature to make a donation outright to the several offices of county judge throughout the state, or to distribute such books to be held and kept in trust by the incumbents of the offices for the state, in whom the title remains undivested. That question is not before us, and it is unnecessary to determine it. Certain it is that the county judge, as between himself and all others, except the state, has the right to the possession of such property, and a possessory title sufficient to maintain an action for the recovery of the possession from those wrongfully withholding the same. It is probably also true that the obligation of a retiring county judge to turn over to his successor in office, with the other property belonging thereto, all of the supreme court reports received during his term of office may be enforced by other appropriate proceedings brought for that purpose. We are of the opinion, however, that the county as a municipal corporation has no such interest in, or right of possession to, the property mentioned as will authorize it to maintain an action in replevin for the recovery of the possession. If the county has such title as would authorize it to maintain replevin to recover possession thereof, it would logically and legally follow that, its right to the property being thus established, it might retain the possession of the books for the use of its county commissioners, or turn them over to the county attorney, or some other officer not contemplated by the statute under consideration, or make other use of its possession thereof, and thus defeat the object of the statute. For these reasons the county can not maintain its action in the present case, and the judgment of the lower court must be reversed and the case dismissed.

We have deemed it incumbent upon us to express our

views as to a proper interpretation of the statute under consideration more fully than otherwise might seem appropriate, because of the public interest involved in a controversy of this character.

REVERSED AND DISMISSED.

MILTON L. TRESTER ET AL. V. HANNAH PIKE.

FILED SEPTEMBER 19, 1900. No. 9,266.

1. **Temporary Restraining Order:** UNDERTAKING: RECOVERY OF ATTORNEY'S FEES. The obligors on an undertaking given to secure a temporary restraining order wrongfully issued in an action are not liable for expenses for attorney's fees incurred in the trial of the main issues involved in the case.

2. ———: ANCILLARY ONLY. A restraining order is in aid only, and not a part of the main action; its office is only to hold matters *in statu quo* for the time being, and until parties can be heard as to the propriety of issuing a temporary injunction.

3. **Damages.** Damages for the wrongful obtaining and issuance of a temporary restraining order are confined to just and adequate compensation for the actual loss, which is the natural and proximate result of the restraint imposed.

4. **Attorney's Fees.** A restraining order not being one of the main issues of a case, damages in the way of attorney's fees for its wrongful issuance are limited to the expenses incurred in securing its dissolution, as distinguished from such expenses incurred in the trial of the principal issues involved.

5. ———. It is only where a trial of the principal issues involved is necessary to dispose of an injunction that attorney's fees for the trial of a case are proper to be allowed as damages caused by an injunction wrongfully issued.

6. ———. A recovery of counsel fees for the trial of a case will not be allowed as an element of damages for an injunction wrongfully obtained, if the injunction proceedings be only auxiliary to the main case.

7. ———: INSTRUCTIONS. Instruction in this case, authorizing a recovery as an element of damages for expenses incurred for attorney's fees on the trial of the main case, *held* erroneous.

8. ———: REMITTITUR. The evidence as to the amount of such attorney's fees, being without conflict, uncontradicted, and for one specified sum, *held*, that a remittitur of such excessive sum might properly be allowed.

9. **Liability:** PRINCIPAL AND SURETY. Where, in an action on an undertaking given to secure the issuance of a restraining order, under the pleadings and proof, the liability of two defendants is that of principal and surety, it is error to render judgment against both defendants as principal; such judgment should be rendered in conformity with the provisions of section 511 of the Code of Civil Procedure.

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

Wolfenbarger & Williams, for plaintiffs in error.

George E. Hibner, contra.

HOLCOMB, J.

Proceedings in the nature of a creditor's bill were instituted for the purpose of fixing a lien upon certain real estate, the legal title to which was in the wife of the judgment debtor; and to subject the property to sale to satisfy the judgment debt. At the time the proceedings were instituted the plaintiff applied for and obtained a temporary restraining order, restraining the defendants in the suit, including the wife of the judgment debtor, from in any way disposing of the real property which it was sought to subject to the payment of the debt. Upon the issuance of the restraining order, and in pursuance of the direction of the district court in that regard, an undertaking was executed by the plaintiffs in error, conditioned that the obligors "shall pay to the defendants all damages which they may sustain by reason of said injunction, if it be finally determined that the said injunction ought not to have been granted." In the restraining order it was further ordered that the application for a temporary injunction be set for hearing on a day therein named, which was a short time in the future. No further

proceedings were had with reference to the allowance of a temporary injunction, and no motion made to dissolve or vacate the restraining order theretofore issued. The restraining order was by all parties permitted to remain in force as issued till the final trial of the case. When the case was finally tried, judgment was rendered in favor of defendants upon findings that there was no equity in the bill, and that the property belonged to the person in whom rested the legal title. A suit was then instituted upon the undertaking, given in pursuance of the issuance of the restraining order, for damages alleged to have been sustained by reason of its wrongful issuance, and upon the trial damages were recovered in the sum of $368. In the trial the right of the plaintiff to recover attorney's fees paid out, and for which the plaintiff became liable in the creditor's bill suit, was sharply denied by the obligors on the undertaking mentioned.

The court, in its instruction to the jury, stated, in substance, that the injunction part of said suit was intermingled with, and dependent upon, the issues touching the real ownership of the property in controversy, so that it became a part of the main case, and that the plaintiff was entitled to recover, as an element of damages, on the injunction bond, "such a sum as you determine from the evidence was a fair and reasonable charge for the services of her attorney in trying said action in this court." The ruling of the trial court upon this branch of the case, it is contended, is erroneous. By the undertaking, the obligors bound themselves to pay all damages sustained by the wrongful issuance of the temporary restraining order. Were counsel fees incurred confined solely to obtaining a dissolution of the order thus issued, the same would doubtless be recoverable. The third paragraph of the syllabus in *Gyger v. Courtney*, 59 Nebr., 555, is as follows: "Where the hearing of an application for a temporary injunction has been unreasonably postponed, attorney's fees necessarily incurred in effecting a dissolu-

tion of a restraining order are a proper element of damage, in case it is determined that the restraining order should not have been allowed." Says SULLIVAN, J., in the opinion: "The office of a restraining order is to prevent action on the part of the defendant until both parties can be heard on the application for a temporary injunction. The practice being to hear such applications at the earliest practicable moment, there will, ordinarily, be no occasion for a motion to dissolve the restraining order. But if the hearing of the application for a temporary injunction be unreasonably postponed, as it was in this case, we think the party on whom the restraint has been imposed is justified in moving to dissolve the order, and that all reasonable expense incurred in the matter, including attorney's fees, may be recovered in an action on the bond." A more extended discussion and consideration of the object and purpose of a restraining order, than in the case last mentioned, will be found in *State v. Wakeley*, reported in 28 Nebr., 431, wherein a restraining order was clearly distinguished in its office from a temporary order of injunction. In that case it is said: "It is very clear that the legislature never intended to give the force and effect to a restraining order which attaches to an injunction when regularly allowed. It simply suspends proceedings until an opportunity can be given for the parties to be heard, and upon that hearing having been had, and a decision rendered upon the application, the whole force of the restraining order ceases by its own limitation." Can it be said in a case of this character that the obligors undertook to pay as damages, in case the restraining order was wrongfully issued, attorney's fees incurred in the trial of the main case? It seems to us not; that this is in effect enlarging the liability which they assumed at the time of the execution of the undertaking. The restraining order was intended only to serve the purpose of preventing a transfer of the property which was the subject of the controversy until an opportunity could be given both parties to be heard upon the

propriety of issuing a temporary order of injunction. No hearing has been had upon this subject, and none applied for; no effort was made to vacate the restraining order, except as the hearing upon the main issues affected it. The restraining order was in aid only, and not a part of the main case. Its office was only to hold the property *in statu quo* for the time being. Its vacation or dissolution did not depend upon a trial of the case on its merits. Damages for the wrongful obtaining and issuance of an injunction or restraining order are confined to just and adequate compensation for the actual loss which is the natural and proximate result of the restraint imposed. Sutherland, Damages, sec. 525; *Collins v. Sinclair*, 51 Ill., 328. The necessary and reasonable expenses for attorney's fees expended or incurred in resisting an order of injunction wrongfully issued, or procuring the dissolution thereof, are recoverable as an element of damages. But when the right to an injunction is not the main issue of the case, such damages are limited to the expenses incurred in securing the dissolution of the injunction, as distinguished from the expenses incurred in the trial of the principal issues involved. *Kittle v. De Lamater*, 7 Nebr., 70; *Raymond Bros. v. Green & Co.*, 12 Nebr., 215; *Gyger v. Courtney*, 59 Nebr., 555; *Mitchell v. Hawley*, 79 Cal., 301; *Newton v. Russell*, 87 N. Y., 527. It is only where a trial of the principal issues involved is necessary to dispose of an injunction that attorney's fees for the trial of the case are proper to be allowed as damages caused by an injunction wrongfully issued. Beach, Injunctions, sec. 206; *Andrews v. Glenville Woolen Co.*, 50 N. Y., 282. A recovery of counsel's fees for the trial of a case can not be allowed as an element of damages for an injunction wrongfully obtained, if the injunction proceedings be only auxiliary to the main case. *Field v. Medenwald*, 26 Ill. App., 642; *Allport v. Kelley*, 2 Mont., 343; *Disbrow v. Garcia*, 52 N. Y., 654; *Noble v. Arnold*, 23 Ohio St., 264. We think it entirely clear that the restraining order was auxiliary only to the main pro-

ceedings, and without deciding what would be the effect in case an injunction had been regularly issued, we are of the opinion that it was erroneous to instruct the jury to allow the expenses incurred for counsel in the trial of the issues raised by the pleadings as one of the elements of damages sustained by the defendants by reason of the wrongful issuance of the restraining order.

Under the evidence and the instructions of the court, the jury were authorized to return a verdict for attorney's fees, in the sum of $75, as one element of damages. There was but one witness who testified upon the subject, and the evidence is in no way conflicting or contradictory. Under this evidence, but the one sum could have been allowed by the jury as expenses for attorney's fees. This being the state of the case, and the excess, allowed by reason of the erroneous instruction, being capable of ascertainment from the record, we are of opinion that the case is one where a remittitur may, with propriety, be allowed. The defendant in error will be allowed, within thirty days, to file a remittitur of the judgment obtained, in the principal sum of $75, with all accrued interest thereon. In case the remittitur is filed, the judgment as modified will not be reversed generally.

It is urged that there was error in the admission in evidence of the restraining order; that in the admission of such evidence there was a variance between the allegations and proof. In this contention we do not agree, and will only give the objection a passing notice.

It is also urged that the judgment is erroneous because rendered against both defendants as principals, while the pleadings and proof disclose that one is principal and the other the surety on the undertaking on which the suit is grounded. The objection in this respect is well taken. Under the pleadings and the evidence, it should have been made to appear in the judgment that one of the defendants was liable as principal and the other as surety, in conformity with the provisions of section 511 of the Code of Civil Procedure. It has been determined sev-

eral times that a failure to observe the requirements of this section, in cases similar to the one at bar, is reversible error. *Blaco v. State*, 58 Nebr., 557; *Van Etten v. Kosters*, 48 Nebr., 152; *Kroncke v. Madsen*, 56 Nebr., 609; *Maxwell v. Home Fire Ins. Co.*, 57 Nebr., 207.

For the reason last assigned, the judgment must be reversed. In the event a remittitur is filed, as herein indicated, the cause is reversed, with instructions to render judgment on the verdict less the amount of the remittitur, in conformity with the provisions of section 511 of the Code. Otherwise, the judgment is reversed generally, and the case remanded for further proceedings in accordance with law.

JUDGMENT ACCORDINGLY.

CHAMBERLAIN BANKING HOUSE V. WILLIAM H. WOOLSEY ET AL.

FILED SEPTEMBER 19, 1900. No. 9,162.

1. **Taxes:** NAME OF PARTIES: PRIMARY EVIDENCE: ASSESSMENT ROLL: TAX SCHEDULE. The primary evidence of the name of parties against whom taxes are assessed is the "assessment roll," or tax schedule required to be signed and verified by the party assessed.

2. **Clerical Error:** CORRECTION: STATUTE. Where, in transcribing assessments to the "assessor's return" or assessment book, a clerical error is committed in the name of a party assessed, the same may be corrected without notice to the tax debtor, as in the case of errors in assessments provided for by section 1, article 2, chapter 77, Compiled Statutes, entitled "Revenue."

3. **Entry of Assessment:** PRESUMPTION. Assessments being regularly entered on the assessment books of the county, the presumption is that public officers do their duty and corrected an error or irregularity, if one existed, in the manner provided by law.

4. **Statutory Lien.** A statutory lien for taxes due exists upon all personal property of the tax debtor from and after the tax lists are made and delivered to the county treasurer.

5. ———: CHATTEL MORTGAGE: ANTEDATE: SUPERIOR LIEN. A lien for taxes upon the property of the tax debtor is inferior to that of a chattel mortgage lien antedating the time the tax lien attaches.

6. **Burden of Proof**: ALLEGATION IN PLEADING. The *onus probandi* is on the plaintiff to prove the material allegations of the petition not admitted in the answer by a preponderance of the evidence.

7. **Sale of Mortgaged Property**: TRANSFER OF DEBT: NEW NOTE: PAYMENT: PRESUMPTION. Where, in a transaction involving the sale of mortgaged personal property, the debt is transferred to the purchaser thereof, and a new note and mortgage are executed, the note evidencing the original indebtedness being canceled and surrendered, the presumption of law is that the execution and delivery of the new note and mortgage is in payment and satisfaction of the prior indebtedness, and the burden is on the creditor to prove to the contrary.

8. ———: ———: ———: ———: ———: RETENTION BY CREDITOR: PAYMENT: EXPRESS AGREEMENT. Where, in such transaction, the note and mortgage evidencing the prior indebtedness are retained by the creditor, and a new note and mortgage taken for the amount due on the same indebtedness, the taking of such new note and mortgage will not effectuate payment of the prior indebtedness, unless there is an express agreement of the parties that such new note and mortgage were received in payment and satisfaction of such prior indebtedness.

9. **Instruction**. Instruction examined, and *held* not to state the law correctly.

10. ———. An instruction submitting to the jury as an issue of fact a question material to the case, regarding which there is no evidence to support a finding, is erroneous.

11. **Distress Warrant**: LEVY BY SHERIFF: CHATTEL MORTGAGE LIEN. Where a sheriff levies distress warrants for delinquent taxes for several years upon property of the tax debtor, upon which a valid chattel mortgage exists, the seizure and sale of the property is wrongful and unauthorized to the extent and for the years the mortgage lien is prior and superior to the lien for delinquent taxes.

ERROR to the district court for Johnson county. Tried below before LETTON, J. *Reversed.*

M. B. C. True and *S. P. Davidson*, for plaintiff in error.

Thomas Appelget and *Frederick Shepherd, contra.*

HOLCOMB, J.

An action of trespass was begun by plaintiff in error against the defendant Woolsey, as sheriff, and the sureties on his official bond, for the alleged wrongful seizure and conversion of certain chattel property on which plaintiff claimed a lien by virtue of certain chattel mortgages thereon, then held and owned by it. The petition charges, in substance, that on September 1, 1892, one Zutavern was the owner of certain chattel property, being a part of a certain livery stock, and that on said date he sold said property to one Rowcliffe and Paine, who executed and delivered to the seller their promissory note for part of the purchase price, and a chattel mortgage on said property to secure the same. The said note and mortgage were sold and delivered to the plaintiff by the payee, Zutavern; that afterwards and on November 1, 1892, the said Paine sold his interest in said property to one Cummins, and in the transaction a new note and mortgage, of the same date and for the same amount and on the same property as the original one, were executed by Rowcliffe and Cummins to the original payee, and by him transferred to the plaintiff, the first note being surrendered, and the mortgage securing the same remaining unreleased and uncanceled; that on July 24, 1894, the said Cummins sold his interest in said property to the said Rowcliffe, and in the said transaction a note for the amount then due, secured by a mortgage on the same property, was executed by the said Rowcliffe and indorsed and transferred to the plaintiff, the plaintiff retaining the said note and mortgage executed by Rowcliffe and Cummins, the debt and lien thereby created being unpaid and unsatisfied; that in the several transactions referred to, the transfer and mortgaging of said property were simultaneous acts, and the original indebtedness was never satisfied, and the mortgage lien created by the several mortgages remained unreleased and in full

force and effect; that on July 8, 1895, the treasurer of Johnson county issued his distress warrants for delinquent taxes for the years 1891, 1892, 1893 and 1894, due from the said Rowcliffe, and a distress warrant for delinquent taxes for the year 1893, due from the said Rowcliffe & Cummins, and delivered the same to the defendant sheriff for execution; that the said defendant sheriff, by virtue of his office, pretended to levy said distress warrants on said chattel property as the property of the said Rowcliffe, and Rowcliffe and Cummins, then in possession of the said plaintiff under its said chattel mortgages, which were then in process of foreclosure by advertisement and sale, and wrongfully, forcibly and unlawfully seized said property and converted the same to his own use. It is also alleged that there was no valid assessment of taxes for the year 1893 against the said Rowcliffe and Cummins. It is alleged that the tax lists of Johnson county were delivered to the county treasurer for the respective years for which the assessments were made as follows: September 27, 1891, September 14, 1892, October 15, 1893, and October 11, 1894. It is alleged that other property in said county was, during all of said time, held by said Rowcliffe and Cummins out of which said taxes could have been satisfied. The answer admits the corporate character of the plaintiff, the official character of the principal defendant, and that the others were the sureties on his official bond, and the issuance of the distress warrants directed to the sheriff, and the levy of the same by him on certain property to satisfy said distress warrants, and denies the other allegations of the petition. A trial on these issues to the court and jury resulted in a general verdict for the defendants.

It is urged that the assessment against Rowcliffe and Cummins for the year 1893 is void for irregularity in the manner of levying the same. This contention is based on the assumption that no assessment was levied against the parties named, but against Rowcliffe & "Carmen," and that the error in the name of the party assessed has

not been corrected in the manner provided by law. To this proposition we do not agree. As we understand the testimony, it is proven by the "assessment rolls" that the assessment was against Rowcliffe and Cummins, the parties against whom it purports to be. This "assessment roll" or schedule is the primary evidence of the assessment actually made, and is required to be signed and verified by the party assessed. The assessment was, therefore, correctly made, and in the correct name of the party assessed.

It is also testified that in the "assessor's return" (assessment book) the name appears as "Rowcliffe & Carmen." This might be considered an immaterial misnomer only. At most, it is only a clerical error on the part of the assessor in making his return from the "assessment rolls," and is subject to correction without notice to the tax debtor, as in the case of errors in assessment provided for by section 1, article 2, chapter 77, Compiled Statutes, entitled "Revenue." Furthermore, the assessment being regularly entered on the assessment books of the county, the presumption of law is that public officers did their duty and corrected the error or irregularity, if one existed, in the manner provided by law. The tax referred to appears to have been legally assessed and is a valid obligation against the persons to whom it is charged.

The paramount question in the case involves the determination of the priority of liens; one, the chattel mortgage lien of the plaintiff, and the other the statutory tax lien upon property of the tax debtor. The principal contention of the plaintiff is that from the time of the creation of the first lien on the property in dispute, September 1, 1892, it has held a valid, subsisting and superior lien to that of any lien for taxes created by statute. It is contended that the lien created by the first mortgage was not extinguished by the transactions subsequently had with reference to the different sales of the property mortgaged, consequently no prior tax lien could attach

to the property thus mortgaged, and as against the plaintiff the seizure was unauthorized and unlawful. The defendant, to the contrary, urges that because of the subsequent transactions respecting the sale of the property and the execution of new notes and mortgages securing the same, the liens created by the first and second mortgages on said property were extinguished, and the tax lien therefore became effective and superior to the lien of the plaintiff. Under the law of this state it is now settled that a statutory lien for taxes due exists upon all personal property of the tax debtor from and after the time the tax lists are made and delivered to the county treasurer. *Farmers Loan & Trust Co. v. Memminger*, 48 Nebr., 17; *Reynolds v. Fisher*, 43 Nebr., 173. In the case at bar, applying the foregoing rule, if the first mortgage was at the time of the levy of the distress warrants a valid and subsisting lien, no tax lien could attach to the property of the said Rowcliffe, or Rowcliffe and Cummins, included in said mortgage, save, perhaps, the taxes for the year 1891. If, however, as contended by the defendants, the original debt as well as the security for the payment of the same were satisfied and extinguished by the subsequent transactions to which reference has been made, then a tax lien for the taxes assessed against the said Rowcliffe, and Rowcliffe and Cummins, for the years prior to the last transaction would attach, and the plaintiff's lien, by virtue of the mortgage last taken, would become subsequent and inferior to the tax lien for each year delinquent prior thereto. It therefore becomes material to inquire how the plaintiff's claim to the property in dispute under the first mortgage and his lien thereon is affected by reason of the subsequent transactions wherein the property mortgaged, or an interest therein, was sold to other parties, and a new note and mortgage executed to secure the amount due on the original indebtedness; and likewise, how the second lien thus obtained was affected by the transaction involving the execution of the third note and mortgage.

In the trial of the case, after the submission of evidence, the court, after stating the issues, instructed the jury upon the point referred to as follows:

"5. The plaintiff claims that it has had a valid lien upon all of said property ever since the first day of September, 1892, by virtue of a chattel mortgage given by Rowcliffe and Paine to one George C. Zutavern, and that said lien had never been released, and that on the first day of November, 1892, said firm was dissolved, that the new firm of Rowcliffe & Cummins assumed the former debt of Rowcliffe & Paine and gave new notes and mortgages on the same property to the plaintiff for the same debt, and that on or about the 24th day of July, 1894, the said firm was dissolved and said Cummins sold his interest in said firm to his partner Rowcliffe and the said indebtedness of the firm to the plaintiff was transferred to said Rowcliffe, and said Rowcliffe thereupon executed a new note and mortgage to the plaintiff on the same property to secure said debt, that the agreement between the same parties was that none of said chattel mortgages so given should be released of record until the indebtedness should be fully paid, but should remain on record as security against intervening liens and said mortgages have not been released of record.

"6. If the plaintiff has proved to your satisfaction by a preponderance of the evidence that such was the agreement and that the surrender of the notes given by Rowcliffe & Paine to Zutavern and giving of the new note by Rowcliffe & Cummins in lieu thereof did not constitute a payment of the debt of Rowcliffe & Paine, then the lien of the first mortgage continued and was not divested, but unless you find such was the agreement the surrender of the old notes and the giving of the new would release the lien of the first mortgage.

"7. The same instruction applies to the transaction between Rowcliffe & Cummins and the plaintiff and Willis Rowcliffe except that the notes of Rowcliffe & Cummins still remained in the hands of the plaintiff

raises the presumption that the giving of the new notes was not taken as payment of the old notes, and the burden of proof would be on the defendant to establish the truth of that contention. If you find that the giving of said notes by Willis Rowcliffe was taken and accepted by the plaintiff as payment of the Rowcliffe & Cummins notes, then the lien created by the prior mortgages was divested and the lien of the plaintiff would only date from said time, which the uncontradicted evidence shows was on or about the 24th day of July, 1894."

The giving of the sixth and seventh instructions was excepted to by the plaintiff, and they are now assigned as error. It is urged that these instructions incorrectly state the law, and that the evidence submitted did not warrant the submission of such an issue to the jury.

As to the first of the two instructions complained of, we do not think it subject to the objections raised. The burden of proving the allegations in its petition rested primarily on the plaintiff. The evidence disclosed that in the transactions wherein Paine sold his interest in the property in dispute to Cummins a new note and mortgage were executed, the original note being surrendered and canceled; and there is a sharp conflict of testimony as to plaintiff's agreement to release the mortgage given to secure the same. This being a controverted fact, it was proper for the jury to determine the truth of the matter. The transaction which resulted in the surrender and cancellation of the note originally given leads to the presumption of the payment and extinguishment of the then existing debt. By the evidence showing the surrender and cancellation of the note, a *prima facie* case of payment of the original debt was made, and irrespective of the state of the pleadings, the burden was upon the plaintiff to overcome this presumption by other competent evidence. *Smith v. Gardner*, 36 Nebr., 741; *Smith v. Harper*, 5 Cal., 329. Certainly the burden rested on the plaintiff to sustain the material allegations of the petition not admitted by the answer; and it was equally incumbent upon

it to overcome the presumption of payment of the original debt, and satisfaction of the mortgage lien securing the same, arising from the surrender and cancellation of the note evidencing such indebtedness, by competent proof to the contrary. The instruction fairly stated the law applicable to the issues and the evidence, and the objection thereto is not well taken.

As to the second of the two instructions objected to, we think the court not so fortunate in its expression of the law applicable to the case. While its tendency is towards a correct expression under the issues and the evidence as applied to the transaction to which it referred, it did not state the law as correctly and explicitly as it should have done. Its tendency was to confuse and mislead the jury as to the fact which it was their province to determine. It permitted them to infer payment and satisfaction of the antecedent debt without evidence of an express agreement of the parties to that effect. As to the transaction to which the instruction had reference, it is established by the evidence that in taking the renewal note and the mortgage of the sole purchaser of the entire interest in the mortgaged property, no alteration was made of the antecedent indebtedness, and that the note and mortgage which evidenced the same were retained and kept by the plaintiff. Under this state of facts, it was unnecessary for plaintiff to prove an agreement between the parties interested to keep alive and in force such antecedent debt, and the lien securing the same. The law accomplishes this for him without proof of an express agreement that such should be the case. Nor in such a transaction, where the prior note and mortgage remain uncanceled and in the hands of the creditor, does the law merely raise a presumption of non-payment of the original indebtedness. It is a positive conclusion of law that such indebtedness and the security therefor remain in full force and effect, unpaid and unsatisfied, unless there is proof of an express agreement between the parties that such new note and mortgage is given and

received as a payment and in satisfaction of the prior indebtedness. *Young v. Hibbs*, 5 Nebr., 433; *Day v. Leal*, 14 Johns. [N. Y.], 404; *Olcott v. Rathbone*, 5 Wend. [N. Y.], 490; *Daly v. Proetz*, 20 Minn., 411; *Alford v. Batker*, 53 Ind., 279; *Weakly v. Bell*, 9 Watts [Pa.], 273. It was incumbent on the defendants to show by the evidence that there was an express agreement between the parties that the note and mortgage of Rowcliffe was taken and accepted in payment and satisfaction of the Rowcliffe & Cummins note before they could recover on that issue, and the failure to so instruct the jury was prejudicial error. Another fatal objection to this instruction is that it presents to the jury an issue of fact not applicable under the evidence. Our attention has not been called to any place in the record where there is any evidence tending to prove any agreement between the parties as to payment of the Rowcliffe & Cummins indebtedness by the execution and delivery of the note and mortgage by Rowcliffe alone; nor has a careful scrutiny of the entire record revealed to us any such evidence. The only evidence upon the subject is by one witness, to the purport that he heard nothing said whatever relative to payment or other disposition of this prior indebtedness. This evidence is purely negative in its character, and proves, or tends to prove, nothing. Were it incumbent on plaintiff to prove an agreement that no payment was intended, the evidence might possibly be material, as tending to prove absence of such agreement; and the case seems to have been tried somewhat upon that theory.

In the brief of counsel it is suggested that, inasmuch as the plaintiff was seeking to foreclose its chattel mortgage last given, this is evidence of the payment of the note given for the original indebtedness. We do not so regard it. The note last given was held as collateral security to the original debt, unless there was an agreement that the debt should be paid by such note, and the plaintiff was at liberty to resort to such security for the satisfaction of the debt without in any way prejudicing him or

his right to look to the makers of the prior note or the security given therefor. Furthermore, it is shown by the evidence that plaintiff had resorted to both mortgages, and was endeavoring to secure satisfaction for the debt secured thereby by a sale of the property so mortgaged. There being an entire absence of evidence supporting the contention of payment of the Rowcliffe and Cummins note and the release of the mortgage security, it follows that the instruction given was inapplicable, and presented to the jury for its determination a fact not in controversy under the evidence.

There being no competent evidence of any payment or satisfaction of the Rowcliffe & Cummins note and mortgage, the lien of the plaintiff by virtue of this mortgage on the property in dispute is established as being in force from November 1, 1892, and the seizure of the mortgaged property for taxes due from the tax debtor, which became a lien subsequent to that date, was to that extent unauthorized, and the plaintiff's right of recovery for such unlawful seizure unquestioned.

While other questions are presented, those considered are of controlling interest, effectually dispose of the case, and render a further examination unnecessary. The judgment of the lower court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

JOHN WILLIAMS ET AL. V. STATE OF NEBRASKA.

FILED SEPTEMBER 19, 1900. No. 11,190.

1. **Burglary:** LARCENY: DEFINITION OF BURGLARY: INSTRUCTION: VERDICT: ERROR WITHOUT PREJUDICE. Where, in an action against a person for burglary with intent to steal and also the larceny of goods, the court, in instructing the jury, in defining

what constitutes the offense of burglary, omits an essential element, and the jury return a verdict of not guilty as to the charge of burglary, *held*, that such omission is error without prejudice.

2. **Instruction:** DEFINITION OF LARCENY: VALUE: GRAND: PETIT. Where the statute defining grand and petit larceny is incorporated in an instruction to the jury defining the essential elements of the crime, such instruction is not open to the objection that it does not state that the property stolen must be of some value.

3. **Possession of Stolen Property:** PRESUMPTION: INFERENCE: EVIDENCE. Under the doctrine announced and held in this state, no presumption of guilt arises from the mere possession of stolen property; the inference to be drawn from such fact is alone for the jury when weighed in connection with all the evidence adduced on the trial.

4. **Presumption of Innocence:** REASONABLE DOUBT. The presumption of innocence attends the accused through every step of the trial, until the jury finds his guilt established under the evidence beyond a reasonable doubt.

5. **Burden of Proof.** The burden of proof in a criminal action does not shift to the accused.

6. **Possession of Stolen Goods:** JURY: INSTRUCTION. The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, are solely for the jury, and it is improper for the court to instruct the jury as to the effect to be given, or the sufficiency of, the evidence, in whole or in part.

7. **Instructions.** Instruction set forth in the opinion *held* to have been erroneously given.

ERROR to the district court for Hitchcock county. Tried below before NORRIS, J. *Reversed.*

A. C. Yocum, J. W. James and *W. F. Button,* for plaintiffs in error.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy,* for the state.

HOLCOMB, J.

Defendants were informed against for burglary by breaking into and entering a store building, and the larceny of certain goods contained in said store building.

On the trial, by the verdict of a jury, they were acquitted of the charge of burglary and found guilty of larceny of property of the value of $146, as charged in the information. Objections are made to certain instructions given by the court on its own motion. It is claimed, in the first place, that the court omitted to instruct the jury that, where burglary is committed with intent to steal, the property must be of some value; and, likewise, in the instruction as to larceny, the jury were not told that the property must be of some value.

As to the instruction excepted to relating to burglary, accepting counsel's position to be correct, we think, in view of the jury's verdict upon the charge of burglary, that it was, if erroneous, without prejudice. No bill of exceptions was preserved, and an instruction of the nature given was doubtless required under the evidence; the omission, however, to state therein one essential element of the offense, viz., that, where the unlawful breaking and entering was with intent to steal, the property must be of some value, is, in this case, harmless error.

As to the instruction with reference to the alleged larceny, the court, in its instruction, in defining what constituted grand and petit larceny, quoted the section of the statute on the subject, and we think, in effect, thereby told the jury, not only that the property stolen must be of some value, but that, in order to constitute the offense of grand larceny, the goods must be of the value of over $35. This instruction, in our view, meets the requirement of law as to the essential elements to be proven before a verdict of guilty could be rendered. Neither of the objections noted are well taken.

It is contended that the instruction relative to the possession of property stolen by the persons charged with the theft is erroneous. The instruction is as follows: "You are instructed that the possession of recently stolen property is usually regarded in law as a criminating circumstance strongly tending to show that the possessor of stolen property is guilty, unless the facts and circum-

stances surrounding or connected with such possession or other evidence explains or shows that such possession might have been acquired honestly. *Possession of stolen property immediately after the theft is sufficient to warrant conviction of larceny, unless the attending circumstances or other evidence so far overcomes the presumption thus raised as to create a reasonable doubt of the person's guilt, when an acquittal should follow.*" The objections in this regard seem to be sound. We are of the opinion that the part we have italicized is especially objectionable. By it the jury are, in effect, instructed that the possession of stolen property immediately after the theft is sufficient to warrant a conviction, unless the presumption of guilt thus arising is overcome by the attending circumstances or other evidence, in so far as to create a reasonable doubt of the person's guilt, when an acquittal should follow. Under the doctrine as announced and adhered to in this state, "no presumption of guilt arises from the mere fact of possession of stolen property, but that the inference to be drawn from such fact is alone for the jury, when weighed in connection with all the evidence adduced on the trial." *Metz v. State*, 46 Nebr., 547; *Dobson v. State*, 46 Nebr., 250; *Robb v. State*, 35 Nebr., 285. In *Ingalls v. State*, 48 Wis., 647, 656, it is said in the opinion, by Mr. Justice Taylor: "The rule to be derived from these cases, and which is sustained by the later elementary writers upon evidence in criminal cases, is, that the possession of the stolen goods by the accused recently after the larceny does not raise any legal presumption of the guilt of the party so found in possession. The fact of the possession of the stolen property by the accused is evidence tending to prove his guilt, but is in no sense conclusive as to his guilt; nor does his guilt follow as a presumption of law unless such possession be explained by the accused." The presumption of innocence attends the accused through every step of the trial, until the jury finds his guilt established under the evidence beyond a reasonable doubt. The tendency of the instruction is to shift the burden and

require the accused to overcome the presumption stated in the instruction by attending circumstances or other evidence sufficient to raise in the minds of the jury a reasonable doubt of his guilt. The burden of proof in a criminal action does not shift to the accused. *Davis v. State*, 54 Nebr., 177. In *Robb v. State, supra*, it is said: "In a criminal prosecution for larceny, the rule is that the possession of stolen property recently after a larceny thereof, when unexplained, may be sufficient to warrant the jury in drawing an inference of guilt of the party in whose possession it is found. The effect to be given to the fact of possession is solely for the jury to determine when considered in connection with all the other facts and circumstances proven on the trial." In the instruction complained of, the jury are instructed that such possession, if unexplained, is sufficient to warrant a verdict of guilty. The instruction, we think, in this regard, invades the province of the jury by telling them what is sufficient, and the effect to be given such evidence. This contravenes a well established rule of law. The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, were solely for the jury; and it is improper for the court to instruct the jury as to the effect to be given to, or the sufficiency of, the evidence, in whole or in part. 11 Ency. Pl. & Pr., p. 102; *Metz v. State, supra; Dobson v. State, supra; Robb v. State, supra; Olive v. State*, 11 Nebr., 1.

For the reasons given, the judgment of the trial court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

MISSOURI PACIFIC RAILWAY COMPANY v. WILLIAM K. FOX, ADMINISTRATOR OF THE ESTATE OF AMOS THOMPSON, DECEASED.

FILED SEPTEMBER 19, 1900. No. 11,112.

1. **History of Case:** PRESUMPTION. After trial, on appeal to this court, it was decided that on a certain point in the case the evidence was insufficient to prove a cause of action. The case was reversed, and a second trial had; the trial court submitting to the jury the question thus decided in the former appeal. *Held*, In the absence of a record to the contrary, that it is presumed the trial court, having the evidence in both trials before it, found a material difference existing, from which it was determined that the decision in the case on appeal did not apply to the evidence as submitted in the second trial.

2. **Res Adjudicata.** It is a settled rule in this court that a legal principle involved in the trial of a case, when once determined, becomes thereafter the law of the case, binding, not only upon the trial court, but this court as well, and will not, ordinarily, be re-examined in a subsequent review of the proceedings of an inferior court had in the further trial of the action. This rule, however, is not applicable to decisions rendered on questions of fact; in such cases, the decision as to the sufficiency of testimony on a particular feature of the case, as disclosed by the record on the first trial, is not binding in a subsequent trial, where the testimony is, or may be presumed to be, materially different, in the investigation of which a reviewing court is to be controlled by the record then before it, uninfluenced by such prior decision.

3. **Instructions.** Where several instructions to the jury in the trial of a case are requested, some of which are inconsistent with the others, and involve different theories of the case, a party submitting such instructions can not complain of the trial court in adopting one of the theories of the case, and giving the instructions applicable thereto, and refusing those which were inconsistent with the ones given.

4. **Leading Trial Court into Error.** It is a sound and salutary principle that a party can not be heard to complain of an error which he himself has been instrumental in bringing about.

5. **Instructions:** JURY: PRESUMPTION. It is presumed that a jury followed the instructions given in arriving at their verdict, and unless it affirmatively appears to the contrary, it can not be said that such instructions were disregarded.

6. ———: CONTRIBUTORY NEGLIGENCE. An instruction regarding contributory negligence may be properly refused, when it in effect states that contributory negligence would be imputed to an individual who did not exercise the greatest care and caution that an ordinarily prudent man would exercise under like circumstances, and when, grouping a number of acts together, it calls attention to facts and circumstances to be considered, of which there is no proof of negligence, and omits an important fact connected with the transaction to which it relates.

7. ———: ———. Where an instruction on contributory negligence is given, which requires a greater degree of care and caution to be exercised than is necessary as tested by the true rule, the giving of such instruction is not to the prejudice of the party alleging contributory negligence.

8. ———: TECHNICAL ERROR: WITHOUT PREJUDICE. Instruction on contributory negligence examined, and, although technically incorrect, *held* to be without prejudice.

9. **Obvious Peril:** DEGREE OF CAUTION: SURROUNDING CIRCUMSTANCES. Where a person is confronted with an obvious peril, he is required to exercise care and caution commensurate with the peril. This, however, is to be determined by the conduct of ordinarily prudent men, confronted by such peril under like circumstances.

10 **Instructions:** REPETITION. It is not necessary to give an instruction requested which involves a proposition covered by other instructions already given, since it is in the nature of a repetition.

11. **Expert Witness.** A person who is a yardmaster of a railroad company, having charge of switchmen and brakemen, and who has been a switchman himself, and has handled cars of all kinds, and is acquainted with the mode of construction, may be permitted to testify as an expert respecting the manner of construction of certain parts of a car involved in the controversy, and to express an opinion thereon as to what is a proper or improper construction. Such person, although not having as thorough a knowledge as an experienced car-builder or car-architect, possesses a superior knowledge regarding the subject, qualifying him to speak with reference thereto, for the purpose of aiding the jury to rightly determine the mooted question involved in the controversy.

12. ———: RULE: DISCRETION OF TRIAL COURT. The general rule as to the competency of witnesses to testify as experts rests very largely in the sound discretion of the trial court, whose rulings thereon will not be reversed unless clearly erroneous as a matter of law.

13. **Testimony:** DUTY OF BRAKEMAN. Certain testimony as to the duties of a brakeman and car inspector examined, and *held* admissible under the issues of the case.

14. **Expert Testimony.** Expert testimony may be received regarding a subject peculiarly within the knowledge and experience of those testifying, and which is not of such a character as to be within the knowledge of men of common education and experience in considering and forming an opinion upon it.

15. ———. When the question involved does not fall within the range of common experience or common knowledge, the opinions of witnesses skilled in the particular science, art or trade to which the question relates are admissible in evidence.

16. **Answer Not Responsive:** MOTION TO STRIKE. Where an answer is not responsive to the question, it should be reached by motion to strike out.

17. **Test of Admissibility.** The test of the admissibility of evidence is upon the questions asked, rather than the answers returned.

18. **Expert Witness.** Persons having several years' experience in railroading, and having knowledge as to the manner of constructing road-beds and maintaining the same, *held* to be competent to testify, and to express an opinion, as to whether the road-bed at a certain place was properly or improperly constructed.

19. **Improper Evidence:** ERROR WITHOUT PREJUDICE. Where improper evidence is received, it will be held to be without prejudice, if it appears that the jury could not have been perceptibly influenced by the improper statements received in evidence.

20. **Cross-Examination:** PREDICATING ERROR: RULE. Where questions on cross-examination are asked for the purpose of eliciting certain information in the nature of a contradiction of the testimony in chief, and ruled out on objections, and the evidence sought is afterwards established by other uncontradicted evidence, error can not be predicated on the ruling of the court regarding such cross-examination.

21. ———: ———: ———. Where a witness is asked on cross-examination concerning a certain matter, to which objection is made, and the objection sustained, and the witness is afterwards called as a witness in chief by the party cross-examining, and the same questions asked and answered, no error can be predicated on the ruling in the cross-examination of such witness.

22. ———: LATITUDE. The latitude to be given in the cross-examination rests largely in the discretion of the trial court, and should always be restricted to facts and circumstances brought out on direct examination.

23. **Predicating Error on Testimony Stricken Out.** Where evidence is admitted over objection, as to the statements of the conductor of a train made soon after the accident occurred out of which the suit grew, which was admitted as a part of the *res gestæ*, and all of said evidence was afterwards stricken out and withdrawn from the jury, error can not be predicated upon the admission of such testimony.

24. **Damages for Negligence:** VERDICT: MOTION FOR NEW TRIAL: DELAY: INTEREST. Where, in an action for damages for negligence, a verdict is returned for plaintiff, and by reason of a motion for a new trial by the defendant a delay occurs in the rendition of judgment on the verdict, it is not error to allow interest on the amount of damages as found in the verdict, from the date thereof to the date of the rendition of the judgment.

25. **Motion for New Trial.** Where different trials have been had, resulting in verdicts for plaintiff, and new trials have been denied by the trial court, the verdict and judgment in the last trial will not be overruled and set aside, unless the evidence is clearly insufficient to support them.

26. **Evidence:** VERDICT: JUDGMENT. Evidence examined, and found to be sufficient to support the verdict of the jury and the judgment rendered thereon.

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

B. P. Waggener, James W. Orr, A. N. Sullivan and *C. S. Polk*, for plaintiff in error.

Matthew Gering, contra.

HOLCOMB, J.

For the third time this action is before this court for consideration, the two former opinions being reported in *Thompson v. Missouri P. R. Co.*, 51 Nebr., 527, and *Missouri P. R. Co. v. Fox*, 56 Nebr., 746. The action is founded upon the alleged negligence of the railroad company, resulting, as claimed in the petition, in the death of one Amos Thompson, a brakeman in the employ of said company, while in the performance of his duties as such. The acts of negligence pleaded as

causing or contributing to the death of Thompson are of a threefold nature. It is asserted that the deceased came to his death in an attempt to make a coupling or connection of a passenger coach to a coal car on the rear end of a freight or accommodation train, then being made up at a station called Union, on the line of said road, and that because of the defective and negligent manner of the construction of the coupling appliances, the improper and negligent construction of a truss-rod or bolt in the end of the coal car,—it being alleged that it was permitted to protrude through the nut in which it was screwed at the end of the car to an unreasonable and unnecessary length,—and the imperfect and improper condition of the roadbed at the place of the accident, the deceased came to his death, the several acts of negligence as alleged causing or contributing to his said death, without fault or negligence on his part.

In the trial first had, upon a peremptory instruction of the court, a verdict was by the jury returned for the defendant company. The peremptory instruction was based upon the conclusion that the evidence failed to sustain the allegations of the petition as to negligence on the part of the company, and was not sufficient to support a judgment in plaintiff's favor. Upon review, by error proceeding, this court in its first opinion upheld the conclusion reached by the trial court on all points presented except as to the sufficiency of the evidence with reference to the manner of the construction of the truss-rod or bolt, and whether, if negligently constructed, it was the proximate cause of the death of Thompson. It was there "*held* that the case should have been submitted to the jury on the question of negligence in the construction of the car with reference to the bolt, and as to this being the proximate cause of his death, the car not being one with which he was familiar, and it not being shown that such a construction was common among the cars he habitually handled." Says Commissioner IRVINE, at the close of the

opinion: "We think in this aspect of the case, and this only, there was evidence which should have gone to the jury as justifying an inference that the construction of the car with the bolt so projecting was a negligent construction, and the proximate cause of Thompson's death." As to the other causes of negligence pleaded in the petition, this court, in the same opinion, announced the rule as follows: "If the machinery, tools, or appliances furnished a servant by his master are obviously defective and dangerous, and the servant, notwithstanding, continues in the service, he thereby assumes the risks of any injury which he may sustain by reason of such defective appliances," following the rule as laid down in *Missouri P. R. Co. v. Baxter*, 42 Nebr., 793.

The judgment rendered in the first trial being reversed for the reason stated, a new trial was had, in which the jury returned a verdict in favor of the administrator, upon which judgment was rendered and the case again brought here for review, and again reversed. The judgment of reversal was based upon an instruction by the court upon the doctrine of comparative negligence, which it was held did not prevail in this jurisdiction. Error was also found in the admission of certain testimony as expert testimony, which, it was held, was incompetent as such.

In the last trial, the jury again returned a verdict in favor of the administrator of the decedent's estate for the full amount claimed in the petition, and allowed by statute, and we are asked to again review the case.

Numerous alleged errors are assigned as grounds for reversal. It is argued that the trial court erred in submitting to the jury the question of liability of the company by reason of the alleged defective coupling appliances, the imperfect condition of the track at the place of the accident; and in its rulings upon certain instructions relating to both questions. We can, perhaps, save some time by considering these questions together and at the same time make our views sufficiently clear. One of the

instructions requested by the company and refused, of which complaint is made, in effect advised the jury that the only question for them to determine was whether the truss-rod or bolt was negligently constructed, and if so, was it the proximate cause of the death of Thompson, and unless both questions were determined in the affirmative, a verdict should be returned for the defendant company. The other, in substance, directed that the deceased assumed the risks incident to his employment; that, under the undisputed evidence, he knew the dangers incident to the operation of the coupling appliances, and continued in the company's service without complaint, or promise of change, and that, if they found his death was caused by reason of the coupling appliances slipping by when attempting to make the coupling, then the plaintiff could not recover. An instruction was also requested by the company and refused, which directed the jury to disregard all evidence as to the condition of the track at the place of the accident as a cause of the injury complained of. These instructions were requested upon the assumption that the questions to which they relate have heretofore, in the same case, been decided, and are within the rule of "the law of the case," and to support this view our attention is called to the opinion first delivered by this court in the present case. As we have heretofore stated, it was therein held that, on the question of the alleged negligent construction of the truss-rod or bolt, the evidence in that trial was sufficient to warrant a submission to the jury as to the proper inference to be drawn therefrom; or, to put it another way, under the record as then presented, the evidence alone upon the question of alleged negligent construction of the truss-rod or bolt, and whether or not, if negligently constructed, it was the proximate cause of Thompson's death, was such as to require its submission to the jury for their determination, the refusal of which was prejudicial error. In discussing the evidence preserved in the record of that trial, Mr. Commissioner IRVINE, who wrote the opinion, in speaking

with reference to the coupling appliances, says: "So far as we have stated the evidence, we think it tends in nowise to disclose a cause of action. It falls clearly within the rule that if the machinery, tools, or appliances furnished a servant by his master are obviously defective and dangerous, and the servant, notwithstanding, continues in the service, he thereby assumed the risks of any injury which he may sustain by reason of such defective appliances." And again he says: "It is also alleged that the track at the point referred to was defective because of improper ballast; but there is no evidence to show that the method of ballasting employed was improper, or that it increased the hazard to employés; nor is it shown that the accident to Thompson was caused or contributed to in any way by the condition of the track." The conclusions reached were arrived at from an examination of the evidence then before the court. We are unable to say from the record now before us that the evidence now presented is not materially different from what it was on the first trial of the case. The evidence in different cases, and in different trials of the same case, may, and often does, differ in many essential particulars. It may shift and change as the current of a stream in a bed of sand. Not only may changes occur by reason of newly-discovered evidence, new witnesses whose testimony may supply a missing link, but often those having the management of a case turn the current of evidence in one direction at one time, and in an entirely new channel at another. If the evidence is the same, or substantially so, and made to thus appear, doubtless the rule would apply. Whether or not it is the same, we are unable to say from the record before us, which is now to guide us in our examination. It is but a fair and legitimate presumption to say that the trial court, in passing upon the instructions requested, and having before him the evidence in both trials, found a material difference in the testimony in the last trial from that of the first, and, therefore, determined that the opinion regarding the matter, an-

nounced in the first appeal, did not apply to the testimony as then existing. If called upon, or if it became necessary, we could say, from an examination of the record before us, whether a cause of action was proven regarding either of the questions under consideration, but the question being presented in the way it is, this is not required. The rule sought to be invoked is based upon the many utterances of this court, upon the proposition that a decision in a case, when once rendered, will thereafter be followed as the law of the case; and, in this instance, it is insisted that, it having been determined on the first appeal that the evidence was insufficient to prove a cause of action for negligence in respect to the alleged defective coupling appliances and improper ballasting of the roadbed at the place of the accident, this decision should control in all proceedings in the case had thereafter. The rule may be stated, as found in *Coburn v. Watson*, 48 Nebr., 258, as follows: "The determination of questions presented to this court in its review of the proceedings of an inferior tribunal become the law of the case, and, ordinarily, will not be re-examined in a subsequent review of the proceedings of the inferior tribunal on a second trial or hearing of the cause." To the same effect are *Fuller v. Cunningham*, 48 Nebr., 857; *Omaha Life Ass'n v. Kettenbach*, 55 Nebr., 330; *Richardson Drug Co. v. Teasdall*, 59 Nebr., 150; *Hayden v. Frederickson*, 59 Nebr., 141. From the different expressions of the court upon the question, we understand the rule to apply to a legal principle involved in the trial of a case, which, when once determined, becomes thereafter the law of the case, binding, not only on the trial court, but this court as well; and will not, ordinarily, be re-examined in a subsequent review of the proceedings of an inferior court had in the further trial of the action. A conclusion, however, arrived at from an examination of the testimony upon one trial of a case must necessarily be subject to modification or entire change, if, upon a subsequent trial, the testimony with respect to the question is materially different. Regarding conclusions

reached from an examination of the testimony upon questions of fact, we understand the rule to be as announced in *Lane v. Starkey*, 20 Nebr., 586, wherein it is held: "The rule stated in *Hiatt v. Brooks*, 17 Nebr., 33, 'that a previous ruling by an appellate court upon a point distinctly made is a final adjudication, from the consequences of which the court can not depart nor the parties relieve themselves,' is applicable only to legal principles enunciated and rules of law laid down for the government of the inferior court upon the second trial. It has no reference to decisions on questions of fact solely where the evidence upon the second trial is materially different from that on the first." Says REESE, J., in the opinion: "We do not so understand the application of that rule. So far as the enunciation of any legal principle is involved which is common to both cases, the rule must be applied; but wherein the decision was upon questions of fact alone, as developed by the testimony upon the first trial, they can apply only to that case; and the testimony in this case—or rather in this stage of the case—being, in many respects, different from the testimony taken on the first trial, the case is before us to be decided upon its merits, uninfluenced by any conclusion of fact on the former hearing." In *Mattingly v. Pennie*, 45 Am. St. Rep., 88, decided by the supreme court of California, says Van Fleet, who wrote the opinion: "Respondent contends that on the former appeal the question of the sufficiency of the evidence to sustain a verdict for plaintiff was decided in favor of plaintiff; that plaintiff's evidence was substantially the same on the last trial as on the first; and that the decision on that point has become the law of the case, and precludes us from now considering the sufficiency of that evidence. * * * It is settled beyond controversy that a decision of this court on appeal, as to a question of fact, does not become the law of the case. But plaintiff contends that the question thus presented of the insufficiency of the evidence to support a verdict for plaintiff was a question of law, and was the very fact in judgment

on that appeal. Assuming, without deciding, that that view is correct, we are, nevertheless, of opinion that the point now presented is not the same as that so supposed to have been decided on the former appeal, and that we are therefore now entitled to consider it without being concluded by the former decision. We adhere to what was said on that subject in *Wixson v. Devine*, 80 Cal., 388, and will not extend the application of the doctrine of the 'law of the case' beyond the cases in which it has hitherto been held to apply." And it is there held: "The decision of an appellate court on appeal as to a question of fact does not become the law of the case." Our attention has been called to the case of *Wittenberg v. Mollyneaux*, 59 Nebr., 203, where the rule as heretofore announced is reiterated and applied to a question of evidence. That case was for a third time before this court for its decision. Reference was made therein to a decision in a former appeal upon the question of the recovery of gains and profits as an element of damages growing out of a breach of contract. It was decided that under certain conditions there could be such a recovery, but further held that, in the case at bar, there was an entire absence of necessary testimony to support a recovery for loss of gains and profits. In the third opinion, there being likewise an absence and lack of such testimony, the former opinion was deemed and held to be decisive of the question. The decision, in the first instance, partook more of the enunciation of a legal principle than a conclusion of fact derived from the testimony, there being in each instance no testimony of the character required before a recovery could be had on one of the items of damages claimed. We do not regard the opinion in that case as in conflict with the views herein expressed. It follows that a decision as to the sufficiency of the testimony on any particular feature of the case, as disclosed by the record on the first trial, is not binding upon a subsequent trial, where the testimony is, or may be presumed to be, materially different, and that in the present investigation

we are to be controlled by the record now before us, uninfluenced by such decision.

There is, we think, another view of the matter under consideration, which concludes the company in its contention with respect thereto. Not only were the instructions referred to, which in effect withdrew from the consideration of the jury the questions to which they relate, requested and refused, but other instructions on the same subject, for the guidance of a jury in their consideration of such questions, were requested and given. Instruction No. 7, requested by the company and given, is as follows: "The jury are instructed that if the machinery, tools, or appliances furnished a servant by his master are obviously defective and dangerous and the servant, notwithstanding, continues in the service, he thereby assumes the risk of any injury which he may sustain by reason of such defective appliances." By instruction No. 10, requested and given, the jury were told in substance that if they found the deceased was engaged in the service of the company for some time prior to the accident, was of mature age and experienced in the business in which he was engaged, and had frequently, during his service, performed similar duties to those in which he was engaged when he received the injuries, and that he knew, or could have known by the exercise of ordinary care, that the coupling apparatus would occasionally slip by, and had seen and known of its slipping by prior thereto, and continued in the service of the company without protest or promise of change, then he assumed whatever risk or danger there was in the use of such appliances, and waived the right of recovery for any injury to himself resulting therefrom. In instruction No. 16, requested and given, the principle involved in the tenth instruction was reannounced and the jury directed that "if you further find that the injury and death of said Amos Thompson resulted from the use of the coupling appliance on C. B. U. P. coach No. 10, then the plaintiff can not recover herein, and your verdict must be for the

defendant." In addition to the instruction directing the jury to disregard evidence as to the condition of the roadbed at the place of the accident, the defendant company submitted an instruction upon the question for the jury's guidance in their deliberation, which was given, and is as follows: "The jury are instructed that if they find from the evidence that such railroad track at the time of the accident to Amos Thompson was in a defective condition, that such condition caused or contributed to the injury complained of, and further finds from the evidence if it had continued in that condition for such a length of time previous to the date of accident, that the said Amos Thompson knew, or by the exercise of reasonable care should have known of its condition and he continued in the employment of the company with such knowledge or means of knowledge, without complaint, then and in that event the plaintiff can not recover herein on that branch of the case." These several instructions, which were requested by the company and given, are inconsistent with the ones refused. The court could not have consistently given all, and was compelled to choose between the two. It adopted the theory that the questions should be submitted to the jury. This was one theory the defendant had of the case, or else it were useless to have submitted the instructions given. We do not think the company ought to be permitted to request the numerous instructions that it did, some of which were inconsistent with the others, and then be allowed to complain because the court adopted a part of them consistent with one theory of the case, and refused the others because inconsistent with the ones given. It is said in *Clark v. Pearson*, 53 Ill. App., 311: "A party who presents to the court different and antagonistic instructions, and such that if one be given, consistency requires that the other be refused, can not be heard to complain of the action of the court in erroneously deciding between the two." If the refusal of the peremptory instructions upon the questions to which they refer was error, then the court also erred in

submitting to the jury, under the instructions requested, the same questions for their consideration. We regard it as a sound principle, as well as a salutary one, that a party can not be heard to complain of an error which he himself has been instrumental in bringing about. *Walton v. Chicago, St. P., M. & O. R. Co.*, 6 C. C. A., 223; *Borden v. Croak*, 19 Am. St. Rep., 23; *Kincaid v. Higgins*, 1 Bibb [Ky.], 396; *Blakey v. Blakey*, 3 Marsh. [26 Ky.], 674; *Mudget v. Kent*, 18 Me., 349; *Loomis v. Wabash, St. L. & P. R. Co.*, 17 Mo. App., 340; *Price v. Town of Breckenridge*, 92 Mo., 378. We are of the opinion that the instructions requested by the defendant company and given, together with others, fairly and fully presented to the jury the law applicable to the two questions growing out of the alleged negligent construction of the coupling appliances and the condition of the road-bed, and it is fair to presume that the jury followed the instructions thus given in arriving at their verdict; and unless it affirmatively appears to the contrary, it can not be said that such instructions were disregarded. *Harper v. Wilgus*, 6 C. C. A., 45; *Mandeville v. Guernsey*, 51 Barb. [N. Y.], 99; *Ayres v. Hartford Ins. Co.*, 21 Ia., 193.

The final and ultimate test in the present case is whether or not, under the pleadings and all the evidence submitted, the jury were warranted in drawing the conclusion shown by the verdict returned; and if so, it will be presumed that the verdict was based only on the evidence which, under the instructions given, supported the verdict reached.

It is further argued that the trial court erred in refusing to give instruction No. 24, requested by defendant company, and also in giving instruction No. 3, on its own motion. The two instructions mentioned referred to the law of contributory negligence, which was raised in a mild form by the pleadings. In the instruction requested and refused, after stating that the plaintiff could not recover, if deceased was guilty of contributory negligence, it is stated: "In determining whether the deceased, Amos

Thompson, was guilty of contributory negligence, the jury may take into consideration the questions as to whether or not the train was, at the time, being moved under his signals and direction, also as to whether or not he had ample time and opportunity to place the link in the safest and most prudent place to make the coupling in question, also as to whether or not he had provided himself with a suitable link to make said coupling, also as to whether or not he exercised due and reasonable care in placing a link in the safest and most prudent place to make such coupling, also whether, under the circumstances, he had placed himself in a safe and prudent position to make the coupling; as well as all other facts and circumstances shown by the evidence introduced by either party. And if from all the facts and circumstances the jury believes that the said Amos Thompson did not, at the time, and under the circumstances and conditions exercise due and reasonable care for his own protection, or such care and prudence as an ordinarily prudent person would have exercised under like circumstances and conditions and that such failure, if failure there was, caused or directly contributed to the injury complained of, then the deceased would be guilty of contributory negligence and the plaintiff can not recover herein, and your verdict must be for the defendant." We do not think the instruction requested above criticism. It in effect stated the principle to be that contributory negligence would be imputed to an individual who did not exercise the greatest care and caution that an ordinarily prudent man would exercise under like circumstances. It speaks of the safest and most prudent place for putting the link, while the true rule would seem to be what under the circumstances would be regarded as an ordinarily safe and prudent place for the link. Its tendency was to require a higher degree of care and caution than is required by the true test. It falls within the rule uttered by LAKE, J., in *Dunbier v. Day*, 12 Nebr., 603, in that it directs attention to facts about which there is no

proof of negligence, and in its conclusion gave an exceedingly wide range to search for proof of negligence on the part of deceased. It is, we think, faulty in another respect, in entirely omitting and overlooking the important fact sought to be established by the evidence, viz., that the death of Thompson was occasioned by the alleged negligent construction of the truss-rod or bolt in the end of the coal car. The instruction given on the subject of contributory negligence is as follows: "The jury are instructed, that contributory negligence, under the law, is the doing or omitting to do some act, which a reasonably prudent man in the exercise of caution commensurate with an obvious peril confronting him would have done or have omitted to do, and which act or failure on the part of such person directly contributed to the injury." We are not impressed with the instruction as a clear and explicit expression of the law of contributory negligence. We are, however, to consider it in connection with, and as applicable to, the evidence in the case. Under the evidence, the coupling of the two different kinds of couplers, which were used in making the connection when the accident occurred, was attended with risks of injury and danger greater than ordinarily and usually accompany the performance of such an act. It was in this case, under the evidence, an obvious peril confronting the person making the coupling. By the instruction the jury were told that the deceased, in order to be free from contributory negligence, must exercise that degree of care and caution which a reasonably prudent man, in the exercise of caution commensurate with an obvious peril confronting him, would have exercised. This was stating the rule more strongly against the plaintiff than defendant company. It was not, we think, prejudicial to the defendant. In *City of Beatrice v. Ried*, 41 Nebr., 214, it is held in the second paragraph of the syllabus: "If one attempts to pass over a place of danger, the law requires him to exercise caution commensurate with the obvious peril; but this means that the law only requires of the party to exer-

cise ordinary care, the danger and his knowledge thereof considered." In the instruction now before us, when fairly considered in connection with the evidence, it is stated that the deceased, in the performance of his duties as brakeman in coupling the two cars, in the doing of which it was claimed there was contributory negligence on his part, must have done or omitted to do some act which a reasonably prudent man, in the exercise of caution commensurate with an obvious peril confronting him, under like circumstances, would have done or omitted to do. It can hardly be said the instruction was too favorable to the plaintiff. The converse, we think, is true, and its tendency was to require greater care and caution, rather than less, than would be exercised by ordinarily prudent men under like circumstances. If the peril was obvious, the deceased was required to exercise care and caution commensurate with the peril. This, however, is to be determined by the action of ordinarily prudent men confronted by such peril under similar circumstances. We do not, as already said, think the instruction prejudicial to the defendant company. Conceding the instruction on contributory negligence which was given to be technically incorrect, we think the proposition it contained was, in substance and effect, included in other instructions given, and for that reason no prejudicial error can be predicated upon it.

Several instructions were given at the request of the defendant, directing the jury that if deceased was engaged in the service of the company, and knew or might have known of the defective condition of the coupling appliances, and his death was caused thereby, the plaintiff could not recover under that issue on the evidence, as the deceased assumed the risks of his employment and could not, therefore, recover regardless of the question of contributory negligence. Having assumed the risks incident to his employment, it did not change the liability of the company as to the manner in which he discharged his duties. His assumption of the risks of employment

precludes his right of recovery for injuries growing out of the dangers incident to his duties, and the application of the rule would include all injuries thus received, whether he be guilty of contributory negligence or not. The principle announced in the instructions as to the risks assumed by the deceased, being broad enough to cover the contention as to contributory negligence, the lesser proposition becomes merged in the larger one. Additional instructions would have been in the nature of a repetition of the same principle, and not required. *Beavers v. Missouri P. R. Co.*, 47 Nebr., 762; *Barton v. McKay*, 36 Nebr., 632; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Nebr., 356; *Bushnell v. Chamberlain*, 44 Nebr., 751.

It is claimed that error was committed in the admission of certain testimony as expert testimony, which was offered and received over objections of defendant. One part of the testimony thus objected to was by a witness, who, at the time, was yardmaster, having charge of switchmen and brakemen, and who had been switchman himself, and, according to his testimony, had handled cars of all kinds. He was permitted to testify respecting the manner of the construction of the truss-rod or bolt, and to express an opinion as to its being properly or improperly constructed. It is contended that the witness had not shown himself qualified to testify regarding such matters. It is not, we assume, required that a person shall be an experienced car-builder, or one engaged in the construction of cars, or an architect whose business it is to plan the construction of cars, before, as claimed, he is qualified to testify as to what is a proper construction. One habitually handling cars of all kinds, and having an opportunity to observe the usual modes of construction thereof, would possess a knowledge regarding the subject qualifying him to speak with reference thereto, which, although perhaps not as thorough as that of an experienced car-builder, would yet be valuable in aiding the jury to rightly determine the mooted question regarding the truss-rod or bolt involved in the controversy. The witness possessed

knowledge superior to that of persons in the ordinary walks of life, which, we think, entitled him to speak upon the subject. The difference in degree of knowledge as between him and a car architect or builder would affect the weight to be given such testimony rather than determine a person's qualification to testify. It may be said, as a general rule, that the competency of a witness to testify as an expert rests very largely in the sound discretion of the trial court, whose ruling thereon will not be reversed unless clearly erroneous as a matter of law. *Fayette v. Chesterville*, 77 Me., 28, 33; *Perkins v. Stickney*, 132 Mass., 217, 218; *Stillwell Mfg. Co. v. Phelps*, 130 U. S., 520; *Allen's Appeal*, 99 Pa. St., 196, 202. Again it is urged that the testimony of this witness, and that of two others who had had years of experience as brakemen on railroad trains, which was permitted to be given over objections of defendant, as to the duties of a brakeman in inspecting coupling appliances when making couplings of cars, and also the duty of car inspectors regarding the inspection and observation of defective appliances on cars in use, was erroneously admitted. The testimony of this character objected to is made clear by the following interrogatories and answers thereto:

Q. Then Mr. Switzer, I will ask you to state to the jury what are the duties of a brakeman or switchman when going in between cars to make a coupling, in reference to examining draw-bars and coupling apparatuses?

A. Well, if a man looks at his draw-bars, and they are in good shape, he is to make the coupling.

Q. What is his duty as to looking underneath the car while the train is in motion with which to make the coupling?

A. A man ain't supposed to get under the car when the train is moving.

Q. Just state to the jury, if you know, what the duties of a car inspector were at that time?

A. When a train comes in the yards, the car repairer

is supposed to examine his train, and, if any cars are in bad shape, he is to set them out and have them fixed.

This testimony was elicited in support of a theory of the case claimed by the plaintiff, wherein he sought to prove that, at the time of the accident, the Miller hook or coupling bar had dropped down lower than its natural or ordinary position because of the loosening of a support bar underneath it, and that the accident occurred because the Miller hook, by reason of its uncommonly low position, slipped past and beneath the draw-bar on the coal car, and not laterally, as would be the case by reason of the different forms of construction of the two coupling appliances. The testimony, in this view of the case, and in support of this theory, was, we think, admissible. It was regarding a subject peculiarly within the knowledge and experience of those testifying, and not of such a character as to be within the knowledge of men of common education and experience in considering and forming an opinion upon it, under the rule laid down in *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Nebr., 356. The contention of the plaintiff was that, entirely aside from the form of the construction of the Miller hook, the pieces composing the same and supporting it had become loosened, thereby allowing it to fall below its ordinary and natural position, by reason of which, and notwithstanding an attempt being made to couple it in the special manner required, it slipped underneath the other draw-bar, thereby contributing to the injury complained of; and that the deceased, in the performance of his duties, was not expected or required to make careful examination and inspection for this character of defects. The opinion, therefore, of witnesses qualified to speak upon the subject, was admissible for the purpose of giving to the jury a clear understanding as to his duties relative to such matters; and, as a correlative of the duties imposed upon him, it became proper to show whose duty it was to make such inspection. The duties of a brakeman and other employees

of a railroad company, regarding such matters, must, in a measure, be controlled by the nature of the work to be performed, the duties of others in the general employment, and the usages, customs and rules of the company respecting such matter, which can be ascertained only from those acquainted with, and engaged in, such work. In the case at bar, as applied to the question under consideration, the jury, without the aid of testimony of the character given, were not in a position to intelligently pass upon the question as to how far it was incumbent upon the deceased to acquaint himself with the condition of the coupling appliances required to be used by him in the discharge of his duties. Such knowledge is not, we hold, within the possession of men of common experience and education generally, and is, therefore, admissible as expert or opinion testimony. In Rogers on Expert Testimony, page 19, section 6, the rule is laid down as follows: "The opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of the nature of a science, art or trade, as to require a previous habit, or experience, or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience, or common knowledge, but requires special experience, or special knowledge, then the opinions of witnesses skilled in the particular science, art or trade to which the question relates, are admissible in evidence." In *McCray v. Galveston, H. & S. A. R. Co.*, 3 Am. & Eng. R. Cas. [n. s.], 276, 281, it is held that evidence of the duties of a brakeman by one who had knowledge of such duties should be admitted.

On the trial different witnesses testified relative to the alleged improper condition of the road-bed or ballasting at the place of the accident. Some of the witnesses testified on the point mentioned as experts, and were per-

mitted to express an opinion, whether, at the place mentioned, the road-bed was in a proper or improper condition as to the manner of ballasting. An hypothetical question was put to one witness, fairly reflecting the testimony on the point mentioned, in which he was asked, "What kind of surfacing would you call that?" Objection to the question was interposed because the question was "not within the issues of the case, calling for the conclusion, and not a proper hypothetical question, immaterial, irrelevant and incompetent." Answer was permitted, notwithstanding the objection, the witness replying, "Well, I would say that was rather bad construction." The answer was not responsive, and probably would have been stricken out on motion. It signified nothing and from it an intelligent idea could not be formed as to whether the ballasting was done and maintained in the ordinary and usual manner, or whether it was improper and imperfect. The test of the admissibility of the evidence is to be determined upon the questions asked, rather than upon the answers returned. While the form of the question may be improved upon, it was not so seriously objectionable as to require its exclusion. It is said that the issue to which the question was directed was eliminated in the first opinion rendered. But, as we have seen, this applied only to the testimony on the first trial, and does not preclude new testimony upon the same subject at a subsequent trial. The question was in line with other evidence upon the same subject, regarding which there was much testimony *pro* and *con.* The general character of the evidence to prove the condition of the road-bed was, we think, admissible, and the witnesses who testified were not incompetent to speak upon the subject. In *Ft. Worth & D. C. R. Co. v. Wilson,* 24 S. W. Rep., 686, the supreme court of Texas held that, in an action against a railroad company, its roadmaster and section foreman, who had charge of the track where the derailment and injury occurred, and who had had several years of experience in railroading, were com-

petent to testify that, in their opinion, the track at such place was not properly constructed. The rule is well supported by a great many authorities, among which may be found the following: *Fitts v. Cream City R. Co.*, 59 Wis., 323; *Cross v. Lake Shore & M. C. R. Co.*, 69 Mich., 363; *Laughlin v. Street R. Co.*, 26 Am. & Eng. R. Cas., 377, 378; *Hayes v. Southern P. R. Co.*, 11 Am. & Eng. R. Cas. [n. s.], 420.

Another witness, a machinist by trade, was permitted to testify over objections, as an expert, that, in his opinion, a person could not tell by an examination of the truss-rod or bolt in the coal car whether it had been removed since the car was constructed in 1892. Evidence of this character was, we think, inadmissible. We do not, however, regard it as such prejudicial error as to call for a reversal of the case. There is a great mass of testimony as to the manner of construction of the bolt. A great many witnesses testified regarding the matter, and in view of the large volume of the testimony offered on this subject, we do not think the jury could have been perceptibly influenced by the statement referred to. It is a direct contradiction of some of the witnesses, when the witness should only have been permitted to give his view as to the construction of the bolt, and the effect, marks or changes of appearance, if any, in the event of the removal of the bolt after the construction of the car, leaving it to the jury to say, which after all they were required to do, what was the truth on the point in controversy.

Exceptions are taken to the rulings of the trial court on the questions asked in the cross-examination of certain witnesses testifying on behalf of the plaintiff. Witnesses who had been members of the coroner's jury, and who testified in the case, were asked on cross-examination as to the conclusions reached and the findings returned in the verdict of the coroner's jury. Objections to the questions were sustained and the evidence excluded. The testimony in chief related to the observations of the wit-

nesses immediately after the accident, as to the nature of the wounds on the deceased, and as to the appearances and condition of the end of the coal car and of the coach respectively where the coupling was attempted to be made. The cross-examination appears to have been for the purpose of showing a conflict between the conclusions reached on the coroner's jury and the testimony given on the trial. An objection to the exclusion of this proposed evidence may be disposed of by saying that afterwards the verdict of the coroner's jury was admitted in evidence, thus establishing what was sought to be established by the cross-examination, and rendering immaterial the ruling of the trial court thereon. The exclusion of evidence of a fact established by other competent and uncontradicted evidence is not ground of error: *Clough v. State*, 7 Nebr., 320, 333; *Delaney v. Errickson*, 11 Nebr., 533; *Barr v. City of Omaha*, 42 Nebr., 341, 346.

Another witness on behalf of the plaintiff was asked on cross-examination concerning the condition of the truss-rod or bolt, and whether or not he found it in proper condition. This was objected to as not proper cross-examination, and the objection sustained. Complaint is made of this ruling. The witness in his examination in chief, after qualifying for the purpose of testifying as an expert, was asked only to define what would be a proper construction of a truss-rod or bolt in cars of the kind to which the coal car mentioned belonged. He was asked nothing regarding any particular car, and we think the question was not one strictly proper to be asked on cross-examination. The latitude to be given in cross-examination rests largely in the discretion of the trial court, and should always be restricted to facts and circumstances brought out on direct examination. *Davis v. Neligh*, 7 Nebr., 84; *Cool v. Roche*, 15 Nebr., 26; *Mordhorst v. Nebraska Telephone Co.*, 28 Nebr., 610; *Hurlbut v. Hall*, 39 Nebr., 889. The record also discloses that this same witness was called for the defense, and testified to the same facts sought to be brought out on his cross-examination

by defendant. This fact renders entirely harmless the ruling of the trial court, conceding it to have been erroneous.

Error is claimed in the admission of testimony as to statements made by the conductor of the train that caused the accident within about one-half hour thereafter relative to the cause of the death of the deceased. The testimony was offered and admitted upon the theory that the statements were a part of the *res gestæ*. In no event can error be predicated upon the admission of this testimony, for the reason that, by an instruction of the court, it was wholly withdrawn from the jury's consideration. Error in admitting improper evidence is cured by the court's withdrawal of such evidence from the jury. *American Building & Loan Ass'n v. Mordock*, 39 Nebr., 413; *Obernalte v. Johnson*, 36 Nebr., 772; *Nelson v. Jenkins*, 42 Nebr., 133.

Complaint is made because interest is allowed on the amount of damages, as found in the verdict of the jury, from the date thereof to the date of the rendition of the judgment on the verdict. The delay was caused by reason of the presentation by the defendant company of a motion for a new trial and the consideration of the same. The allowance of interest was, we think, proper, and clearly falls within the rule announced in *Fremont, E. & M. V. R. Co. v. Root*, 49 Nebr., 914, wherein it is said: "It is claimed that the amount of the judgment should not have exceeded that of the verdict, that the court erred in allowing and including in the judgment the interest as we have before stated. The delay in the rendition of judgment was caused by the filing and pendency of the defendant's motion for a new trial, and it was but just and right that the plaintiff was in the judgment accorded interest on the verdict from its date to the time of judgment."

Finally, it is urged that the jury disregarded the instructions of the court, that the verdict is contrary to the instructions and the evidence, and is not supported by

sufficient evidence, and that the court erred in not awarding a new trial. These objections may be summed up in the one proposition of whether the evidence is sufficient to support the verdict and judgment. For this purpose we are disposed to eliminate from consideration every branch of the case, save the alleged negligent construction of the truss-rod or bolt, and the relation between it and the death of the deceased, if any exists, and the evidence bearing upon these several questions. We regard the evidence as to the kind and character of the coupling appliances, and the condition of the road-bed at the place of the accident, as insufficient to give to the plaintiff under the proof a cause of action; and as to these matters, the deceased assumed the risks of injury incident to the employment in which he was engaged.

In the first opinion in this case, it was held that the evidence as to the alleged negligent condition of the truss-rod or bolt, and whether it was the proximate cause of the deceased's death, was such as should have been presented to the jury for them to draw therefrom such inference as the evidence might warrant. Assuming the evidence on this feature of the case to be as strong and convincing as in the first trial, the adjudication in that case has already determined the question adversely to the defendant company. A careful examination of the evidence relating to the matter confirms us in our judgment as to the correctness of the views first expressed. It is, we think, sufficient to support the finding that the truss-rod or bolt was negligently constructed, and was the proximate cause of Thompson's death. The evidence proves or tends to prove that the wound on the body of Thompson conformed in shape and size with the end of the rod more nearly than with any other instrument on the end of the cars between which the accident occurred. The place of the wound found on the deceased corresponded in height to that of the rod. There was testimony tending to show that the wound was of a nature sufficient in itself to produce death. The deceased, according to

the testimony of some of the witnesses, was facing the coal car, and was seen near the outer edge of the car; he seemed to be thrown up, as testified to by one witness, as the cars came together; and was next seen with his face in the other direction, "dragging" on the coach as it receded in consequence of the concussion of the cars, whereon he supported himself for a few steps, and then fell outside of the rail, and was run over on the right arm and leg, which were cut off near the body by the oncoming coal car. The conductor of the train, a witness on behalf of the defendant, and who made the coupling soon after the accident, testified that he was ready to jump from between the cars in case he saw that the draw-bars or coupling apparatus were going to slip by. The jury, we think, were warranted in inferring from the evidence that the deceased, at the time of the accident, was likewise trying to protect himself, and was caught or struck by the truss-rod, and thereby came to his death. The space or distance between the cars is of vital importance to those whose duty calls them to occupy it when the cars are being pushed together for coupling or other purposes, and where, on the end of a car, an unnecessary projection of one and a half or two inches exists, we think under the evidence it may well have been the moving and proximate cause of Thompson's death.

Two different trials have been had, resulting in verdicts for plaintiff. New trials have been denied by the trial court, and we are not, in reviewing the last, warranted in overruling the verdict and judgment, unless it is clearly insufficient to support them. *Summers v. Simms*, 58 Nebr., 579; *City & S. R. Co. v. Waldhaur*, 11 S. E. Rep. [Ga.], 452; *Johnson v. Blanchard*, 5 R. I., 24; *Cole v. Fall Brook Coal Co.*, 87 Hun [N. Y.], 584; *Bennett v. Runyon*, 34 Ky., 422; *Louisville & N. R. Co. v. Connelly*, 7 S. W. Rep., 914. We now think, as expressed in the first opinion, that the evidence is sufficient to be submitted to the jury, and to warrant an inference of negligence on the part of the defendant company, causing the death of the deceased, for which a liability against it arises.

Perceiving no reversible error in the record, the judgment should be, and is,

AFFIRMED.

SULLIVAN, J., concurring.

I think every question essential to the decision of this case has been correctly decided, and that the judgment should be affirmed; but I do not agree to all that is said in the opinion.

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

FILED SEPTEMBER 19, 1900. No. 11,265.

1. **Trade Fixtures:** IMPROVEMENTS BY LESSEE: INSTRUCTION OF COURT. The lessees and operators of a planing mill placed machinery, consisting of a boiler and engine, therein, and at the expiration of the lease the owner of the premises claimed such property as trade fixtures; and the evidence showed, or tended to show, that the machinery was placed in an addition erected in an alley abutting the premises on which the planing mill was located. *Held*, That in a controversy over the ownership of such property it was not error for the trial court to instruct the jury that all the testimony regarding the location of the boiler and engine in the alley was to be disregarded by them, "except so far as it has a bearing, if any at all, upon the question of whether said boiler and engine were trade fixtures."

2. **Instruction:** AMBIGUITY: TENDER BY COUNSEL. Where an instruction to the jury is not satisfactory to a party to the case, because of alleged uncertainty or vagueness, it is the duty of counsel to tender an instruction free from the uncertainty or vagueness alleged to exist in the one given.

3. **Trade Fixtures:** LANDLORD'S TITLE. A tenant is not permitted to dispute his landlord's title, and as between the landlord and tenant, or one claiming through the tenant, the fact that an addition to leased premises, or fixtures thereto, are located in an alley abutting on or adjoining to such premises will not of itself affect the landlord's title thereto; and in a dispute over property so located, claimed as a trade fixture, testimony as to the location of such property can have no other bearing than in determining whether such property is in fact a trade fixture.

4. **Instruction.** Instruction given *held* not to conflict with former opinion of this court in this case.

5. ———: DEFECT IN RECORD. On the record presented, instruction could be upheld because material evidence is wanting in the record, the absence of which may be presumed to have warranted the instruction given.

6. **Trade Fixture:** QUESTION OF FACT. Whether certain property involved in a controversy is a trade fixture, is to be determined from all the facts and circumstances shown by the evidence.

7. **Definition of Trade Fixture.** Ordinarily, the requisites of a trade fixture are: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use of that part of the realty with which it is connected; (3) the intention of the one making the annexation to make the articles a permanent accession to the freehold,—this intention being gathered from the nature of the article affixed, the relation and situation of the party making the same, the structure and mode of annexation, and the purpose or use for which it has been made. *Oliver v. Lansing*, 59 Nebr., 219, and *Freeman v. Lynch*, 8 Nebr., 192, followed.

8. **Trade Fixture:** INTENTION OF PARTIES. Whether it was the intention of the parties to make an article in dispute a trade fixture, is to be ascertained as announced in the foregoing rule, and is a question for the jury under proper instructions from the court.

9. **Uncontradicted Testimony:** CONCLUSION FOR THE JURY. When, in a controversy over the right to property, the evidence is uncontradicted, and reasonable men might draw different conclusions therefrom, it is the province of the jury to say what is the proper inference to be drawn from such evidence.

10. **Verdict of Jury:** REVIEW. Where a case has been tried different times, resulting in a verdict in favor of one and then the other of the parties to the litigation, the verdict of the jury in the last trial should not be disturbed unless there is a clear lack of sufficient evidence to support it.

11. **Evidence:** VERDICT. Evidence examined, and found to support the verdict of the jury.

ERROR to the district court for Douglas county. Tried below before KEYSOR, J. *Affirmed.*

A. H. Murdock and *Isaac E. Congdon*, for plaintiff in error.

B. N. Robertson, contra.

HOLCOMB, J.

Two assignments of error are argued by counsel for plaintiff in error and presented to us for consideration. The first is that the court erred in one of its instructions to the jury, and the second, the verdict and judgment are not sustained by the evidence. The controversy involves the right to a portable engine and boiler claimed by the plaintiff in the court below, who is also plaintiff in error, by virtue of a chattel mortgage thereon executed by a partnership in the firm name of Silver & Smith. The defendant Fuller claims title to the property under what in law is denominated a "trade fixture."

It appears from the evidence that Fuller was the owner of certain premises in South Omaha, occupied, equipped and used as a planing mill. Silver & Smith were in possession of the premises under a lease from the owner, and while thus in possession, during the term of their lease, erected an addition to the mill building in the alley abutting on the premises, placing therein, in proper position, and in a stable and substantial manner, the engine and boiler in controversy, for the purpose of furnishing the power to run the planing mill machinery, the engine and boiler on the premises having become worthless for such purpose. The evidence shows in detail, and with much *minutia*, the manner in which the disputed property was set on foundations prepared therefor; how attached to the soil; how braced and made stable and steady, so as to serve the purpose for which it was constructed, and the alterations made in the buildings in erecting the addition and in placing the machinery in position; and how connected with the machinery for power purposes. We will not undertake herein to give a resume of the testimony with reference to the matters alluded to, deeming it not required in properly disposing of the objections presented for consideration. The leased premises, with the property in controversy as placed thereon, were sur-

rendered to the owner, the exact time being in dispute and covering a period from July 5 to the 17th of the same month. On the 8th day of July the mortgage, under which the plaintiff claims, was executed, and on the 11th was filed in the office of the county clerk.

Among other instructions to the jury, the following was given, which is excepted to: "There has been some testimony relative to the location of the boiler and engine in the alley. You are instructed that a tenant cannot deny the landlord's title to premises which he obtains by virtue of his lease. The shed or annex which Silver and Smith built and attached to the defendant Fuller's planing mill became a part of said mill, and the ground on which it stood became a part of the defendant Fuller's premises so far as Silver and Smith and their mortgagee, the plaintiff, are concerned. You are therefore instructed to disregard all of the testimony about the boiler and engine being in the alley, except so far as it has a bearing, if any at all, upon the question of whether said boiler and engine were trade fixtures or not." We find no valid objection to this instruction. Counsel, if we understand them rightly, contend that the idea of the court is not clear from the language used, and that it implies that it had no bearing at all. If the instruction was not entirely satisfactory, counsel should have tendered one free from the uncertainty existing in the one given. *Home Fire Ins. Co. v. Decker*, 55 Nebr., 346; *Chicago, B. & Q. R. Co. v. Oyster*, 58 Nebr., 1. But we do not think the instruction merits the criticism urged against it. It was proper for the court to direct the jury as to the purpose and object of the evidence as to the location of the machinery in dispute. Without an instruction of the kind given, the jury would probably have entered into a consideration of the case with a view of its disposition upon the question as to whether the property was on defendant's lot, and, if not, then he could have no valid claim to it. Such a view of the matter would not be in conformity with law. The rights of the parties in the property in dispute did not

depend on the question as to whether it was in the alley adjoining the leased premises, but whether it was in fact a trade fixture. The court, by its instruction, limited the jury's consideration of the evidence on this point to the only purpose for which it was applicable. The testimony as to the location of the property could have no other material bearing than in determining whether defendant's contention that it was a trade fixture, and passed to him on the surrender of the premises, was correct. Conceding the addition in which the machinery was located to be erected in the alley, this fact alone would not conclusively defeat the defendant's right to the property. It would not disprove that the machinery was a trade fixture. Its location in the alley was important and material in so far only as it might assist in determining whether it was a trade fixture, and the evidence in relation thereto could serve no other purpose in the trial of the case. The addition in which the machinery was placed was a part of the leased premises. The tenants were not in a position to dispute the title of their landlord thereto. As between him and them, their possession was his also. The location of the addition, and the machinery therein, in the alley adjoining the leased premises, did not thereby preclude the machinery from becoming a part of the leased premises, other requisites of a fixture being established by the evidence. As between the parties for all other purposes, its location in the alley made no difference; it belonged to, and formed a part of, the leased premises. *Bliss v. Whitney*, 9 Allen [Mass.], 114; *Arnold v. Crowder*, 81 Ill., 56; *Redlon v. Barker*, 4 Kan., 445; *Haider v. St. Paul Fire & Marine Ins. Co.*, 70 N. W. Rep. [Minn.], 805; *McGorrish v. Dwyer*, 78 Ia., 279. We do not regard the instruction given as being in conflict with the views of this court expressed in a former opinion in this same case. It was there said, "Whether the machinery was placed in Fuller's building, or in a public alley joining his premises, was a question of fact for the jury to determine from the evidence." 48 Nebr., 145, 151.

The language quoted was not directed to any point decided in that opinion. It may be regarded as *obiter dictum.* But if it were relative to a question therein decided, it does not conflict with the instruction given. In a controversy as to the place of location of the addition containing the machinery, it is doubtless a question of fact to be determined by the jury, and yet this would not conflict with the rule laid down in the instruction limiting the purpose of such evidence to the one question of determining whether the machinery was a trade fixture. The instruction, upon the whole, is not open to the objections urged, and was as favorable to the plaintiff as he was entitled to under the evidence. We are justified on the record presented to us in sustaining the instruction, because there is presented no evidence of any alley adjoining the leased premises. While mention is made of the introduction of a plat of the city where the real estate is situated, none is incorporated in, or attached to, or made a part of the bill of exceptions. We prefer, however, to consider the subject on the assumption that all the evidence which purports to be in the record is there.

As to the second contention, that the evidence is insufficient to support the verdict and judgment, it is urged that, on account of the character of the property in controversy, the purposes for which it was used, the manner of placing the boiler and engine in position and the intention of the parties, it is made manifest that the property is not a trade fixture, and did not attach as such to the property in which situated. We think there is some merit in this contention, and yet we do not, from the entire record, regard ourselves as being justified in saying that a finding that the property is a trade fixture may not be deducible from the evidence. As a basic point from which to consider the question, it is to be regarded as one of fact,—a proper conclusion regarding which is to be arrived at from an examination of all the facts and circumstances shown by the evidence. In *Oliver v. Lansing*, 59 Nebr., 219, it is said by NORVAL, J., writing the opinion

of the court: "It is easy to define a fixture, but often difficult to determine what particular article may fall within the definition." As to what a fixture is, the rule laid down in *Freeman v. Lynch*, 8 Nebr., 192, was reiterated and adhered to in the *Lansing Case*. It is held in the third paragraph of the syllabus in *Oliver v. Lansing:* "Ordinarily, the requisites of a fixture are: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use of that part of the realty with which it is connected; (3) the intention of the one making the annexation to make the article a permanent accession to the freehold,—this intention being gathered from the nature of the articles affixed, the relation and situation of the person making the same, the structure and mode of annexation, and the purpose or use for which it has been made. *Freeman v. Lynch*, 8 Nebr., 192, followed." Supporting the rule adopted by this court are: *Teaff v. Hewitt*, 1 Ohio St., 511, 529; *Helms v. Gilroy*, 26 Pac. Rep. [Ore.], 851; *Binkley v. Forkner*, 117 Ind., 176; *Dudley v. Hurst*, 67 Md., 44; *Henkle v. Dillon*, 15 Ore., 610. As disclosed by the evidence in the case at bar, there are many of the elements requisite to a trade fixture as defined in the cases above cited. The intention of the parties to be gathered, as indicated in the rule above quoted, is a matter to be submitted to a jury under proper instructions, which we hold were given in the present case. The evidence tends to prove that the addition or annex in which the boiler and engine were placed was constructed in such a manner as to become a portion of the main structure, and in the same manner as additions to structures are ordinarily erected. The roof appears to have been a continuation of the roof then on the building. The addition was joined to the main structure in the ordinary way, the partition between it and the main building being removed, thus forming but one room, and the partition material used in constructing the addition. The boiler and engine were placed in this addition in a solid and substantial manner; the foundations being strong and

solid and imbedded in the earth; the excavations being walled up with stone and brick, forming a solid piece of masonry. The material used in the construction of the machinery and braces for support and steadiness were abutting on, and nailed to, the main building. The different pieces were connected together with iron rods, and the boiler had attached to it a smoke-stack some twenty-four feet in length, extending through the roof of the addition, or annex. The machinery was attached to the soil and also to the building in which situated. Its permanency of character and attachment to the freehold could scarcely be more thorough or complete. It may be, and as we think, truly, said that the manner of its construction was necessary in order to accomplish the uses and purposes for which it was constructed, and therein lies the difficulty in arriving at a correct conclusion. It is for this same reason that there is ground for regarding the property in a twofold light, both as a fixture and a movable chattel. There was evidence before the jury that the mill ceased to be operated, and the premises surrendered to the owner, July 5; that in such transaction there was no exception or reservation as to the property in controversy,—a circumstance which, if found true by the jury, might properly be regarded as evidence tending to show the intention of the parties relative to such property. There is no substantial variance or contradiction in the testimony as to the manner of the erection of the addition to the leased premises, and the construction of the machinery in controversy placed therein. It had all the requisites of a stable and permanent attachment to the leasehold premises; and there is merit in the statement of counsel for mortgagees, wherein he says: "In no less permanent manner could the boiler and engine have been anywhere placed, in order to make use of them." The proper inference to be drawn from the testimony is one regarding which different persons may honestly disagree. The case seems to fall within the principle announced in *Habig v. Layne*, 38 Nebr., 743, wherein it is

held that where the evidence is uncontradicted, and reasonable men might draw different conclusions therefrom, it is for the jury, and not the court, to say what inference is warranted by the evidence.

Another reason why the verdict should stand, unless clearly wrong, is that heretofore a verdict for the plaintiff, by direction of the court, and judgment thereon, on error to this court, has been reversed, and the case remanded for new trial. *Fuller v. Brownell*, 48 Nebr., 145. The cause was then reversed because of the exclusion of testimony offered to prove the property in controversy had become trade fixtures. The case was again tried in the district court, resulting in a verdict and judgment for the defendant, which, upon appeal to this court, was again reversed and remanded because of the form of the findings in the verdict. *Brownell v. Fuller*, 57 Nebr., 368. A third trial has been had in the district court and, upon the issues joined, a verdict has again been returned by the jury for the defendant Fuller. After the three trials, the first verdict being in favor of one party, the two succeeding in favor of the other, following the rule in *Summers v. Simms*, 58 Nebr., 579, the verdict should not be disturbed, unless there is clearly a lack of sufficient evidence to support it.

We hold that the jury were warranted, under the evidence, in reaching the conclusion evidenced by their verdict, and the judgment is, therefore,

AFFIRMED.

STATE OF NEBRASKA, EX REL. SETH THOMAS CLOCK COMPANY, V. BOARD OF COUNTY COMMISSIONERS OF CASS COUNTY.

FILED SEPTEMBER 19, 1900. No. 11,199.

1. **Reason for Conduct:** ESTOPPEL BY DECLARATION. Where a party gives a reason for his decision and conduct touching a matter involved in controversy, he is estopped, after litigation has be-

gun, from changing his ground and putting his conduct upon another and different consideration. *Ballou v. Sherwood*, 32 Nebr., 666, followed.

2. **Reason for Rule.** The right to invoke the above rule rests upon proof of the conduct of the parties before litigation is begun, and is not rendered unavailable because other issues are raised by the pleadings.

3. **Statute:** MANDAMUS: PLEADING. Under section 652 of the Code, regulating mandamus, the plaintiff may on the trial avail himself of any valid objection to new matter contained in the answer as to its sufficiency, or by proof in denial or by way of avoidance.

4. **Contract:** TERMS: EVIDENCE ALIUNDE. A contract will generally be construed solely by reference to its own language and terms; but where the language is uncertain or ambiguous, other evidence may be considered, not for the purpose of contradiction, but to explain the uncertainty or ambiguity.

5. ——: ——: ——: CONSTRUCTION: CONDUCT OF PARTIES. Where both parties to a contract, regarding which there may be doubt or uncertainty as to a proper construction, by their actions under and with reference to it, and with knowledge of its terms, have given to such contract one and the same construction, it is generally a safe rule to adopt such construction.

6. ——: INDIVIDUAL SIGNATURE: AGENT: PRINCIPAL. A contract, even though signed by the agent individually, will be held to be the contract of the prinicpal, if it appear by its terms that it was intended and executed as the contract of the principal.

7. **Res Adjudicata:** QUESTION EXPRESSLY DECIDED: QUESTIONS NECESSARILY INVOLVED. A question once decided by this court in the trial of a case will be held to be the law of the case during its future course of procedure, and will not be overturned unless manifestly incorrect. This rule applies, not only to points expressly decided, but to all questions presented in the record and necessarily involved in the decision rendered.

8. **Questions of Law:** QUESTIONS OF FACT. The above rule applies to questions of law and not of fact, where the conclusion reached is based upon testimony materially different.

9. **Claim Against County:** DESIGNATION OF COUNTY: IRREGULARITY. A claim in favor of a party for property sold to a county under a contract with the county, wherein it is recited that the property was sold to the county commissioners of such county as per agreement, *held* to be a claim against the county, and the failure to designate the county by name as debtor was only an irregularity which did not affect the validity of the claim.

10. **Delivery is Filing.** A claim is filed when delivered to the county clerk to be acted upon by the county board, even though the clerk fail to indorse upon such claim the fact and time of the filing thereof.

11. **Power of Board:** STATUTE. The power and jurisdiction of the county board to act upon claims is derived from section 23, article 1, chapter 18, Compiled Statutes, 1899, and not from section 37 of said chapter.

12. **Statute:** JURISDICTION. Section 37 regulates the grant of power and mode of procedure in the allowance of claims against the county, and the failure to observe its provisions does not deprive the commissioners of a county of jurisdiction to act upon claims against the county.

13. **Evidence:** FINDING. Evidence examined, and found not to support a finding by the trial court that one C. M. Wickersham was doing business as, and under the assumed name of, S. L. Wickersham.

14. **Res Adjudicata.** Former holding of this court as to the agency of S. L. Wickersham adhered to.

ERROR to the district court for Cass county. Tried below before RAMSEY, J. *Reversed. Rehearing granted. Opinion modified.*

Alfred W. Agee, Byron Clark and *C. A. Rawls,* for plaintiff in error.

Matthew Gering and *Samuel M. Chapman, contra.*

HOLCOMB, J.

Mandamus proceedings were instituted in the district court for the purpose of requiring respondents, as county commissioners, to enter an order on the county clerk to draw a warrant in favor of relator, and to require the clerk to draw such warrant for the purpose of payment of a claim in favor of relator, theretofore allowed by said commissioners. Respondents declined to comply with the request of the relator because, as claimed by them, a warrant had already been drawn and delivered to relator's agent and paid, thereby constituting full payment for the

claim so allowed. The case was tried and brought to this court for review. The opinion is reported in 53 Nebr., 767. It was there held that no payment had been made, as claimed, and that relator's right to the warrant for the amount of his claim as allowed by the county commissioners, together with legal interest, was conclusively established. The judgment of the lower court was reversed and the case remanded. Upon a retrial of the case an amended answer was filed by the respondents, entirely changing the issues from those raised on the first trial. From a careful examination of the record, and briefs of counsel, we are of the opinion that on the first trial the only defense existing that could be interposed with reasonable hope of success was presented. The defense thus interposed, viz., payment, being finally determined adversely to the respondents, a new trial was had, and the case is, after several years of delay and the attendant concomitants of litigation,—accumulated costs and interests,—again presented for consideration.

Notwithstanding the change in issues as raised by the amended answer, it is insisted by the relator that, respondents having based their refusal to allow the warrant upon the ground of prior payment, they are now estopped from changing their ground and resisting, as is sought to be done, upon the plea that no contract existed or had been entered into between relator and respondents, and that no claim was ever allowed in relator's favor, and that nothing is or has been due from respondents to relator as claimed. We think there is much merit in this contention. A contract was in fact entered into, although it is now claimed with a different party than relator. The clock was furnished in accordance with the terms of the contract, and a claim for the amount due under that contract presented in favor of relator and against the county, and by the commissioners passed upon, approved and allowed. A warrant was drawn and, as determined in the prior case, delivered to a party wholly unauthorized to receive it, which in law constitutes no payment; and a

refusal to draw and deliver to relator a warrant in pursuance of the allowance of the claim was solely on the ground of the alleged prior payment. These matters were all contested and finally adjudicated adversely to the respondents. It would be a remarkably strange commentary on the procedure in the administration of justice if, when these matters had been finally adjudicated adversely to the respondents, they should be permitted to change their hold entirely and plead that there was in fact no contract and no claim presented or allowed, and that nothing whatever was due to the relator on account of such transaction. It is hard to conceive where litigation would end, if parties were permitted to try their action upon one ground at one time, and upon an entirely different and inconsistent ground when the first question had been determined adversely. It seems to us that the reason for the rule invoked by the relator could hardly be more apparent than in the present case. It has been announced in this jurisdiction, as well as in many others, that "where a party gives a reason for his decision and conduct touching a matter involved in controversy, he is estopped after litigation has begun from changing his ground and putting his conduct upon another and different consideration." The foregoing may now be regarded as a settled rule of law of this court. *Ballou v. Sherwood*, 32 Nebr., 666; *Frenzer v. Dufrene*, 58 Nebr., 432; *Railway Company v. McCarthy*, 96 U. S. 258.

It is urged by the respondents that after a general reversal upon an appeal to a court of last resort and the remanding of the case for new trial, the issues may be reformed. In a proper case, this is conceded. But even if counsel's contention in this respect be true, it does not follow that the rule of law before referred to does not apply in full force. It is contended that, no objection having been interposed, the right to invoke the rule claimed is thereby waived. We do not so regard it. The relator properly pleaded facts showing it entitled to the relief sought and the ground upon which the respondents re-

fused to act. The answer denies these statements and pleads other facts which defendants seek to interpose as a defense to relator's claim. The right to invoke the rule arises by reason of the conduct of parties as established by the evidence before litigation has begun, and is not rendered unavailable because of other issues raised by the pleadings. The ground upon which respondents refused to act, when proved or admitted, operates as an estoppel against the interposition of the other defenses pleaded in the answer. The very essence of the rule and object sought is to prevent a change of ground of conduct relative to matters in controversy assumed before litigation, after the adverse party has been driven to the courts to establish his rights to the relief claimed. The reason for the rule is made quite obvious by the course of the present litigation. Again, by section 652 of the Code, governing the subject of mandamus, it is especially provided that "if an answer be made containing new matter, the same shall not in any respect conclude the plaintiff, who may, on the trial or other proceeding, avail himself of any valid objection to its sufficiency, or may countervail it by proof, either in direct denial or by way of avoidance." For these reasons we think the rule entirely applicable to the case at bar.

But to proceed directly to the contention of the respondents, that no contract was in fact consummated between relator and respondents, we must also resolve that proposition in favor of relator. The contract was entered into between S. L. Wickersham, representing the Seth Thomas Clock Company, party of the first part, and the county of Cass, represented by the county commissioners, party of the second part. It provided for furnishing and properly constructing a tower clock in the county court house, for which the county agreed to pay $981. It was signed in the name of S. L. Wickersham without designation as agent or otherwise than as in an individual capacity, and by two of the county commissioners, representing the party of the second part. Under the terms of the agree-

ment the clock was furnished by the relator and a claim presented for the sum agreed to be paid "as per agreement." With reference to the claim of respondents that the contract was that of Wickersham and not that of the relator, it is proper to say, first, a contract must generally be construed by reference to its own terms and conditions; but in cases of ambiguity or uncertainty, other evidence is admissible, not by way of contradiction, but in explanation of the uncertain and ambiguous terms; second, in cases of doubt and uncertainty, the court will look to the subsequent acts of the parties under the contract; and third, where both parties to a contract, with knowledge of its terms, by their action under it, have given it the same construction, it is generally a safe rule to adopt such construction. *School District v. Estes*, 13 Nebr., 52; *Hale v. Sheehan*, 52 Nebr., 184, and cases therein cited. The tendency of all evidence throughout the entire proceedings, until the former opinion of this court was filed, is to establish the contract as being one between the relator and respondents. The parties, during all this time, have so treated it, and it may now, we think, with reasonable assurance of correctness, be regarded as the contract of the parties to the suit. Upon the point of the agent's part in the execution of the contract and his signature thereto rather than that of the principal, we think, from an inspection of the contract, it may be said to be the contract of the clock company. The agent represents himself as representing the clock company. The clock is to be furnished by the company. There is nothing save the signatures from which the inference may arise that the agent is acting not for the company but on his own behalf. It is held by this court that it is sufficient if, from the terms of the instrument itself, or any other matter therein, it appears that the party intended it as the agreement of the principal, and if his name appeared therein, however informally, it may be signed by the agent. *Wheeler v. Walden*, 17 Nebr., 122; *McWilliams v. Lawless*, 15 Nebr., 131; *Baker v. Chambles*, 4 Greene [Ia.], 428. We

are of the opinion, from the contract itself, as well as the construction placed thereon by the parties to it, that the contract was one between the relator and respondents acting as commissioners of said county.

Another view of the subject worthy of notice is that upon the first trial of this case the same contract was under consideration as the basis of relator's right to the relief therein sought, and that the construction therein given, where it is held to be a contract between relator and respondents, has become the law of the case, and will not be overturned unless manifestly incorrect. *Lane v. Starkey*, 20 Nebr., 586; *Shamp v. Meyer*, 20 Nebr., 223; *Meyer v. Shamp*, 51 Nebr., 424; *City of Hastings v. Foxworthy*, 45 Nebr., 676; *Todd v. Houghton*, 59 Nebr., 538. If it be said that, in the first opinion, the point as to who the contracting parties were was not directly decided, then it may be said to fall within the following rule, which will be found in *Hayden v. Frederickson*, 59 Nebr., 141: "Where a cause is brought a second time into this court, the first decision will be deemed the law of the case, not merely as to the points expressly decided, but to all questions presented by the record, and necessarily involved in the decision, and ordinarily will not be re-examined." That a contract existed between the parties in this action was obviously and necessarily involved and determined in the opinion first rendered. See, also, *Home Fire Ins. Co. v. Johansen*, 59 Nebr., 349.

It is urged that, because an issue as to the existence of the contract is raised in the second trial for the first time, the rule does not apply, and we are cited to the language of Judge REESE in *Lane v. Starkey, supra,* in support of counsel's view on that point. We do not think this case comes within the exception referred to. The construction of the contract under consideration is a question of law rather than of fact, and while evidence may be admitted to explain its terms when uncertain or ambiguous, or to show the conduct of parties with reference to a practical construction of it, this does not change the character of

the proposition to be decided, nor does it render it a question of fact to be determined according to the evidence in each particular case or in different stages of the trial of the same case. It having been determined in the first trial that the contract was one between the relator and respondents, this decision should be adhered to as a final adjudication of the matter, unless it appears clearly wrong. *City of Hastings v. Foxworthy, supra.*

It is next urged that the relator is not entitled to the relief prayed for, because, first, no claim against the county has ever been presented; second, no claim was ever filed; and third, the claim presented was not verified as required by section 37, article 1, chapter 18, Compiled Statutes, 1899. These objections will be considered together. While the claim presented recites the names of the commissioners, and describes them as commissioners of Cass county, it shows upon its face that it is a claim in favor of relator for putting up complete a tower clock with attachments in the court house as per agreement. It is apparent from an examination of the bill, and especially in connection with the contract referred to, that it is a claim against the county and describes the commissioners in their official capacity and as the representatives of the county. At most, it was only an irregularity which might have been taken advantage of in connection with its approval, which in no way affects the jurisdiction of the commissioners or their authority to act; their action therein without objection would be treated as a waiver of the irregularity. The contract was with the county, by which, according to its terms, a certain sum was to be paid by the county for the clock when completed, and a claim was presented for this amount in pursuance of such agreement. The claim was delivered to the clerk to be acted upon by the board, and was by them approved and allowed. The failure of the clerk to indorse upon the claim the fact and time of filing in no way militates against its validity. The fact that it was filed, that is, deposited with the clerk to be preserved in

his office, and acted upon by the board of county commissioners, is abundantly proven by the evidence; and the further fact that it was received by the board and acted upon is confirmatory of its filing, and is sufficient to show its due presentation and allowance against the county. The want of any verification of the claim, showing it to be just and true, is worthy of more serious consideration. It is contended that the action of the board upon an unverified claim of this character is null and void, the board being entirely without jurisdiction. We are disposed to the view that this proposition has also been adjudicated in the former trial adversely to the respondents, and the rule already referred to is applicable here. If, as claimed, action of the commissioners is void for want of jurisdiction, that fact could be raised in any stage of the proceedings, and having been raised, it was there determined that, at most, it was an irregularity, not jurisdictional in its nature, which had been waived by the parties because not seasonably presented. *State v. Board of Commissioners of Cass County*, 53 Nebr., 767. But, conceding the matter is not *res adjudicata*, we think the determination of the question must result adversely to the respondents. By section 22 of the chapter referred to, counties have authority and power "to make all contracts and to do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate powers." Section 23 provides that the county board shall have power "to examine and settle all accounts against the county, and all accounts concerning the receipts and expenditures of the county." By section 37, the one relied upon in support of respondent's contention, it is provided that all claims against the county shall be verified and filed with the county clerk, and also how appeals may be taken by the party aggrieved; and section 38 provides for an appeal by a taxpayer from the allowance of any claim. In *Perkins County v. Keith County*, 58 Nebr., 323, 326, it is said, with reference to sections 23 and 37, by Judge SULLIVAN, writing the opinion of the court: "From

the language just quoted it is entirely clear that section 37 is not a grant of power to the county board, but rather a provision regulating the exercise of the power granted in section 23." The authority or jurisdiction of the commissioners to act upon claims against the county is derived from section 23, and not from section 37. The omission to verify would not deprive the board of commissioners of jurisdiction or authority to act. *Myers v. McGavock*, 39 Nebr., 843; *Trumble v. Williams*, 18 Nebr., 144; *County of Clinton v. Pace*, 59 Ill. App., 576. The same question herein presented was before the court in *State v. Cather*, 22 Nebr., 792, where the answer alleged that the account upon which the writ of mandamus was asked had never been verified. It is there said, p. 796: "There is a denial of the authority of the county board, in 1884, to make the allowance, and it is claimed that there is no verified account filed with the board. But the account evidently had been pending before such board for a number of years and had been acted upon by it. There is no claim of fraud or undue means in procuring the allowance of the account, and the allegations are too vague and indefinite to constitute a defense."

It is pleaded in the answer last filed that the contract was entered into between the county and one C. M. Wickersham, doing business in the name of S. L. Wickersham, and that payment was made to the said C. M. Wickersham, as S. L. Wickersham, as the party rightfully entitled thereto under said contract. Much testimony is submitted to prove that C. M. and S. L. Wickersham are one and the same person. Since respondents have abandoned the plea of payment to relators, and deny the existence of a contract, or that any dealings have been had with the company, by which any indebtedness has accrued to it, we think the question of the identity of S. L. Wickersham is immaterial. This question becomes material in this transaction only for the purpose of determining whether payment was made to a person authorized to receive it on behalf of the relator. In the former

opinion it is held that payment to C. M. Wickersham was without authority, and did not relieve the county from liability of payment to the clock company, or to those authorized to receive payment on its behalf. But conceding this question to still be material, we find nothing in the evidence to justify a change of the view first expressed, to the effect that the payment claimed to have been made was to one unauthorized to receive it, and that C. M. and S. L. Wickersham are different persons. The views then expressed are controlling of the proposition now, and should be adhered to, notwithstanding the additional testimony submitted on the proposition.

The judgment of the lower court is reversed, and the cause remanded with directions to award a peremptory writ of mandamus, as prayed for by relator.

JUDGMENT ACCORDINGLY.

The foregoing opinion was modified as follows:

NOVEMBER 21, 1900.

The opinion and judgment filed and entered in this case September 19, 1900, modified to the extent that the cause is remanded with directions to award a peremptory writ of mandamus, as prayed for by relator, for the issuance of a warrant on the treasurer of Cass county for the amount of the claim theretofore presented and allowed by the board of county commissioners of said county.

ANDERS O. PETERSON V. HAMILTON MARTIN.

FILED OCTOBER 3, 1900. No. 9,268.

1. Error: PARTIES: PRIVIES: PETITION IN ERROR. Only parties to a judgment, or their privies, can successfully prosecute a petition in error.

2. **Finding:** CONFLICTING EVIDENCE. A finding based on evidence fairly conflicting will not be disturbed on review.

3. **Reversal:** WITNESS: IMPROPER QUESTION: PERMISSION TO ANSWER: ERROR. A reversal can not be based upon the permitting of a witness to answer an improper question where the answer was not unfavorable to the complaining party.

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

Jefferis & Crawford and *W. B. Comstock*, for plaintiff in error.

J. L. Kaley, contra.

NORVAL, C. J.

Hamilton Martin sued Andrew O. Peterson to recover commissions for the sale of certain real estate situate in the city of Omaha alleged to have been earned under a specific contract of employment. The answer denies the making of the contract set forth in the petition, and avers that plaintiff was the agent of one Cameron, the purchaser of the property, and employed by him to effect the purchase and sale, and defendant contended that said Cameron alone was to pay plaintiff his commissions in the transactions. The reply consisted of a general denial of the averments of the answer. Plaintiff recovered a verdict and judgment, and to obtain a reversal thereof, Anders O. Peterson has prosecuted error proceeding. The petition in error very properly might be dismissed, because by it there is sought to be reviewed no judgment or final order rendered against Anders O. Peterson, the plaintiff in error, but judgment obtained against Andrew O. Peterson only is by this proceeding asked to be reversed. It is firmly settled that only parties to a judgment, or their privies, can prosecute error proceeding. *Burlington & M. R. R. Co. v. Martin*, 47 Nebr., 56. Inasmuch as a decision adverse to plaintiff in error

can not be avoided when the case is considered on its merits, we shall adopt that method in disposing of the cause.

It is first urged that the verdict is without evidence to support it, because the existence of a specific contract of employment and for payment of commission was not established upon the trial. In the brief of plaintiff in error is set out portions of the testimony of plaintiff below, which testimony alone may be insufficient to support the finding of the jury, but, when taken in connection with the evidence adduced on the trial and contained in the bill of exceptions, was sufficient to make out the case of plaintiff in the lower court. Not only are the proofs sufficient to establish that Martin sold Peterson the property, but that the authority was by express contract conferred upon the latter to make the sale for a stipulated commission, and that Peterson, after the sale was effected, agreed to pay the commissions which had been earned. It is a fact that the defendant introduced ample evidence to sustain his defense that there was no express contract of employment; but that is no reason for disturbing the verdict. That a finding based upon conflicting evidence will not be disturbed on review, is a familiar rule, often invoked by litigants and applied by this and other courts.

Two assignments of error relating to the rulings of the district court on the admission of testimony, having been waived in the briefs of plaintiff in error, will not be noticed.

Edward T. Peterson was called and examined as a witness by the defendant. On cross-examination he was asked, "Were you present at his place of business during the month of December, 1894, near the corner of 14th and Nicholas streets in this city, and in conversation with him there, in the presence of Mr. Monroe, say these words, or, in substance, that 'We don't deny owing Mr. Martin'—meaning the plaintiff in this case—'a commission for the making of the sale of the house and lot,' in controversy in this case?" It is argued that there was reversible

error in permitting this question to be answered over the objections of the defendant, since the witness was not a party to the suit, and no statement or admission made by him could bind the defendant in any way. A short answer to this is that the answer of the witness to the question was favorable to the party calling him.

No reversible error appearing of record, the judgment is

AFFIRMED.

MARIA HELLMAN V. DAVID ADLER & SONS CLOTHING COMPANY.

FILED OCTOBER 3, 1900. No. 11,166.

1. **Newly-Discovered Evidence:** NEW TRIAL: APPLICATION: LIMITATION. A party desiring to obtain a new trial on the ground of newly-discovered evidence must make his aplication to the district court within one year from the date of the judgment in that court.

2. ——: ——: ——: ——: CAUSE PENDING IN THE SUPREME COURT. The district court has authority, for one year after rendering final judgment in a case, to entertain an application for a new trial on the ground of newly-discovered evidence, and grant the relief demanded, although the cause may be pending for review in the supreme court.

ERROR to the district court for Douglas county. Tried below before DICKINSON, J. *Affirmed.*

Connell & Ives, for plaintiff in error.

Montgomery & Hall, contra.

SULLIVAN, J.

This proceeding in error has for its object the reversal of a judgment denying Maria Hellman's application for a new trial based upon an alleged discovery of material evidence after the adjournment of the term at which the case of *David Adler & Sons Clothing Co. v. Maria Hellman* was decided. The final decree in the case mentioned was

rendered in February, 1895. It was adverse to the defendant, and she appealed to this court, where the decision of the district court was affirmed June 9, 1898. It appears from the record that the petition for a new trial was dismissed because it was not filed within the time limited by section 318 of the Code of Civil Procedure. It was filed October 27, 1898; more than three years after the final judgment was rendered in the district court, but within one year after the judgment of affirmance was pronounced. Counsel for the plaintiff in error contend that their application was seasonably made, because the final judgment contemplated by the limitation law is the ultimate decision rendered in the case, whether such decision be given by the trial court or by this court. We think counsel are wrong.

The policy of the legislature with respect to the re-examination of the issues of fact once tried and determined is clearly indicated in article 6 of the Civil Code. A party claiming a new trial must show diligence; he must move promptly. Any needless delay, any inertness, on his part, which hinders the court in bringing the litigation to a speedy conclusion results in a forfeiture of the statutory right. Section 316 is as follows: "The application for a new trial must be made at the term the verdict, report or decision is rendered, and, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." Section 318 provides: "Where the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases; * * * but no such petition shall be filed more than one year after the final judgment was rendered." It is quite clear from the sections quoted that, if the new evidence

is discovered during the term at which the cause was decided, although after the decision was rendered, the application for a new trial must be made at that term. Under these circumstances the law exacts of the unsuccessful suitor a high degree of diligence as the price of a new trial. Why should it be less exacting after the adjournment of the term at which the cause was decided? If a defeated litigant elects to abide by the judgment of the district court, the time within which he may move for a new trial is certainly limited to one year from the date of such judgment. Why should he be given a longer period because he is disposed to be litigious? Why should he be permitted to lengthen the time by instituting an appellate proceeding and conducting it leisurely to judgment? We can not believe that the legislature would have required a party to be expeditious and diligent in applying for a new trial at one stage of the case if it intended to allow him to take his own time at another stage. The period of limitation should, it would seem, begin to run from the date of the decision in the district court, for the trial there may, and frequently does, suggest the possible existence of other material evidence. The trial in this court, however, reveals nothing with respect to the facts of the case that was not known before.

The petition for a new trial, if presented in apt time, may be entertained by the district court although the cause be pending in this court for review. Such is the obvious meaning of the statute, and such is the construction given like statutes in other jurisdictions. *Cook v. Smith*, 58 Ia., 607; *Gibson v. Manly*, 15 Ill., 140. A party desiring to obtain a new trial under the provisions of section 318 of the Code has, therefore, the right in every case to make his application within one year from the date of the judgment in the district court, and that court has authority to entertain his petition and grant the relief demanded, although the cause may be pending for review in this court. The legislature did not intend to say that the remedy which it provided should be available under

all circumstances for one year, and might, at the option of the complaining party, be made available for an indefinitely longer period. This conclusion is in harmony with the dictum of Chief Justice MAXWELL in *Bradshaw v. State*, 19 Nebr., 644.

The judgment is

AFFIRMED.

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

FILED OCTOBER 3, 1900. No. 11,347.

1. **Contract in Restraint of Trade:** PUBLIC POLICY. Contracts which impose unreasonable restraints upon the exercise of any business, trade or profession contravene sound public policy.

2. ———: ———: PROTECTION TO PURCHASER. Partial restraints upon the exercise of any business, trade or profession are not unreasonable when they are ancillary to an actual purchase of property, made in good faith, and are apparently necessary to afford fair protection to the purchaser.

3. ———: ———: MONOPOLY. But, if it appears that the main purpose of such agreement is to secure a monopoly, and that the purchase of the property is a mere incident or means to that end, it is within the rule applicable to ordinary combinations in restraint of trade and will not be enforced.

4. **Appellate Court:** SUBSEQUENT APPEAL: REVIEW OF FORMER APPEAL. It is not permissible for an appellate court, on a subsequent appeal of a cause, to reconsider and correct an erroneous decision made by it in the same case on a former appeal.

5. **Res Adjudicata:** OBITER DICTA. The rulings upon the first appeal settle definitely, for the purposes of the litigation, all questions adjudicated; but mere expressions of opinion respecting matters not actually involved in the decision have no binding force.

6. **Deed:** COVENANT: PUBLIC POLICY. A covenant in a deed for the exchange of hotel property by which the grantee in one deed agrees that for a period named he will not use the property acquired by him for hotel purposes, is not void as being contrary to public policy.

7. **Franchise:** INNKEEPER: DUTY TO PUBLIC. The right to run a hotel is not a franchise. An innkeeper is not clothed with any authority from the state, and he owes no duty to the public

except to render to all who come, and are fit to be received, fair accommodations at fair prices, while he sees fit to continue in business.

8. **Evidence:** ADMITTED FACTS. It is not necessarily prejudicial error to receive evidence to prove admitted facts.

9. **Covenant:** CONDITION: WAIVER: If a party waive a covenant conditionally and the condition is broken, the waiver ceases to be effective for any purpose.

10. **Evidence:** ISSUE: REVERSIBLE ERROR. The reception of evidence which responds to no issue in the case, but which is incapable of mischief, is not reversible error.

11. **Best Evidence.** The best evidence of which a case is in its nature susceptible is always admissible to prove the fact in issue.

12. **Compensatory Damages:** GAINS: LOSSES. A party may recover for gains prevented as well as for losses sustained when such damages are not only certain, but are the natural and probable result of the wrong complained of.

13. **Witness:** DIRECT EXAMINATION: TENDER. A party to avail himself of an error of the court in refusing to permit a witness on direct examination to answer a question, must make a formal offer to prove the fact sought to be elicited.

14. **Evidence:** ERROR. It is not error to refuse to receive evidence of facts admitted by the pleadings.

ERROR to the district court for Clay county. Tried below before STUBBS, J. *Affirmed.*

G. W. Bemis and *R. G. Brown*, for plaintiffs in error.

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

SULLIVAN, J.

John T. Mollyneaux brought this action in the district court to recover damages of Marcus Wittenberg and his co-defendants for breach of a covenant contained in a deed of conveyance. In June, 1889, the plaintiff was the owner of a hotel in the city of Sutton, and the defendants were at the same time the owners of another hotel in the same city. The parties agreed to exchange their properties, and the agreement was carried into execution. The conveyance made by Mollyneaux to the defendants provided

that the premises therein described should not be used for hotel purposes for a period of two years. The petition alleges that this stipulation has been violated, and that the plaintiff has been damaged thereby. Issues were joined by the filing of an answer and reply. The cause was tried to a jury, and, there having been a verdict and judgment for the plaintiff, the defendants bring the record here for review, alleging error in the admission and exclusion of evidence, and in the giving and refusal of instructions. Many of the rulings assigned for error assume that the covenant upon which the action is grounded is valid and enforceable. This position is resolutely assailed by counsel for the defendants. They contend that there being only two hotels in Sutton, the closing of one would give the owner of the other a monoply, and that such a result would be prejudicial to the interests of the traveling public and contrary to the policy of the state. We think the restriction upon the use of defendants' property was not unlawful. Contracts which impose unreasonable restraints upon the exercises of any business, trade or profession are said to contravene sound public policy; but partial restraints are not deemed to be unreasonable when they are ancillary to an actual purchase of property made in good faith, and are apparently necessary to afford fair protection to the purchaser. Although such agreements tend to suppress competition and bring about conditions favorable to the creation of monopolies, they are in harmony with the policy of the state, which is to promote commerce by facilitating the sale and transfer of property. Of course if it be shown that the main purpose of the agreement is to secure a monopoly, and that the purchase of the property was a mere incident or means to that end, it is within the rule applicable to ordinary combinations in restraint of trade, and will not be enforced. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. Rep., 271, 46 L. R. A. 122; *Richardson v. Buhl*, 77 Mich., 632; *People v. Milk Exchange*, 145 N. Y., 267; *State v. Nebraska Distilling Co.*, 29 Nebr., 700; *State*

v. Standard Oil Co., 49 Ohio St., 137; *Distilling & Cattle Feeding Co. v. People*, 156 Ill., 448. The defendants in this case, notwithstanding the contract in question, were at liberty to engage in the hotel business at Sutton; so was any one else who might choose to do so. And the business might be established and carried on anywhere within the corporate limits, except upon the premises formerly owned by Mollyneaux. Under these circumstances, it would seem that the public interests were not formidably threatened by the restrictive covenant, which was doubtless designed to secure to the plaintiff the patronage of his old customers. But the suggestion is made that when the case was first here it was intimated that the facts alleged in the answer would, if proven, constitute a good defense to the action. We are aware of the rule that forbids an appellate court to reconsider and correct, on a subsequent appeal of a cause, an erroneous decision made by it on a former appeal. *Ripp v. Hale*, 45 Nebr., 567; *Coburn v. Watson*, 48 Nebr., 257; *Omaha Life Ass'n v. Kettenbach*, 55 Nebr., 330; *Hayden v. Frederickson*, 59 Nebr., 141; *Leavitt v. Bell*, 59 Nebr., 595. The judgment rendered by this court when the cause was first here is, we concede, a finality; it is the law of the case, an adjudication binding upon the parties, and settling definitely, for the purposes of the litigation, all questions adjudicated. This rule, however, does not apply to a mere expression of opinion in regard to matters not actually involved in the decision. The only point determined in *Mollyneaux v. Wittenberg*, 39 Nebr., 547, touching the agreement of the defendants, was that the district court erred in holding it to be unenforceable. The legal effect of the averments of the answer, except those relating to the waiver, was not considered by the court and was not decided. Upon this branch of the case our conclusion is that the restrictive covenant was valid when made; that events subsequently arising could not, and did not, render it invalid, and that, therefore, the trial court did not err in excluding evidence offered, and instructions re-

quested, on the hypothesis that such covenant was null in its inception, or else became null by reason of the failure of Mollyneaux to furnish fair and reasonable entertainment to all comers. We have not overlooked the contention of counsel that the public has a special interest in hotels; that they are affected with a public use, and that it is contrary to public policy to discontinue the operation of a business of this kind. The first answer to this argument is that the evidence does not show that the Oakland Hotel was in operation when the exchange of properties was effected, and consequently there is no proof that the contract made only one hotel to run where two were running before. The second answer is that the right to run a hotel is not a franchise; an innkeeper is not clothed with any authority from the state, and he owes no duty to the public, except to render to all who come, and are fit to be received, fair accommodations at fair prices, while he sees fit to remain in business. The doctrine established by such cases as *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan., 602; *Woodman v. Innes*, 47 Kan., 26; *Gibbs v. Consolidated Gas Co.*, 130 U. S., 396; *People v. Chicago Gas Trust Co.*, 130 Ill., 268, and *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va., 600, is not applicable to property adapted to use as a hotel or actually used for that purpose.

It is said that the court erred in permitting Mollyneaux to testify to the fact that the Oakland Hotel, the one which he acquired by the exchange, was incumbered at the time the exchange was made. This evidence was offered for the purpose of showing that there was an adequate consideration for the covenant here in question. Such proof was unnecessary; it was immaterial, but we are not able to see that it was in the least degree prejudicial.

Other assignments of error are grounded upon the theory that the measure of damages is the difference between the loss which would have resulted to the plaintiff from the operation of the Occidental Hotel at one dollar

a day and the loss resulting from its operation at two dollars a day. This view is erroneous. If the right of the defendants under the waiver was lost by failing to comply with its conditions, the plaintiff was entitled to be compensated for any loss of patronage occasioned by the operation of the hotel regardless of the rate charged. The question whether the condition was violated was submitted to the jury under proper instructions, and their decision must, under the evidence in the record, be deemed conclusive.

Exception was taken to the ruling of the court admitting in evidence the deed from Mollyneaux to the defendants. This evidence responded to no issue, but it was obviously incapable of mischief and consequently furnishes no reason for reversing the judgment. The plaintiff undertook to prove his damages by showing loss of patronage resulting from the operation of the hotel conveyed by him to the defendants. The evidence offered for that purpose was the best attainable under the circumstances, and was of the same character as that recognized as competent in *Wittenberg v. Mollyneaux*, 55 Nebr., 429, and *Wittenberg v. Mollyneaux*, 59 Nebr., 203. Feeling entirely satisfied with the views entertained by the court when these decisions were made, we will not enter upon a re-examination of the question at this time. That a party may recover for gains prevented as well as for losses sustained when such damages are not only certain, but are the natural and probable result of the wrong complained of, is a point no longer open to dispute in this state. *Western Union Telegraph Co. v. Wilhelm*, 48 Nebr., 910; *Wittenberg v. Mollyneaux*, 55 Nebr., 429.

It is insisted that the court erred in sustaining objections to questions asked Wittenberg with the view of showing that the Occidental Hotel was run as a dollar a day house. The rulings were quite technical, but they were within the law. We will not give them special consideration, because the defendants having made no offer to prove the facts sought to be elicited, the errors, if any

were committed, are not available. *Nebraska Telephone Co. v. Jones*, 60 Nebr., 396.

The defendants undertook to show that the plaintiff sustained loss of patronage as a result of the drouth of 1890. I. N. Clark was questioned upon this subject, but the court declined to receive his testimony, on the ground that no sufficient foundation had been laid. The rulings were probably not erroneous, but we do not determine the point because, there having been no formal offer to prove the facts sought to be elicited, no advantage can be taken of the alleged errors. These remarks are also applicable to many of the specifications of error based upon the exclusion of evidence of the class to which Mr. Clark's testimony belongs. The testimony of Wittenberg as to the effect of the crop failure of 1890 upon the hotel business in Sutton was stricken out, for the reason that he was not shown to be qualified to testify upon that point. This ruling affords no just ground for complaint, because it does not appear that he knew to what extent the loss of hotel patronage was due to the crop failure. He testified to a general falling off of hotel patronage in 1890, and showed the percentage of loss by comparing the business of 1890 with that of 1889, and that evidence was permitted to go to the jury.

It is claimed that the court erred in refusing to receive proof of the consideration for the waiver referred to in the answer. No proof was necessary. The execution and validity of the waiver were admitted by the reply. The effort of the plaintiff was to show that it ceased to be effective by events occurring after its execution.

There is no prejudicial error in the record, and the judgment is, therefore,

AFFIRMED.

WILLIAM BROWER V. FOLKERT FASS.

FILED OCTOBER 3, 1900. No. 11,071.

1. **Illegal Contract:** PARTIES IN PARI DELICTO: PRIVIES. When an illegal contract has been executed and the parties thereto are *in pari delicto*, no action lies to recover back money paid under it, or for restitution of property delivered in pursuance of its terms. This rule applies to the parties themselves and to all others claiming through or under them.

2. **Illegal Sale:** CREDITORS OF VENDOR: RIGHTS. The creditors of a vendor who has made an illegal sale of his property can not seize the same unless they can show that such transfer was an invasion of, and prejudicial to, their rights.

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

John P. Maule and *Ames & Ames*, for plaintiff in error.

John C. Watson, *John V. Morgan* and *Frank P. Ireland*, *contra.*

SULLIVAN, J.

Henry Huette was a licensed vender of intoxicating liquors, doing business at Syracuse, in Otoe county. On March 25, 1898, he executed to Dietrich Bose a bill of sale (which was in legal effect a mortgage) covering all the liquors and fixtures in his saloon. Three days later the property described in the bill of sale was sold absolutely to Folkert Fass, who took immediate possession of the saloon and continued for some time to conduct the business in the usual way, but without having obtained a license from the village board. After Fass took possession of the saloon, the only connection Huette had with the business is thus described in the abstract upon which the case is submitted: "After Mr. Fass got the property, witness [Huette] had nothing more to do with it than that he was around there to work for Mr. Fass until the

latter got around." There was no attempt to transfer Huette's license to Fass; at the time of the sale there was no agreement with respect to it, and nothing was said concerning it while the negotiations for the sale were in progress. Under an execution issued upon a judgment in favor of David Wise & Co. and against Henry Huette, the plaintiff in error, as sheriff of Otoe county, seized the liquors and fixtures aforesaid as the property of the execution defendant. Thereupon Fass commenced an action of replevin against Brower on the theory that the seizure was wrongful. The jury found in favor of plaintiff, and judgment was rendered on the verdict. The various specifications of error present but a single question for decision. We will assume for present purposes that the evidence was sufficient to warrant the jury in finding that the sale of the property in dispute was illegal—that Fass bought intending to resell in violation of law and that Huette was a guilty participant in the transaction. But the illegality of the sale was not alone sufficient to justify the sheriff in levying upon the property as the property of Huette. It was held in *Hall v. Hart*, 52 Nebr., 4, that where property of an insolvent debtor, or one in failing circumstances, has been transferred to another by an illegal sale, it will be treated as though it had been disposed of without consideration and in fraud of the rights of the vendor's creditors. Counsel for Brower insist that we shall now go a step farther and declare that creditors of a solvent vendor may appropriate to the satisfaction of their claims property which has passed out of his hands in execution of an illegal contract of sale. No decision is instanced in support of this contention, and we have been unable to find any that gives it the least countenance. In *Traders Nat. Bank v. Steere*, 165 Mass., 389, 393, it is said: "The conveyance of property by a contract which is void as being against public policy in a particular which has no reference to creditors does not necessarily give creditors a right to pursue the property after the contract has been

fully executed. Such a contract may or may not be fraudulent as against creditors. If it is, they may set it aside; if it is not, they cannot." The sale here in question was not actually fraudulent as to creditors, and it should not be held to be presumptively fraudulent, in the absence of a showing that it was prejudicial to their rights. Huette, at the time of the sale to Fass, was neither insolvent nor in failing circumstances; at least, there is no evidence that he was, and, therefore, his creditors were affected by the illegal transfer, only as all other members of the community were affected. When an illegal contract has been executed and the parties thereto are *in pari delicto*, no action lies to recover back money paid under it, or for restitution of property delivered in pursuance of its terms; and this rule is applicable, not only to the parties themselves, but to all others claiming through or under them. Huette could not recover the property in dispute; he has no cause of action against Fass. Neither can Huette's creditors reclaim such property unless the sale and delivery of it to the plaintiff was actually, or by implication of law, an invasion of their rights. If this were not so, one of the parties to an illegal transaction might at any time, with the assistance of a friendly creditor, recover back from the other money or property delivered to him as part of such transaction. In *Speise v. M'Coy*, 6 Watts & Serg. [Pa.], 485, it was held, in an opinion by Chief Justice Gibson, that money lost on a wager forbidden by statute could not be attached by a creditor of the loser. The contention in behalf of the creditor in that case was the same as the contention of the sheriff in this, but it was in effect decided that a creditor can claim nothing by virtue of an illegal act of his debtor without showing that such act was, not merely a violation of the rights of the public, but an infringement of his private rights.

The judgment is

AFFIRMED.

GEORGE MOTLEY ET AL. V. EMILY E. MOTLEY.

FILED OCTOBER 3, 1900. No. 11,369.

1. **Res Adjudicata:** REVIEW: SUBSEQUENT APPELLATE PROCEEDINGS. The determination of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case and will not be re-examined in a subseuqent appellate proceeding.

2. **Widow:** DOWER: STATUTORY BAR. A widow is entitled to dower in the lands owned by her intestate husband at the time of his death, unless barred therefrom in the manner prescribed by the statute.

3. **Baker's Decedent Law.** The fact that the husband died after "Baker's Decedent Law" (Session Laws, 1889, ch. 57) was adopted and before it was adjudged to be unconstitutional, does not in any way affect the widow's right to dower.

4. **Curative Act:** ITS PURPOSE. The purpose of the curative act of 1895 (Session Laws, 1895, ch. 32) was to legalize findings, orders, judgments and decrees made under the provisions of the decedent's law which was held to be unconstitutional in *Trumble v. Trumble*, 37 Nebr., 340.

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

Capps & Stevens, for plaintiffs in error.

Batty & Dungan, contra.

SULLIVAN, J.

The judgment under review affirms the claim of Emily J. Motley to be endowed of the lands owned by her intestate husband at the time of his death, and is in strict conformity with the decision rendered by this court when the case was before us on appeal. Every point now raised by the plaintiffs in error was considered and decided against them when the first judgment of the trial court was brought here for revision. The opinion in *Motley v. Motley*, 53 Nebr., 375, is the law of the case, and must control its disposition. *Ripp v. Hale*, 45 Nebr., 567;

Coburn v. Watson, 48 Nebr., 257; *Omaha Life Ass'n v. Kettenbach*, 55 Nebr., 330; *Hayden v. Frederickson*, 59 Nebr., 141; *Leavitt v. Bell*, 59 Nebr., 595. That opinion enunciates principles that are believed to be sound, and answers completely all the arguments now advanced for a reversal of the judgment in favor of the defendant in error.

The curative act of 1895 (Session Laws, 1895, ch. 32) has no bearing whatever upon this controversy. The purpose of that act, as declared in its title, was to legalize orders, judgments and decrees which had been made under the provisions of the decedent's law of 1889 before the case of *Trumble v. Trumble*, 37 Nebr., 340, was decided. The substantive part of the act of 1895 is as follows: "Now, therefore, all judgments, orders, decrees and findings that have been made by any court in the state of Nebraska under and by virtue of the provisions of said act, pertaining to any estate of any deceased person, be, and the same is hereby, legalized and made valid to the same extent and to the same purpose as though said act had not been adjudged unconstitutional by the said supreme court." Neither the county court nor the district court of Adams county, at any time, made any order, judgment or decree in pursuance of the unconstitutional decedent's act which assumed to divest the right of the defendant in error to dower in the land in controversy. There was, therefore, nothing, so far as the estate of John Motley is concerned, upon which the curative act could operate. *Boales v. Ferguson*, 55 Nebr., 565. Mrs. Motley is very clearly the owner of a life estate in one-third of the lands of which her husband died seized. and the record does not disclose that she has done any act by which she has forfeited the right to assert her ownership.

The judgment of the district court is right, and is

AFFIRMED.

ESTATE OF MARGARET L. MCKENNA, DECEASED, V. SARAH A. MCCORMICK.

FILED OCTOBER 3, 1900. No. 9,259.

1. **Order of Probate Court:** STATUTE: VACATION OF ORDER: ALLOWANCE OF CLAIM: VACATING ORDER. An order of a probate court, entered under the provisions of subdivision 3 of section 602 of the Code of Civil Procedure, vacating an order allowing a claim against an estate made at a prior term, is appealable, and from it an appeal may be taken to the district court.

2. **Statute:** PROBATE MATTERS: APPEAL: PROPER PARTY. By section 42, chapter 20, Compiled Statutes, 1899, in all probate matters an appeal is allowed from any final order, judgment or decree of the county court to the district court by any one against whom the order, judgment or decree is made, or who is affected thereby.

3. **Judgment:** PROCEEDING TO VACATE: STATUTE. Whether or not a proceeding to vacate a judgment or order comes within the provisions of subdivision 3 of section 602 of the Code is to be determined from the grounds upon which the application is based as disclosed by the record.

4. **Entry:** MISTAKE: NEGLECT: OMISSION: JUDGE ACTING AS CLERK. Under the evidence, *held* that the entry, by the probate judge, acting as his own clerk, on the records of the probate court, of the judgment sought to be vacated was not an act of "mistake, neglect or omission of the clerk," within the meaning of said subdivision 3, section 602.

5. **Irregular Judgment.** An irregular judgment is one which is rendered contrary to the course of law and the practice of the courts.

6. **Judgment:** FRAUD: REMEDY: PETITION: SUMMONS: LIMITATION. Where it appears from the records that the ground for vacating a judgment is that it was fraudulently obtained, by reason of which a party was prevented from defending, the remedy is by instituting proceedings to vacate the judgment, by filing a petition duly verified and having summons issued thereon, such action to be begun within two years from the date of the judgment. A motion filed to vacate the judgment on the ground of irregularity will not lie after the lapse of the time mentioned.

ERROR to the district court for Sarpy county. Tried below before SLABAUGH, J. *Affirmed.*

I. J. Dunn and *J. J. O'Connor*, for plaintiff in error.

A. E. Langdon and *Martin Langdon, contra.*

HOLCOMB, J.

On September 20, 1892, an order allowing a claim against the estate of Margaret L. McKenna, plaintiff in error, and in favor of Mrs. Sarah A. McCormick, defendant in error, was entered by the probate court of Sarpy county. Because of an alleged informality or defect in the form of the order of allowance, litigation between the estate and the claimant resulted, wherein it was determined by this court, in *McCormick v. McCormick*, 53 Nebr., 255, that the said judgment or order of allowance was, in all respects, a valid and binding judgment against the estate. During the pendency of the suit first brought to test the validity of the judgment, proceedings were instituted by the administrator to vacate and annul the order allowing the claim, under the provisions of section 602 of the Code of Civil Procedure. The motion to vacate the order allowing the claim was filed September 3, 1895, and was based upon the following grounds: "First, that the order of allowance was obtained and entered through an irregularity, namely, that said order was entered as of Sept. 20, 1892, after the hearing of said claim had been continued for a period of 30 days, and was also entered without judgment of allowance ever having been had on said claim. Second, said order purporting to have been an order of allowance, and purporting to have been made Sept. 20, 1892, and entered in record "C," at page 466, was entered through mistake of said county judge acting as clerk of said county court of Sarpy county." In support of the motion is an affidavit of the administrator, who says that he was at the office of the county judge on September 20, 1892, and that no hearing was had on said claim, and that no parties appeared on behalf of the claimant at the hour set, and

that he waited until the hour of 2 o'clock, when the said county judge announced that the hearing on said claim, and all other matters connected with the estate, would be continued until October 25, 1892; that on October 25 he was again present and, under substantially the same circumstances as before, the judge again continued the hearing until December 26, 1892; that on December 26 the office of county judge was not open, and he went to the residence of the county judge and inquired about the claim, and was informed by the county judge that the claim was or would be disallowed, and that the administrator need do nothing about it unless he got notice. The purported conversation with the county judge on December 26, at his residence, is corroborated by the affidavit of another witness. It is also claimed, in the affidavits in support of the motion, that the estate was not indebted to the claimant in any sum whatever. After the allowance of the claim, and before motion was filed to vacate the judgment, the county judge who allowed the claim had died. Upon a hearing of the motion to vacate the order of allowance, which was had before a special county judge appointed for that purpose, the motion was sustained, and an order entered as requested, vacating the judgment of allowance. An appeal was taken to the district court, where, upon a hearing, the action of the county judge was reversed, and the special proceedings to vacate the order allowing the claim dismissed. The administrator urges in this court that the district court erred in entertaining the appeal from the county court, on the ground that the order of vacation entered by the county judge is not appealable. The contention is not regarded as tenable. By section 42, chapter 20, Comp. Statutes, 1899, in all probate matters, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court by any one against whom the order, judgment or decree is made, or who may be affected thereby. The section has been construed in conformity with the views herein expressed

in *Bazzo v. Wallace*, 16 Nebr., 293, and in *Malick v. Estate of McDermot*, 25 Nebr., 267.

It is next claimed that the finding and judgment of the district court are contrary to law, and not supported by the evidence, and that the order of vacation by the probate court appealed from should have been affirmed. These proceedings are claimed, and evidently were intended to be regarded as brought under the third subdivision of section 602 of the Code of Civil Procedure, relating to the vacation of judgments and orders after the terms in which they are rendered. By this subdivision and other sections to which it is related a judgment or order may be vacated or modified, by motion, upon reasonable notice to the adverse party or his attorney in the action, "for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order," if proceedings are begun for that purpose within three years.

Whether or not the grounds upon which the application is based in the present case come within the provisions of the section quoted must be determined from the record before us. The mere *ipse dixit* of the parties that such is the case will not suffice. One of the grounds upon which the motion is made, is that the order of allowance was entered without a judgment of allowance ever having been had. This question has already been decided on the prior appeal, and the order adjudged to be a valid and complete judgment in all respects. *McCormick v. McCormick, supra.*

The ground urged in the second paragraph of the motion is also untenable. The only evidence of the rendition of the judgment is the record itself. This record was made by the probate judge acting as his own clerk. It can hardly be said that such an entry is an act of "mistake, neglect, or omission of the clerk," within the meaning of the subdivision quoted.

We are thus brought to the only remaining ground mentioned in the motion, viz., "irregularity in obtaining the judgment or order." Can it be said that this was

obtained by irregularity, as contemplated by subdivision 3, of section 602? In 1 Black, Judgments, sec. 170, it is said: "An irregular judgment is one which is rendered contrary to the course of law and the practice of the courts"; and in section 326, volume 1, the author further says: "It is a general rule that the court in which a judgment was rendered may vacate it, on motion, at the same or a subsequent term, on proof that it was entered irregularly, and not according to the course of the court."

In 1 Freeman, Judgments, sec. 97, it is said: "A judgment is said to be irregular whenever it is not entered in accordance with the practice and course of proceedings where it was rendered." The irregularity here complained of is that the judgment was rendered after the case was continued. If this be true, and it was rendered inadvertently, the judgment was rendered "before the action regularly stood for trial," and a motion to vacate must be made in the first three days of the succeeding term. Code of Civil Procedure, sec. 604. The order of allowance was not entered irregularly in the sense that it was obtained contrary to the practice and course of proceedings had in such cases in the probate courts of the state. The notice to present claims against the estate had been given, and the claim in pursuance thereof had been filed for allowance. The time set for allowance of claims had arrived, and the court, in its regular course of procedure, was then empowered to act upon and allow the claim. The record shows no continuance and no application for one. If, however, as is attempted to be established by the affidavits filed in support of the motion to vacate the judgment, a continuance of the hearing of the claim was had, and notwithstanding such continuance a judgment was entered on the same day, and further continuances announced, as stated, when the judgment had already been entered, then a fraud was practiced on the administrator, whereby he was prevented from making a defense to the claim. In such a case, the remedy would be, if brought under the provisions of the

section under consideration, by filing a petition, duly verified, and having summons issued thereon, such action to be begun within two years from the date of the judgment sought to be vacated. A motion to vacate the judgment under subdivision 3 would not lie. By the proceedings had in this action, it is attempted by motion, supported by affidavits on the ground of alleged irregularity, to contradict and impeach the record of the judgment sought to be vacated. This, it occurs to us, can not be done in the absence of a charge of fraud in procuring the judgment; and if fraud is claimed, the remedy is by a different proceeding than in the present case.

From the record we are disposed to the view that the conclusion reached on the trial of the case in the district court is sustained by the evidence, and is in conformity with law. The judgment is accordingly

AFFIRMED.

MARTHA J. PINKHAM V. JOHN H. PINKHAM, APPELLEE, AND EMMA E. RYAN ET AL., APPELLANTS.

OCTOBER 3, 1900. No. 11,168.

1. **Title to Real Estate:** AMENDMENT OF ANSWER: REFORMATION OF DEED. In a controversy over the title to real estate, appellants claimed as heirs, and appellee as grantee, under a deed of conveyance from the same party. On appeal to this court, the instrument under which appellee claimed was construed to be testamentary in character, passing no present estate. *Held*, After the action was remanded for further proceedings, with directions to proceed according to law, the appellee might properly amend his answer by pleading a mistake in the drafting of the instrument, in that it was stated "this deed is to take effect and be in full force from and after my death," when the true intention and desire of the parties thereto was to reserve to the grantor only a life estate in said premises, and asking for a reformation accordingly.

2. ——: ——: ——: TESTAMENTARY DEED. In proceedings in an action as above mentioned, the opinion of this court, con-

struing the instrument to be testamentary in character, will not be deemed *res adjudicata* as to the alleged mistake pleaded by appellee in his amended answer.

3. **Appeal:** REVERSAL AND REMANDMENT. Where, upon appeal to this court, the judgment of the trial court is reversed, and the case remanded for further proceedings, with directions to proceed according to law, *held*, that the case was remanded generally, and not specially or for any particular purpose.

4. ———: ———: SITUATION OF PARTIES: DISCRETION OF COURT. Where, in an equitable action, the decree of the trial court is reversed, and the case remanded generally, the situation of the parties is the same as at the beginning of the trial, and, in the exercise of a sound discretion vested in the trial court, amendments of the pleadings may be made, not inconsistent with the opinion of the appellate court, and a trial of all the issues had *de novo*.

5. **Deed:** CONSIDERATION: THIRD PARTY: MISTAKE: CORRECTION. A deed of conveyance founded upon a consideration to be paid to a third party therein named, and for labor expended on the premises conveyed, and for care and support of the grantor, is not a voluntary instrument, and mistakes in its execution may be corrected in a court of equity.

6. **Conveyance:** REFORMATION. An instrument intended to operate as a conveyance of land is reformable in character, and where, in its drafting by a notary public, words are used which give to it the character of a testamentary instrument, passing no present estate, when the intention of the parties was to reserve to the grantor only a life estate in the premises conveyed, such mistake may be corrected in a court of equity to conform to the true intention of the parties to such instrument.

7. **Title:** POSSESSION: EQUITABLE DEFENSE: STATUTE OF LIMITATIONS. Where the title of a person in the undisputed possession of land is challenged, he may set forth any equitable defense in favor of his right to the property, and the statute of limitations will not run so as to prevent him from setting forth such defense.

8. **Statute of Limitations:** CONSTRUCTIVE NOTICE. In a controversy where the relief demanded consists in the correction of an alleged mistake made in the drafting of a deed conveying land, which was executed several years before the mistake was pleaded, and the correction of the mistake involved no change of actual possession or disturbance of investments made by the party against whom the correction is sought, and leaves the enjoyment of the property to go on in harmony with the prior acts of the parties in interest, the statute of limitations being pleaded, *held*, that the statute begins to run only from the discovery of the mistake, or of such fact or facts as would put a

person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to such discovery. *Ainsfield v. More*, 30 Nebr., 385, followed.

9. **Deed:** CONSIDERATION: EQUITABLE LIEN. Where, in a deed conveying real estate, as a part consideration therefor, it is provided that the grantee shall pay to a person therein named $50 per annum for ten years, which payment is assumed by the grantee by the acceptance of the deed, *held*, that the sum so to be paid is, and was intended to be, a charge upon the land, and its payment secured as an equitable lien on such land.

APPEAL from the district court of Otoe county. Heard below before RAMSEY, J. *Affirmed in part.*

Ricketts & Ricketts and *H. H. Wilson*, for appellants.

J. C. Watson, F. E. Brown and *Frank Irvine, contra.*

HOLCOMB, J.

The present controversy arises over the title to certain real estate claimed by appellants, as heirs, and by the appellee, as grantee of one Calvin Pinkham, now deceased. The validity of the instrument under which appellee claims title is challenged on the ground of fraud and undue means in its procurement, and it is also averred in the petition that it was executed in anticipation of the death of the grantor as a final disposition of his property, and that, after recovery, he sought to revoke and cancel the same, but was prevented from so doing through fear of bodily harm at the hands of the grantee. The case has once been before this court, the opinion then rendered being found in *Pinkham v. Pinkham*, 55 Nebr., 729. It is there held that the instrument under which appellee's right to the land is to be determined, although in form a deed, which by its terms was to operate only after the death of the grantor, was testamentary in character, and passed no present estate in the premises therein described. The decree of the trial court, quieting title in appellee, was reversed, and the cause remanded for further proceedings, with directions to proceed according to law. After the case was remanded, appellee

applied for and obtained leave to amend his answer so as to plead mistake and error in the manner of drawing the deed, it being pleaded in the amendment that the recital, "This deed is to take effect and be in full force from and after my death," should read according to the true intention and desire of the parties, so as to reserve to the grantor only a life estate in said premises; and asked for a reformation of the instrument by a correction of the alleged mistake, so as to make it conform to the desire and intention of the parties. Issues were joined under the amended pleadings, and a trial thereof resulted in a second decree in favor of appellee, reforming the instrument as prayed for, and quieting the title in the said John H. Pinkham, appellee. Appellants claim that the character of the instrument under which appellee claims was litigated in the first trial, and that the opinion rendered in this court on the first appeal, construing the instrument as testamentary in character, has become "the law of the case," thereby preventing further litigation regarding the said instrument.

It is very true that a decision by the appellate court upon any question presented to it in reviewing the proceedings of the trial court ordinarily will not be re-examined, and becomes the law of the case, binding upon the court and the parties in the further litigation of the case, from the consequences of which the court can not depart, nor the parties relieve themselves. *Omaha Life Ass'n v. Kettenbach*, 55 Nebr., 330; *O'Donohue v. Hendrix*, 17 Nebr., 287; *Hiatt v. Brooks*, 17 Nebr., 33. It is not, however, we assume, in the present case, a question as to what the rule is, so much as to whether it is applicable to the point under consideration. On the first appeal it was determined that the deed, in the form in which it was written, was testamentary in character, and passed no present estate in the land. That question has been adjudicated, and will not be, nor is there any request to have it, further examined into or overturned.

Can it be said that the question as to the right of ap-

pellee to have a reformation of the instrument under which he claims, has been determined in the opinion first rendered? We think not. This proposition is entirely different from the construction of the instrument according to the wording then on the face of it. It is incontrovertible that in the first opinion the question under consideration was as to the legal effect of the instrument in its present form, while in the present hearing we are confronted with the proposition of correcting an alleged mistake, an entirely separate and independent proposition from that first considered. The latter question brings into the case an element not heretofore considered or determined, and the doctrine of the law of the case would therefore seem to be inapplicable. It is, however, urged that, the character of the instrument being in issue in the first trial, the defendant was required to set forth his defense with respect to the alleged mistake, which, it is admitted, he might have done on that trial, and that, because of his failure so to do, the opinion on the first appeal has rendered the character of the instrument *res adjudicata*. We are cited to a number of cases to support the rule, that all defenses that might have been interposed will be deemed to have been adjudicated in the trial of a cause, and are, therefore, *res adjudicata*, and invulnerable against collateral attack. We regard the authorities cited as in point only in cases that have been finally adjudicated, but not as applicable to different steps in the proceedings of the same action. If carried to its logical conclusion, the proposition advanced would prevent amendments in the proceedings of a case in any stage thereof, after a point in controversy had been ruled upon. It is to be observed that the amendment made is consistent with the position of the appellee during all the proceedings had in the case, nor does it conflict with, or seek to overturn, the conclusions reached in the first opinion filed. He has been, during the entire proceedings, claiming the land in controversy by virtue of the instrument as a deed of conveyance of the land, and not

as a testamentary writing of the grantor. When this court found that, by its wording, although in form a deed, it was testamentary in character, and passed no present estate, the appellee alleged mistake in its drafting, and prayed for a reformation to conform to the alleged intention of the parties, such action being in harmony with his contention during the whole course of litigation. We regard the propositions advanced with respect to the law of the case, and *res adjudicata*, as being subordinate to, and hinging upon the more important one of whether the appellee may properly amend his answer in the manner sought, and at the time the amendment was made. If, under a proper construction of the rules of procedure, amendments to pleadings are permissible after a case has been reversed on appeal, and remanded for further proceedings, it would seem that, in the present instance, appellee might rightfully amend his pleading, and would not be concluded by the prior litigation and the opinion rendered as to matters brought in issue by the amendment.

It is urged that, the case being remanded "for further proceedings," it should be proceeded with only with a view of determining the rights of the parties litigant under the instrument as construed in the opinion, and that it was error to permit an amendment of the pleadings and relitigate the issues as amended. Our conception of the case is that it was remanded generally, and without directions, to be proceeded with in any particular manner. The direction was "to proceed according to law." Had there been directions to proceed in a particular manner therein specified, doubtless no further proceedings inconsistent with the directions in the mandate could be permitted. The appellee and all parties to the action would be precluded from pursuing a different course than that pointed out, and the only remedy would have been by a motion for a rehearing and modification of the opinion. No special directions being given, the parties, we think, were justified in regarding, as they did,

the remanding of the case as being general, there to be proceeded with according to the established rules of procedure, to be determined by the trial court, in the exercise of a sound discretion in it vested. It is a firmly established rule of practice in this and other states to permit amendments not inconsistent with the opinion of the supreme court, when a judgment in an action in equity has been reversed on appeal and remanded generally to the district court for further proceedings. *Troup v. Horbach*, 57 Nebr., 647; *Badger Lumber Co. v. Holmes*, 55 Nebr., 473; *Cahn v. Tootle*, 48 Pac. Rep. [Kan.], 919; *Heidt v. Minor*, 45 Pac. Rep. [Cal.], 700; *Interstate Savings & Loan Ass'n v. Knapp*, 55 Pac. Rep. [Wash.], 931; *Jennings v. Parr*, 32 S. E. Rep. [S. Car.], 73. In *Badger Lumber Co. v. Holmes, supra*, it is held: "Where a decree in favor of plaintiff, foreclosing a mechanic's lien, is reversed on an appeal by the defendants, and the cause remanded to the trial court for further proceedings, the situation of the plaintiff is precisely the same as if his rights had never been tried." Says SULLIVAN, J., in the opinion in *Troup v. Horbach, supra:* "The judgment was reversed, with authority to the trial court to take such further action, in the interest of justice, as the law would sanction and a sound discretion dictate or approve. Within the bounds of judicial discretion the court might grant, or refuse, leave to amend the pleadings. It might decide the case on the record already made. It might take additional evidence, or it might try all the issues *de novo*." Applying the foregoing rules to the case at bar, we perceive no meritorious objection to the amendment allowed. The appellee in nowise seeks to change his position, or invoke a remedy inconsistent with his former attitude. His contention has been all along, as we understand it, that the deed of conveyance was intended to convey to him all the estate of the grantor in the premises, except a life estate therein reserved unto the grantor; and in the course of proceedings, when amendments are allowable, he applies to amend his pleadings, so that he may be permitted to

establish by proof the claims for which he has been contending. It is said that he has elected to stand on the instrument as written, and is therefore precluded from amending his answer. In considering this question, we are not to confuse his defense with the idea that he has been claiming under an instrument as testamentary in its character. He has at no time assumed this position. He relies only on the instrument as a deed, conveying to him a present estate. This, according to his position, was the contract of the parties. As to the legal effect of the wording of the deed, they are found to be mistaken. He therefore mistook the form of procedure by which his defense might be established, and he asks, at a seasonable opportunity, to amend his pleading so as to effectively prove the contract or agreement, which he pleaded in the first instance and sought to maintain at all times thereafter. The amendment does not involve a shifting to an inconsistent position, or an effort to change the nature of the contract by which his rights are to be measured.

It is urged that for several reasons the instrument is not reformable, and that the amended answer and the proof is insufficient to warrant reformation. It is said, the instrument, being testamentary in character, can not be reformed. For the purpose of considering this point, the instrument is not testamentary. A correction of the alleged mistake is not asked upon the theory that it is testamentary. It is contended that it is an entirely different instrument, one that may be reformed; and the fact that a mistake, if there is one, throws it into the class of testamentary instruments, will not prevent the correction of the error, thereby removing it from the class to which it does not belong. It is the instrument, as corrected, which determines the applicability of the rule which shall govern in its reformation. Neither do we regard it as a voluntary instrument, requiring the application to it of the rules governing errors and mistakes in the execution of such instruments. It was not voluntary in the sense that the property was a gift to the appellee.

It was based upon an expressed, sufficient and valuable consideration, in that it required the payment of $500 in installments to the Lilly P. Riddill therein named. This obligation the appellee was compelled to, and did, assume by the acceptance of the deed. There was a further valuable consideration, as disclosed by the record, in the labor performed and energy expended by the appellee in cultivating and improving the land, caring for and supporting the deceased in his lifetime; all of which was done in view of the expressed intention of the deceased to give to appellee the property for such labor, care and support. This is a valuable consideration, and amply sufficient to justify reformation of the instrument, if a mistake has occurred in its execution. 15 Am. & Eng. Ency. of Law [1st ed.], p. 678; *Baker v. Pyatt*, 108 Ind., 61. The mistake, if any, it is insisted, is not such as, under the circumstances, justifies a reformation. The deed was executed in the absence of the grantee. A notary was called to draft the instrument. It appears reasonably satisfactory from the evidence that it was the intention of the grantor to convey the land upon the consideration heretofore mentioned to his grandson, the appellee, reserving to himself a life estate therein. The notary's testimony is directly to this effect, and other circumstances corroborate and confirm his testimony. This is the probable and natural inference to be arrived at from an examination of the testimony bearing upon the point. The notary failed, in drafting the conveyance, to correctly express the intention of the grantor. The mistake was not a glaring one. The notary may easily have misunderstood the purport and legal effect of the language used, and thereby made the instrument convey an entirely different meaning from that intended, and which the parties believed it did convey. They treated it as an ordinary deed of conveyance, reserving to the grantor the use of the land until death, or a life estate therein. That the mistake was not readily detected or discernible, is made manifest from the fact that it was held to be a deed as contemplated by the

parties until construed to the contrary in this court on the first appeal. Such a mistake, made under the circumstances surrounding the case at bar, does not, we apprehend, fall within any legal rule presented to us, which could bar the instrument from being reformed, and the mistake corrected to harmonize with the desires and intentions of the parties thereto.

The mistake was one of the conveyancer. The grantor relied upon him to express in the deed his reservation of a life estate in the property conveyed. Whether the mistake can be clearly defined as one of fact or of law, is not so important. It possibly partakes of some of the elements of both. If it failed to correctly express the intention of the parties, to the effect that a life estate should be reserved to the grantor, and by the use of inapt words on the part of the notary the instrument was made testamentary in character, we fail to perceive any valid objection to its correction. The fact that the mistake in the use of the wrong words, if there was a mistake, rendered the instrument of a different character than the one intended seems to be immaterial. A mistake would have occurred had other inapt words been used, putting it in another class of instruments, or, perhaps, using words which failed to constitute a legal reservation of a life estate to the grantor in the premises conveyed. In such case, who would doubt the right of the parties to reform the instrument to conform to the actual intention of the parties and give to the grantor a life estate therein, according to the terms of the agreement? Whether the mistake be one of law or fact, or both, it seems to be a doctrine well supported by the authorities, that, if the instrument fails to correctly express the intention of the parties, equity will intervene and grant to the parties injured such relief as they may be entitled to. Upon this subject, Shaw, C. J., in *Canedy v. Marcy*, 13 Gray [Mass.], 373, says: "It is the mistake of the parties to the deed which we are to inquire into; and if they were misled by a misplaced confidence in the skill of the scrivener, it

can hardly be said to be a mistake of law and not of fact on their part." And in the same case it is said: "We are of opinion that courts of equity in such cases are not limited to affording relief only in case of mistake of fact; and that a mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against." In further illustration of the principle, we quote from *Lant's Appeal*, 95 Pa. St., 279, wherein it is said: The case is equally within the principle of equity, viz., "a paper executed by a person, who had a perfect legal right to dispose of her property and intended to do so, but by a plain mistake of the scrivener, it was drawn in the form of a will, when it ought to have been a deed or declaration of trust. Surely it must be in the power of a court of equity in this commonwealth to correct so gross and palpable a mistake, to reform the instrument and decree it to be such as it ought to have been, so as effectually to carry out the intention of the parties." In *Clayton v. Freet*, 10 O. St., 544, in the first paragraph of the syllabus, it is stated: "A mistake in the legal effect of a description in a deed or in the use of technical language may be relieved against. Where parties are shown, through ignorance and mistake, to have conveyed an estate to M. S. and her heirs, when the intention was to make a provision for her children, as well as herself, and to convey the land to M. S. for her life, remainder to her children, held, that the mistake might be corrected." In support of the rule above expressed may also be cited the following authorities: Story, Equity Jurisprudence, sec. 52; *Evants v. Strode*, 11 Ohio, 480; *Stedwell v. Anderson*, 21 Conn., 139; *Cooke v. Husbands*, 11 Md., 492. Many other opinions of courts of last resort, holding to the same proposition, may be found by reference to 15 Am. & Eng. Ency. of Law [1st ed.], p. 643, note 2, and same volume, p. 673, note 3.

It is urged that the statute of limitations operates as a barrier to prevent the appellee from reforming the instrument under which he claims by correction of the al-

leged error. There are, we think, two substantial reasons why this plea can not be made available: first, the appellee is in possession of the land under claim of title to the property; his right and title is assailed by appellants. He may, in such a case, rightfully present any defense, legal or equitable, to sustain his title to the property, irrespective of the running of the statute. When his right of possession is attacked, a cause of action accrues, by which he may plead and prove any equitable defense of which he may be possessed. As long as his title is undisputed, and he is in the peaceable possession of the property thereunder, the statute of limitations would not run, so as to prevent him when sued from setting up any equity he has in defense of his possession. *Dutertre v. Shallenberger*, 21 Nev., 507; *De Guire v. St. Joseph Lead Co.*, 38 Fed. Rep., 65; *Love v. Watkins*, 40 Cal., 547. The same rule is applied in this state, wherein, in actions of ejectment, the party is permitted to prove any equitable defense in favor of his right of possession. *Franklin v. Kelley*, 2 Nebr., 79; *Staley v. Housel*, 35 Nebr., 160. But, secondly, viewing the action as an affirmative one on the part of the appellee, we regard it as having been brought within the limitation as to the time provided by statute. This conclusion is not reached by interpolating into the statute something it does not contain, as is suggested must be done, but rather by an ascertainment and determination as to the time when a cause of action has accrued within the meaning of the statute. This question was thoroughly considered in the case of *Ainsfield v. More*, 30 Nebr., 405, and, as it appears to us, that opinion must be considered as decisive of the question under consideration. In that case, after quoting from a number of authorities, it is said by COBB, C. J.: "In the case of *Parker v. Kuhn*, 21 Nebr., 413, which was one of alleged fraud, and not of accident or mistake, this court held that 'an action for relief on the ground of fraud may be commenced at any time within four years after the discovery of the facts constituting the fraud,

or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery.' A full consideration of the cases cited leads me to the conclusion that a case of relief from the effect of accident or mistake, like that at bar, comes within the same rule of limitation." We have carefully considered the opinion quoted from and the reasoning upon which it is based, as well as the authorities in support thereof, and find no reason for dissenting from it. Applying the rule therein laid down to the present case, the defense interposed in the amended answer of the appellee is not barred because of lapse of time after the cause of action accrued. In *Duvall v. Simpson*, 53 Kan., 291, it is held: "While the lapse of time will bar equitable relief against a mistake made in describing land intended to be conveyed, the period of limitation will not begin to run until the discovery of the mistake, or until the time at which, by the exercise of reasonable diligence, it might have been discovered." It is said in the opinion: "If that statute was applicable and began to run when the instrument was executed, the claim would be well founded; but in cases of fraud or mistake, the statute begins to run from the time of the discovery of the fraud or mistake and not before, or from the time at which, by the exercise of reasonable diligence, it might have been discovered." In harmony with the opinion quoted from are *Dennis v. Northern P. R. Co.*, 55 Pac. Rep. [Wash.], 210; *Harris v. Ivey*, 21 So. Rep. [Ala.], 422; *Hayes v. Carroll*, 76 N. W. Rep., [Minn.], 1017.

In the instrument under which appellee claims title to the land therein described is found the following provision: "The further and additional consideration of this conveyance is, that the said John H. Pinkham shall pay to Ella [Lilly] P. Riddill, my great grand daughter, fifty dollars per annum for ten years from the taking effect of this deed." It is urged that it was error to quiet title to the property in the appellee as against the said Lilly P. Riddill; that, under the provisions quoted, she held an

equitable lien on the land in the sum provided in the deed, to be paid her in installments, as therein mentioned, and the payment of which was assumed by appellee by his acceptance of the deed. We are disposed to the view that the sum mentioned to be paid to the said Riddill is and was intended to be a charge upon the land, and its payment at the time mentioned made certain and effectual by making it a lien, to be satisfied by the grantee before his title to the property became clear and complete. We are of the opinion, under the pleadings and the evidence, that the rights of the defendant, Lilly P. Riddill, should have been fully determined and established in the decree rendered. *Richards v. Reeves*, 47 N. E. Rep. [Ind.], 232; *Thompson v. Lyon*, 20 S. E. Rep. [W. Va.], 812; *Bates v. Swiger*, 21 S. E. Rep. [W. Va.], 874.

The cause will be remanded, with directions to the trial court to find the amount owing to the said Lilly P. Riddill under the terms of the deed, and award her a lien on the premises therefor. In all other respects the decree is affirmed.

JUDGMENT ACCORDINGLY.

LINCOLN AND DAWSON COUNTY IRRIGATION DISTRICT V. ISAAC A. MCNEAL.

FILED OCTOBER 3, 1900. No. 11,376.

1. **Corporation:** DEALING WITH OFFICERS: AGENTS: LEGISLATION: LIMITATION. A person dealing with the officers or agents of a public corporation is required to act with reference to the authority, limitations and restrictions imposed upon such officers and agents by the legislation authorizing the organization and government of such corporation.

2. **Irrigation District:** STATUTE: ORGANIZATION: PURPOSE: PUBLIC AGENTS. An irrigation district organized under the provisions of chapter 70, Session Laws, 1895, is a public corporation organized for a public purpose, to-wit, to furnish water for irrigation purposes, to be usefully and beneficially applied to the

lands within the district, and its agents are public agents of the state. *Board of Directors v. Collins*, 46 Nebr., 411, followed.

3. **Irrigation Act:** EXPENSES: CONSTRUCTION: FUND: LIABILITY. Under section 24 of the irrigation act, all expenses incurred for construction work are to be paid wholly out of the construction fund, and the board of directors is not authorized to incur any indebtedness or liability against the district for labor performed in the work of construction where no construction fund has been created out of which such indebtedness may be paid.

4. ———: PROPOSALS: ADVERTISEMENT: NOTICE: AUTHORITY OF BOARD. Under the provisions of section 22 of the irrigation act mentioned, proposals for construction work should be advertised for by published notice, as in the section provided, and the bid or bids received under such notice either accepted or rejected, before the board is authorized to proceed to construct the work under its own superintendence with the labor of the residents of the district.

5. **Contract:** LIABILITY: REASONABLE VALUE. Where a contract is entered into which a board of directors is authorized to make, and the district has received the benefits of the contract, it would be liable for the reasonable value of the services rendered, not exceeding the contract price, notwithstanding the contract was illegal because of the manner in which it was entered into.

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

W. D. Giffin and *E. A. Cook*, for plaintiff in error.

George W. Thomas and *G. W. Fox*, *contra.*

HOLCOMB, J.

This action is submitted on a printed abstract of the record and briefs of counsel in the case. The plaintiff in error, defendant below, is a corporation organized under and by virtue of an act of the legislature passed in 1895, providing for the organization and government of irrigation districts. Session Laws, 1895, ch. 70. The action is founded upon a claim for work and labor performed in the partial excavation of an irrigating canal proposed to be constructed by the district. The material allegations of the petition, in substance, are: The organization

of the district; the voting of bonds by a majority of the electors in an amount sufficient to pay for the estimated cost of the proposed canal, and the issuance and execution thereof by the proper officers; that the bonds were at all times, and at the beginning of the action, in the possession of the defendant, and had not been sold; that in December, 1895, the district desiring to have work begun on the proposed canal, by and through its board of directors, employed the plaintiff to do a certain amount of work in excavating said canal, said agreement not being in writing; that for such work the plaintiff was to be paid in bonds of the defendant corporation, provided the bonds could not be sold, but if said bonds were sold, then plaintiff was to be paid in money, in an amount not exceeding the lowest bid made for like work by a responsible bidder after advertising for bids; that under said agreement the plaintiff removed 2,980 cubic yards of dirt, and that the reasonable value thereof was $178.80. It is alleged that the defendant did not advertise or receive bids for work similar to that performed by the plaintiff, but received bids for similar work combined with other work of a different nature; that the work was done on, and prior to, January 31, 1896; that the plaintiff informed the defendant he would take bonds at par for the work done, and demanded that he be so paid, or paid in money, and that defendant refused to pay him either. Judgment was prayed for in the sum of $178.80 and interest. The answer admits the organization of the district, and otherwise in the main consists of a general denial. It denies liability to plaintiff for the alleged work; denies authority to enter into the contract pleaded, and alleges that it did not, and has not made any contract with the plaintiff, and was without authority under the law to enter into a binding contract; it alleges that it notified and warned the plaintiff that, should he do any work on its proposed canal, he would do so at his peril. It is also alleged that the petition failed to state facts sufficient to entitle plaintiff to recover. On the trial, objection was raised to the

introduction of any evidence, because the petition failed to state a cause of action. Judgment was rendered for the plaintiff for the amount prayed for, and the case is, by error proceeding, brought here for review. The case was tried upon a stipulation of facts, which will appear in the further discussion of the case.

But two underlying questions are presented for consideration: First, does the petition state facts sufficient to constitute a cause of action; and, second, under the facts as stipulated, is the plaintiff entitled to judgment? A rightful determination of these questions, which we are disposed to consider together, hinges upon a proper construction of the different sections of the irrigation law referred to. By sections 9 and 10 a board of directors of an irrigation district is provided for, and their powers and duties defined. By section 13 it is provided that, for the purpose of constructing necessary irrigating canals, and acquiring the necessary property and rights, and otherwise carrying out the provisions of the act, the board of directors are to determine and estimate the amount of money necessary to be raised, and to call a special election, at which shall be submitted to the electors the question of voting bonds of said district, in the amount determined, and for the purpose mentioned. By section 14 it is provided that bonds may be sold from time to time, as may be most advantageous to raise the money for the construction of canals, and the acquisition of property and rights, and in otherwise carrying out the purposes of the act. The manner in which the bonds are to be sold is prescribed by the section, and it is provided that, in no event, shall such bonds be sold for less than ninety-five per cent of their face value. By section 22 it is provided that, after adopting a plan for the work contemplated, the board shall give notice by publication, inviting bids for the construction of all, or a part of, the proposed work, describing the work to be done, and inviting sealed proposals therefor, stating that the contract will be let to the lowest responsible bidder, and giving

notice of the time and place for opening such proposals. It is provided that the board shall let the work, either in portions or as a whole, to the lowest responsible bidder, or they can reject any or all bids, and readvertise for proposals, or may proceed to construct the work under their own superintendence with the labor of the residents of the district. By section 24 of the act, as it then existed, it is provided that the costs and expenses of purchasing and acquiring property, and of constructing the works therein provided for, shall be wholly paid out of the construction fund. Provisions are therein made for levy of assessments and tolls for salaries of officers, current expenditures, repairs, etc. By section 29 it is declared that "the board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void."

It is unnecessary here to speak of the alternative feature of the contract, mentioned in the petition, involving the alleged agreement of delivery and acceptance of the bonds of the district at their face value for the work of construction alleged to have been performed by the plaintiff. That branch of the controversy is not before us for consideration. The action was tried in the court below as one at law for the recovery of a money judgment, and, for the purpose of this case, a right of recovery is to be determined solely on defendant's liability for a judgment for money for the value of the services performed under the alleged contract.

The section of the statute providing for the disposition of bonds, as it stood at the time the work was being performed, contemplated that they should be sold, after advertisement, to the highest bidder, and for not less than ninety-five per cent of their face value, the proceeds to constitute a construction fund, to be used in the construction of the contemplated canal. This seemed to be

the view of the legislature, which, at its last session, amended the section, by providing, under certain conditions therein mentioned, for an exchange of bonds for the work of construction. The original and amended sections were considered and construed in *Baltes v. Farmers Irrigation District*, 60 Nebr., 310. It appears by the stipulation of facts that a proposition to destroy the bonds, before authorized to be issued, was submitted to the voters of the district in June, 1898, and adopted, and in pursuance thereof, by order of the board of directors, the bonds were destroyed in the succeeding month. As to what effect this proceeding had on the prior transaction, we are not in this case required to express an opinion. By the stipulated facts, the bonds authorized to be issued by the defendant district were advertised for sale; "but no one could be found who was ready to purchase said bonds." From this stipulation and the allegation in the petition that the bonds authorized to be issued were never sold, but remained the property of the district, but one inference can be drawn, viz., that the district officers were unsuccessful in disposing of the bonds at the minimum sum permitted by law, and therefore the bonds remained in the hands of the board of directors of the district, undisposed of.

This brings us directly to the proposition of whether a cause of action can be stated in the petition, when it is disclosed on the face of it that no construction fund, as contemplated by statute, has been created out of which can be paid the expenses incurred in the construction work. Under the stipulated facts it is shown that, after bonds had been voted, there was an order of the board of directors providing that the residents of the district might go to work on its canal, but all who did go to work must take their chances as to pay for such work, and must take bonds instead of money if the bonds could not be sold. It was under the authority thus attempted to be given that the defendant did the work for which suit is brought to recover the value thereof. At the time the work was

performed the bonds had not been advertised and offered for sale; nor had proposals been invited for the construction of the whole or any part of the proposed canal. The authority of the board of directors to act was a matter of which the plaintiff was chargeable with notice. In his dealings with them he was required to act with reference to the authority, limitations and restrictions imposed upon it by the legislation authorizing the organization and providing for the government of the district. *Forrest v. St. Francis Levee District*, 77 Fed. Rep., 555, 561. The defendant is solely a creature of statute, organized for a public purpose, to-wit, to furnish water for irrigation purposes, to be usefully and beneficially applied to the lands within the district. It is, as is held in the case of *Board of Directors v. Collins*, 46 Nebr., 411, a public rather than a municipal corporation, and its agents are public agents of the state. Resort must be had to the statute providing for the organization and government of an irrigation district to determine the power and scope of authority of the board of directors to incur the liability sought to be enforced in this action. *Board of Directors v. Collins, supra;* Dillon, Municipal Corporations [4th ed.], sec. 25; *In re Bonds Madera Irrigation District*, 28 Pac. Rep. [Cal.], 272; *Boehmer v. Big Rock Creek Irrigation District*, 48 Pac. Rep. [Cal.], 908.

It was evidently the intention of the legislature to require that, to authorize the incurrence of any indebtedness for construction work, there must first be created a construction fund out of which the same may be satisfied. This is made manifest by a consideration of the sections heretofore referred to, and giving force and effect to the different provisions therein contained. It is first provided how a construction fund may be created. Then it is provided how the contracts for work of construction may be entered into. It is further provided that all expenses incurred in such construction work shall be wholly paid out of the construction fund; and, lastly, it is declared with emphasis, and as mandatory,

in words that can not be misunderstood, that the board of directors or other officers of the district shall have no power to incur any liability whatever in excess of the provisions of the act, and that such indebtedness, if incurred, shall be and remain absolutely void. It was not, we think, the intention of the legislature that an indebtedness of this character could be incurred to be met at some indefinite time in the future, or to be satisfied from some other source than that expressly provided for in the act referred to. It was, we doubt not, the intention of the legislature that all steps necessary to, and required for, the creation of a construction fund should be first taken, after which indebtedness in the construction of the proposed work might be lawfully incurred to the extent of the fund so created. The sections referred to contemplate that, in respect to the construction of the proposed work, the business should be conducted on a cash and not on a credit basis, and the indebtedness arising thereby should be wholly met from the fund thus provided.

The right of recovery in this action, under the pleadings and evidence, must be based upon a satisfaction of the judgment obtained, wholly outside of, and contrary to, the express provisions of the act regarding the payment of an indebtedness incurred in the work of construction. The affirmance of the judgment establishes a legal and binding obligation, and implies compulsory satisfaction by some other method, and from another source, than that expressly provided by statute. If there be, as stated in the petition and stipulated facts, no construction fund provided, then it logically follows that no legal claim against the district can exist, and that such claim must be satisfied, if at all, contrary to the express provisions of the act.

In principle, the case falls within that announced in *McElhinney v. City of Superior*, 32 Nebr., 744, wherein it is held that "the city council of a city of the second class cannot incur any expense or enter into any contract on

behalf of the city unless an appropriation shall have been previously made concerning such expenditure, except in cases where the proposition has been sanctioned by a majority of the legal voters of the city." Says NORVAL, J., in the opinion of the court: "These sections were construed by this court in *City of Blair v. Lantry*, 21 Nebr., 247. We quote from the opinion: 'It will be seen that no contract can be made by the city council or any committee or any member thereof, or any expense incurred by any of the officers or departments of any corporation, whether such expense shall have been ordered by the city council or not, unless an appropriation shall have been previously made concerning such expense, except in certain cases where a further expenditure is sanctioned by a majority vote of the legal voters of the city.' This is the only reasonable construction that can be placed upon the language used by the legislature, and the decision will be followed."

The statute under consideration is in substance and in the main an adoption and re-enactment of the irrigation act of the state of California. The supreme court of that state, in construing their statute, in *Hughson v. Crane*, 47 Pac. Rep. [Cal.], 122, says: "The irrigation act is evidently framed upon the theory, and with the intention on the part of the legislature, that the affairs of the district shall be conducted upon a ready-money basis, and not upon credit; and, to enable the directors to carry out this purpose, provision is made for levying special assessments for the payment of salaries, wages, and expenses of management, and also for the sale of bonds by which to make the payments required upon the contracts for the construction of the works. This is clearly seen by the provision in section 16 [our 14], authorizing the board to sell the bonds 'from time to time in such quantities as may be necessary and most advantageous to raise money for the construction of said canals and works,' coupled with the provision in section 36 [our 23] that 'the board may draw from time to time from the con-

struction fund, and deposit in the county treasury of the county where the office of the board is situated, any sum in excess of the sum of twenty-five thousand dollars,' and requiring the county treasurer to receive and be responsible for the disbursement of the same. The provision of section 15 [our 13], requiring the directors to estimate and determine the amount of 'money' necessary to be raised for the construction of the works, and to submit to the electors of the district the question whether bonds shall be issued 'in the amount so determined,' clearly implies that the estimate is to be of the 'amount of money' which may be received upon the sale of the bonds, at not less than 90 per cent [ours, 95 per cent] of their face value; that the cost of the works is to be estimated in money, and not in bonds, and is to be paid out of the construction fund created by the sale of the bonds. For the protection of the taxpayers, a limit is placed upon the rate at which the bonds may be sold,—90 per cent of their face value; and, as a special assessment can not be levied without their vote, they have control over the expenditures of the district. The wisdom of this provision is manifest, and is fully illustrated in the financial history of irrigation district bonds during the last few years,—a matter of which we can take judicial knowledge. If the construction of the works is to be paid for in money immediately upon their completion, or in installments as the work progresses, a contract for their construction can be obtained at a much less price than if payment is to be made in the obligations of the district whose value is constantly fluctuating." The views entertained in the opinion quoted from appear to us clearly to express the intention of the legislature, and while the authority is not binding upon us, because the decision was rendered subsequently to the enactment of the law by our legislature (*Myers v. McGavock*, 39 Nebr., 843), we, nevertheless, regard it as an authoritative interpretation of similar statute by the court of last resort of a sister state, worthy of citation in support of the interpretation placed by us on the statute in question.

Much of the argument of counsel on both sides is devoted to a discussion of the provisions of section 22, wherein it is provided that proposals for construction work shall be invited by published notice in a newspaper or newspapers, which shall describe the work to be done, and state that it will be let to the lowest responsible bidder, giving the time and place for the opening of the proposals. It is further provided that the board of directors shall let the work in portions or as a whole to the lowest responsible bidder, or they may reject any and all bids, and readvertise for proposals, or may proceed to construct the work under their own superintendence with the labor of the residents of the district. It is urged that, because, under the stipulated facts, authority was given to do the work under the superintendence of the directors before any proposals had been invited as provided in the section referred to, the board acted without authority, and a contract so entered into, as in the case of the plaintiff, would be void for want of such authority on the part of the directors. We have not deemed an interpretation of this section as essential to a proper disposition of the case. We are of the opinion, however, that it was the legislative intendment that sealed proposals should first be invited as in the section directed, and the bids thereunder accepted or rejected, before the directors would be authorized to enter into a contract for the construction of the work under their superintendence with the labor of the residents of the district. The language of the section, if force is given to all of its different parts, will not permit of the construction as contended, that public notice asking for proposals for construction work need not be given, but the work may, in the first instance, and regardless of the question of notice asking for bids, be undertaken by the residents of the district under the superintendence of the directors. It was, we think, the evident intention of the legislature that, by first advertising for bids, a basis might be laid for the determination of the question as to the proper cost of the

proposed work, after which it might be proceeded with, either under the bids received, or, after the bids are rejected, by the residents of the district in the manner indicated. The construction thus given would not, however, preclude a recovery by those who had performed the work for which the district had received the benefit, even though the contract under which it is done may be found to be illegal. Notwithstanding the illegal contract, if the indebtedness incurred was within the power and authority of the directors to contract, and the districts had received the benefits thereof, it would be liable for the reasonable value of the services rendered, not exceeding the contract price. *Lincoln Land Co. v. Village of Grant*, 57 Nebr., 70; *Grand Island Gas Co. v. West*, 28 Nebr., 852; *Nebraska City v. Gas Co.*, 9 Nebr., 339; *Clark v. Commissioners of Buffalo County*, 6 Nebr., 192. Under the other sections referred to, and in the absence of a construction fund, the directors were wholly without authority to incur any liability against the district for work of construction of the proposed canal, and their acts, with respect to the alleged contract under consideration, were *ultra vires*, and without force or binding effect as against the district. While the construction given may appear to work a hardship upon the plaintiff, yet, if a valid indebtedness of a few dollars or a few hundred dollars can be incurred in violation of the express provisions of the statute, there is no limit by which to confine the amount of indebtedness that may thus be created, thereby placing the property of the district at the mercy of incompetent or designing officers and agents, and setting at naught the will of the legislature.

It follows, from what has been said, that no cause of action is stated in the petition, and no recovery can be had thereunder or under the stipulation of facts. The judgment is

REVERSED.

KENT K. HAYDEN, APPELLANT, V. EDWARD T. HUFF ET AL., APPELLEES.

FILED OCTOBER 18, 1900. No. 9,186.

Subrogation: ENDS OF JUSTICE: INNOCENT PARTY. Subrogation is enforced to subserve the ends of justice, but will not be applied when it will wrong an innocent party, and where the one invoking the doctrine has been grossly negligent.

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

Cobb & Harvey, for appellant:

It is well settled that the doctrine applicable to voluntary payments has no application where the payment is made to redeem one's land from a mortgage or incumbrance. *Rardin v. Walpole,* 38 Ind., 148; *Newell v. Hurlburt,* 2 Vt., 351; *Platt v. Squire,* 5 Cush. [Mass.], 551; *Snowden v. Dunlavey,* 11 Pa., St., 522.

A. G. Wolfenbarger, T. F. H. Williams, A. S. Tibbets, James E. Philpott and *Lambertson & Hall, contra.*

NORVAL, C. J.

On April 4, 1892, Kent K. Hayden, plaintiff and appellant, purchased of Edward T. Huff, one of the defendants, lots 3 and 4, block 28, in South Lincoln, for the sum of $2,200, subject to a mortgage thereon of $1,000, executed by said Huff and wife to the Union Savings Bank, which was a subsisting lien upon said real estate. The title to the lots at the time of the purchase stood in the name of C. U. Crandall, to whom Huff had conveyed the property on October 26, 1891. Crandall and wife, at the request of Huff, executed a deed to the plaintiff. Huff represented to him before the sale that the lots were free and clear of all liens and incumbrances, except said mortgage and a certain judgment in favor of the Nebraska

Savings Bank, and produced an abstract of title to the property showing the facts so to be. The judgment Huff procured to be released as a lien against the lots, and plaintiff, relying upon said representations of Huff and the abstract of title, paid the consideration for the lots, and subsequently, on September 28, 1892, paid off the mortgage to the Union Savings Bank, and the same was thereafter released and discharged of record. Afterwards plaintiff ascertained for the first time that in December, 1891, and during the September, 1891, term of the district court of Lancaster county, three judgments were obtained against said Huff and others, which were liens upon said lots, one in favor of the defendant, Alice A. Minick, for the sum of $621.35, besides costs, and the other two in favor of the Lincoln Savings Bank & Safe Deposit Company and George F. Wolfe, respectively. The several actions in which said judgments were obtained having been commenced prior to the September term of court, said judgments were liens upon said lots from September 21, 1891, the first day of said term, although the deed from Huff to Crandall was made prior to the rendition of the judgments, but subsequent to the first day of said term of court. *Norfolk State Bank v. Murphy*, 40 Nebr., 735; *Ocobock v. Baker*, 52 Nebr., 447. In July, 1895, an execution was issued on the Minick judgment, which was levied upon the lots in question, and the property was sold under the writ to her. This suit was afterwards instituted by Hayden to revive and reinstate the mortgage given to the Union Savings Bank, which mortgage had been paid, canceled and discharged of record; and the petitioner prayed that he be subrogated to the rights of the mortgagee. Upon the trial the court found the issues against the plaintiff, and dismissed the action. Hayden appeals.

The facts do not disclose a proper case for the application of the doctrine of subrogation, since plaintiffs' loss is attributable to his own laches. Had he been diligent and examined the records of the district court of Lan-

caster county, he would have discovered that when the property was conveyed to Crandall, suits were pending against Huff which might, as they did, ripen into judgments and become liens prior in time to the deed to Crandall. The principle of subrogation rests upon equitable grounds, and it can not be successfully invoked as a reward for negligence, or where to do so would deprive another party of his legal rights. *Rice v. Winters*, 45 Nebr., 517; *Seieroe v. Homan*, 50 Nebr., 601; *Ocobock v. Baker*, 52 Nebr., 447. A case quite similar to the one at bar is *Conner v. Welch*, 51 Wis., 431, 439, and Lyon, J., in delivering the opinion of the court, said: "The precise question is, therefore, whether, under the circumstances of the case, the plaintiff is entitled to be relieved of those satisfactions and of such agreement. Has he shown himself entitled to have them set aside, canceled and held for naught? The circuit court found (no doubt correctly) that there was no fraud or collusion on the part of the defendant Welch, the owner of the Stein judgment, and granted the relief prayed, on the sole ground that plaintiff acted in ignorance of the existence of that judgment, in the matter of the satisfaction and discharge of the mortgages. Undoubtedly the plaintiff knew nothing of the judgment, and, presumably (although he has not so testified), had he known of its existence, he would not have had the mortgages discharged, or made the contract he did with Osborne for the conveyance. But that alone is not sufficient to entitle him to have the discharged mortgages reinstated as valid liens upon the land. He must also have exercised reasonable diligence to ascertain whether subsequent liens had been put upon the property. A court of equity never relieves a man from the consequences of his own culpable negligence. Discussing the rules upon which courts of equity proceed in relieving, or refusing to relieve, against contracts made or acts done through mistake or in ignorance of material facts, Judge Story says that 'where an unconscionable advantage has been gained by mere mistake or misapprehension, and there

was no gross negligence on the part of the plaintiff in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo*, equity will interfere, in its discretion, in order to prevent intolerable injustice.' " To apply the equitable principles of subrogation to the case at bar would be prejudicial to the rights of Alice A. Minick, who purchased the property in reliance upon the release and discharge of the mortgage. Subrogation is enforced to subserve the ends of justice, but never when it will wrong an innocent party and when the one invoking the doctrine has been grossly negligent or guilty of laches. The decree is right, and is accordingly

AFFIRMED.

HENRY LEISENBERG V. STATE OF NEBRASKA.

FILED OCTOBER 18, 1900. No. 11,530.

1. **Information:** LANGUAGE OF STATUTE. Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute.

2. ———: TIME. It is not essential, in an information or indictment charging burglary, to state the particular hour of the night at which the crime was committed.

3. ———: FILING DURING TERM: DISCHARGE. Where no information or indictment is filed against a defendant, charged with the commission of a crime, during the term at which he was held to answer, his detention is unlawful and he is entitled to be discharged.

4. ———: SUBSEQUENT TERM: TRIALS: MOTION IN ARREST OF JUDGMENT. But, if at a subsequent term of the court, an information is filed and defendant pleads not guilty, the court has power to try the issue raised; and after verdict of conviction has been rendered, it is not error to deny a motion in arrest of judgment.

5. **Charge of Court.** It is not error for the court in a criminal case to say to the jury as a part of its charge: "You are not at liberty to disbelieve as jurors if from all the evidence you

believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered."

6. **Burglary:** NIGHT-TIME. The fact that a building was feloniously broken and entered between the hours of 6:30 P. M. and 9 P. M. on March 29 does not show, with the requisite degree of moral certainty, that the crime charged was committed in the night season.

7. **Verdict:** CONJECTURE. A verdict resting upon conjecture can not be permitted to stand.

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

Winfield S. Strawn, for plaintiff in error.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy, contra.*

SULLIVAN, J.

Henry Leisenberg was convicted of burglary in the district court for Douglas county and sentenced to imprisonment in the penitentiary for a period of two years. The information was drawn under section 48 of the Criminal Code and charged a breaking and entering in the night season with intent to steal. The particular hour at which the crime was committed was not averred, and upon that omission was based a motion in arrest of judgment. The trial court held that the facts pleaded constituted an offense and refused to allow the motion. This ruling was not erroneous. The statute states the elements of the crime and it is, in such case, generally considered sufficient to describe it in the language of the statute. *Whitman v. State,* 17 Nebr., 224; *Bartley v. State,* 53 Nebr., 310; Wharton, Criminal Pl. & Pr. [8th ed.], sec. 220. The requirements of good pleading are ordinarily satisfied by alleging the ultimate facts; and no sufficient reason is perceived for making the information or indictment charging the crime of burglary an exception to the rule. The intimation in *Winslow v. State,* 26 Nebr., 308, 312,

that the averment of the particular hour is essential, is not, we believe, supported by any American authority and can not be approved. *Commonwealth v. Williams*, 2 Cush. [Mass.] 582; *People v. Burgess*, 35 Cal., 115. "As a rule, it is unnecessary," says Wharton, "to state the hour at which the act was done, unless rendered so by the statute upon which the indictment is framed. In burglary, indeed, it is usual to state it; but alleging the offense to have been committed in the night, without mentioning the hour, has been held to be sufficient." Wharton, Criminal Pl. & Pr. [8th ed.], sec. 130.

Another ground upon which the defendant moved in arrest of judgment was the failure of the prosecuting attorney to file an information against him during the term of court at which he was held to answer. Under the provisions of section 389 of the Criminal Code the defendant was entitled to be discharged from custody because no formal accusation was lodged against him at the January term, although such term adjourned on the day following that upon which the preliminary examination was held. *Ex parte Two Calf*, 11 Nebr., 221; *State v. Miller*, 43 Nebr., 860. The order made by the magistrate at the preliminary examination was effective during the January term, but no longer; when that term adjourned, its force was spent and the defendant was held in jail without authority. His detention was wrongful, but that did not deprive the court of power to try the issue raised by his plea of not guilty. The offense charged was within the jurisdiction of the court and the facts pleaded constitute a crime. This being so the motion in arrest of judgment was properly denied. Criminal Code, sec. 493.

Fault is found with the eighth instruction, in which the court said to the jury: "You are not at liberty to disbelieve as jurors if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." This instruction has never, to our knowledge, received judicial condemnation; on the contrary, it was

considered and distinctly approved in *Willis v. State*, 43 Nebr., 102, and *Barney v. State*, 49 Nebr., 515.

It is further contended on behalf of the defendant that the evidence does not warrant the conclusion reached by the jury. This contention must be sustained. It appears the building described in the information was broken and entered after 6:30 P. M. on March 29, 1900, and that at 9 o'clock of the same evening the defendant was found in possession of some tools which were the fruits of the crime. He took the stolen property to a second-hand store where he sold it for about one-sixth of its real value, stating to the purchaser that his name was August Baker. At the preliminary examination, he testified that he received the tools from August Baker, but did not state under what circumstances or for what purpose they were received. This was practically all the evidence given at the trial tending to show defendant's complicity in the crime. No exculpatory proof was offered. Possession of stolen property is, under some circumstances, evidence of larceny; and it may or may not be evidence of burglary. In *Metz v. State*, 46 Nebr., 547, 555, it is said: "In burglary it is necessary that the breaking and entering be committed in the night-time, and the presumption will not be indulged that the breaking and entering were in the night season from the fact alone that the defendant was found in possession of the fruits of the crime; but in prosecutions for burglary, like those for larceny, the effect to be given to the fact of possession is solely for the jury." This is undoubtedly a correct statement of the rule. *Knickerbocker v. People*, 43 N. Y., 177; *State v. Bishop*, 51 Vt., 287; *State v. Snell*, 46 Wis., 524; *Neubrandt v. State*, 53 Wis., 89; *Trent v. State*, 31 Tex. Cr. Rep., 251; 3 Greenleaf, Evidence [15th ed.], p. 106, note *b;* Wills, Circumstantial Evidence [4th ed.], 61; 1 Wharton, Criminal Law [8th ed.], sec. 813.

In this case the evidence warrants the conclusion that the property found in defendant's possession was taken from Naught, the complaining witness, by breaking and

entering his shop; and consequently the fact of possession points with as much certainty to a felonious breaking and entry of the shop as it does to the theft of Naught's property. It indicates that Leisenberg violated either section 48 or 53 of the Criminal Code—that he broke and entered the shop of the complaining witness either in the night season or in the daytime. And the fact of possession, coupled with the other incriminating circumstances, namely, the sale of the tools at much less than their actual value and the attempted concealment of identity (Wills, Circumstantial Evidence, 57) makes the inference that defendant was guilty of house-breaking altogether justifiable. But, while the evidence was, perhaps, sufficient to warrant the jury in finding that Leisenberg was a criminal, it was not sufficient to justify them in finding that he was guilty of the particular crime charged. Naught's shop was broken and entered after 6:30 o'clock P. M., but how long after does not appear. Neither was it shown whether the time referred to was standard time or true local time. There is no evidence that the act in question was not done in the daytime, nor that it was done in the night season; and there is no fact in the record from which such conclusion may be fairly deduced. Upon this essential point the jury made no deduction from the facts; they simply guessed. A verdict resting upon conjecture can not be permitted to stand. *Ashford v. State*, 36 Nebr., 38; *Waters v. State*, 53 Ga., 567; *People v. Griffin*, 19 Cal., 578.

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

REVERSED AND REMANDED.

GEORGE ZIMMERMAN ET AL. V. STATE, EX REL. ED BAUMAN.

FILED OCTOBER 18, 1900. No. 11,366.

1. School District: ELECTORS: OFFICERS: EXPENDITURE OF MONEY. The officers of a school district can not refuse to execute a valid order of the district electors involving the expenditure of money, on the ground that the taxes levied for the expenses of the current year can not, until they have been collected, be made the basis of contracts for such expenses.

2. Taxes: LEVY: FUND. Taxes levied at the annual school meeting held just prior to the commencement of the school year consitute a fund against which warrants may be drawn.

3. Case Distinguished. *School District v. Stough*, 4 Nebr., 357, distinguished.

4. School District: ELECTORS: REMOVAL OF SCHOOLHOUSE: MANDAMUS. Where the electors of a school district have, in a lawful manner, ordered the removal of their schoolhouse, and the funds in the treasury, together with the taxes levied for current expenses, are sufficient to meet all district obligations incurred or contemplated, the order is valid and its execution will be enforced by mandamus.

5. ———: ———: ———: MAJORITY: UNCERTAINTY OF ORDER. Where a schoolhouse is less than three-fourths of a mile from the geographical centre of the school district, a bare majority vote "to move the schoolhouse" is void for uncertainty, and is also void for want of power in a mere majority to change such schoolhouse site.

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

R. W. Sabin and *H. E. Sackett*, for plaintiffs in error.

Griggs, Rinaker & Bibb, contra.

SULLIVAN, J.

The relator, Ed Bauman, brought this action for a writ of mandamus requiring the respondents, who constitute the district board of school district No. 44 of Gage county, to perform an official duty which, it is

claimed, was imposed on them by a vote of the district electors at the annual meeting held in June, 1898. From a judgment awarding the peremptory writ this proceeding in error is prosecuted. It is very clear from the record that the district electors voted at the annual meeting in 1898 to remove their schoolhouse from section 21, where it then was, to section 32, where it had formerly been. The defendants refused to remove the building, and seek now to justify their refusal by showing that there was not sufficient money at their disposal to pay the expense of removal, together with all other necessary expenses of the district. If the tax levy of 1898 be regarded as an available resource of the district, there can be no doubt about the defendants having ample means with which to remove the schoolhouse and meet all other obligations for that year. The contention, however, grounded mainly on *School District v. Stough*, 4 Nebr., 357, is that no contracts could be lawfully made, or obligations incurred, on the faith of taxes which had been levied but had not been collected. We think the case cited was correctedly decided, but do not consider it a controlling precedent for this case. It is quite evident that the legislature did not intend to confer upon school districts authority to build schoolhouses on the credit of uncollected taxes. But a different purpose is disclosed with respect to ordinary current expenses. They are to be paid out of the taxes levied for the year in which they are incurred. The school year commences on the second Monday of July. Compiled Statutes, 1899, ch. 79, subdiv. 2, sec. 1. At the annual school meeting held on the last Monday in June (sec. 1, *supra*) the qualified voters are authorized to determine "the amount necessary to be expended the succeeding year, and to vote a tax on the property of the district for the payment of the same." Sec. 10, subdiv. 2, *supra*. This language admits of only one construction. It means that the general expenses for each school year shall be paid out of the taxes levied at the annual meeting held just prior

to the commencement of such year. The taxes so levied constitute a fund against which warrants may be drawn; and such warrants, when presented to the district treasurer, are, in default of cash, required to be registered and paid in the order of their registration. Compiled Statutes, 1899, ch. 93. They bear interest from the time they are presented to the treasurer (Compiled Statutes, 1899, ch. 44, sec. 10) and, under the act of 1895, the sinking funds of the district may be invested in them. Sec. 17, ch. 93, *supra.*

The defendants were required to move the schoolhouse by August 1, 1898, and it appears that they had at that time sufficient money with which to pay the expense of removal. The fact that they did not have on hand actual cash with which to pay the teacher's wages for the entire school year, together with all other contemplated expenses, furnishes no excuse for failing to execute the lawfully expressed will of the district electors. They have still under their control sufficient means to enable them to remove the building and meet all other obligations of the district; and it is their duty to do now what they should have done before.

One other point will be briefly noticed. It is contended that the order of removal made in 1898 was rescinded at the annual meeting in 1899. This contention rests entirely upon the following entry in the directors' record of the 1899 meeting: "The vote on moving the schoolhouse, twenty-five for moving, twenty-four not to move it." This was probably intended as a direction by the voters to the school board to carry out the order made in 1898. If that was not the intention, it was void for uncertainty, and for want of power in a mere majority to change a schoolhouse site which was within three quarters of a mile of the geographical centre of the district.

The judgment is

AFFIRMED.

COMMONWEALTH MUTUAL FIRE INSURANCE COMPANY ET AL. V. HAYDEN BROTHERS.

FILED OCTOBER 18, 1900. No. 11,468.

1. **Policy of Insurance:** RECITALS: CONTRACTUAL ELEMENTS. Recitals which are not contractual elements of a policy of insurance are not conclusive on the parties thereto.

2. **Contract:** STATE POLICY: ENFORCEMENT. Contracts which contravene the established policy of this state can not be enforced by action in its courts.

3. **Foreign Insurance Company:** CONTRACTS. A foreign insurance company which has done business in this state without complying with the conditions prescribed by our statutes can not rightfully claim of our courts, as an exercise of comity, the enforcement of contracts made with our citizens insuring property in this state.

4. **Foreign Judgment:** ASSESSMENT: INSOLVENT: SUMMONS. Full faith and credit will be given a judgment of a sister state by which an assessment has been made against members of an insolvent mutual insurance company, although such members were residents of this state and not served with summons or other jurisdictional process.

5. **Stockholder:** DECREE: CORPORATION. A stockholder is bound by a decree of a court of equity against a corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. *Hawkins v. Glenn*, 131 U. S., 319.

6. ———: JUDGMENT: INTEGRAL PART OF CORPORATION. The theory upon which a stockholder is held to be concluded by a judgment rendered against him in a suit brought to enforce a corporate obligation is that, although not personally served with process, he is before the court as an integral part of the corporation and that the corporation represents him.

7. **Mutual Insurance Company:** MEMBERSHIP: JURISDICTION. Membership in a mutual insurance company ceases with the expiration of the member's policy and payment of liabilities incurred while the policy was in force. Jurisdiction of such a company does not include jurisdiction of ex-members who are not in fact indebted on account of the policies which they once held.

8. ———: ———: ———: PLEA. And in an action in this state to enforce the judgment of a sister state against such ex-member he may allege and show that the court had no jurisdiction to render such judgment against him.

9. **Action to Enforce Foreign Judgment:** ONUS PROBANDI. In an action to enforce the judgment of a foreign court of general jurisdiction, the burden is on the defendant to show the non-existence of jurisdictional facts.

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

Richard S. Horton, for plaintiffs in error.

T. J. Mahoney, contra.

SULLIVAN, J.

The Commonwealth Mutual Fire Insurance Company, a Massachusetts corporation, issued two fire insurance policies to Hayden Bros., insuring property owned by them and in their possession at Omaha, in this state. After one of the policies had expired, but while the other was in force, the company became insolvent and passed into the hands of a receiver, who brought this action to recover assessments made against the defendants for the purpose of paying losses and liabilities incurred. The district court held, on demurrer to the petition, that the facts pleaded did not constitute a cause of action, and gave judgment accordingly. Counsel for plaintiff contends for two propositions: (1) That the contracts were made in Massachusetts; that they are valid in that state, and therefore enforceable in this. (2) That the assessments were made by a court of general jurisdiction in the domicile of the corporation, and that the amounts charged against defendants and their obligation to pay the same are established by a valid adjudication.

Nothwithstanding the recitals of the policies indicating that they were issued by the company's Omaha agency, we think it clear that the averment of the petition, that they were executed in Massachusetts, must be taken as true. The recitals are not contractual elements, and consequently are not conclusive upon the plaintiff. It has, in effect, alleged that they are false, and no reason

is perceived why that allegation may not be sustained by proof. 1 Greenleaf, Evidence [15th ed.], sec. 285. But whether these contracts were made in Massachusetts or Nebraska, they contravene the policy of this state and could not be enforced by action in our courts. The statute prescribing the conditions upon which foreign insurance companies may do business here is a police regulation designed to protect our people against irresponsible insurers. It forbids them to do any insurance business, directly or indirectly, in this state until they have complied with its terms; and the principle of judicial comity does not require our courts to actively aid in the enforcement of contracts which interfere with, and tend to frustrate, the policy established by the legislature. *Rose v. Kimberly & Clark Co.*, 89 Wis., 545; *Cowan v. London Assurance Corporation*, 73 Miss., 321; *Seamans v. Temple Co.*, 105 Mich., 400; *Seamans v. Zimmerman*, 91 Ia., 363; *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Nebr., 70, 78. The company having engaged in business in this state without authority and in defiance of the policy of our laws, is not now in a position to insist that our courts should, as an exercise of comity, give effect to its contracts. The defendants agreed to pay all lawful assessments made against them. This agreement was valid in Massachusetts, but will not support an action here. These remarks dispose of plaintiff's first contention.

The claim that the amounts of the assessments and the liability of the defendants to pay them are unalterably fixed by the decree and orders of the supreme judicial court of Massachusetts raises a question of jurisdiction which will be now considered. In *Hawkins v. Glenn*, 131 U. S., 319, 329, it was held: "The stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of a corporation that, in view of the law, he is privy to the proceedings touching the body of which

he is a member." The rule thus laid down by the supreme court of the United States has been generally adopted by other courts (*Glenn v. Williams*, 60 Md., 93; *Mutual Fire Ins. Co. v. Phœnix Furniture Co.*, 108 Mich., 170; *Lycoming Fire Ins. Co. v. Langley*, 62 Md., 196; *Langworthy v. Garding*, 74 Minn., 325; *Parker v. Stoughton Mill Co.*, 91 Wis., 174; *Howard v. Glenn*, 85 Ga., 238), and is not questioned by the learned counsel for defendants. He concedes that the Massachusetts court had authority to make an adjudication binding upon the stockholders of the company without service of summons or other jurisdictional process upon them; but he insists that his clients were not stockholders when the assessments were made, nor at the time the liabilities were incurred upon which the assessments are founded. The petition shows that the policies issued to Hayden Bros. had expired before the assessments in question were made by the directors or confirmed by the court; and it fails to show that such assessments were made to meet losses or expenses incurred during the life of either policy. The allegations with respect to the assessments and the purposes for which they were made are as follows:

"6. And the plaintiffs aver that not being possessed of cash funds sufficient for the payment of incurred losses and expenses, and in pursurance of the decree of the supreme judicial court for the county of Suffolk, commonwealth of Massachusetts sitting in equity, in accordance with sections 47 and 49 of chapter 522 of the Acts of 1894 of the commonwealth of Massachusetts, on the 7th day of March, 1896, the directors ordered and made an assessment of $250,000 upon its members liable to assessment, which said assessment was subsequently ratified, confirmed and established by decree of said court, dated March 25, 1896; that afterward said assessment was computed and made up against those who had taken policies from said plaintiff company who were liable thereto, including said defendant, and was further ratified, confirmed and established as so computed and

made up upon the persons and for the amounts as appear in the schedule annexed to the decree of said court dated December 9, 1896, by which it appears that defendant was assessed upon said policy for the amount of $105.55, the same being the portion of its assessment on said policy.

"7. Said decree was duly rendered, and said orders were duly made by said supreme judicial court in said action, in which George S. Merrill was complainant, and said plaintiff company was defendant, said supreme judicial court having jurisdiction both of the parties and the subject-matter of said action. Said decree remains in full force and effect, and the assessment against said defendant so ratified by said decree remains unpaid."

The theory upon which a stockholder is held to be concluded by a judgment rendered against him in a suit brought to enforce a corporate obligation is that, although not personally served with process, he is before the court as an integral part of the corporation; that the corporation represents him, and that he is, as was said in *Hawkins v. Glenn, supra,* "privy to the proceedings touching the body of which he is a member." Assuming that the Massachusetts laws in regard to mutual insurance companies are like our own, it seems clear that membership in such a company ceases with the expiration of the member's policy and the payment of his share of the liabilities incurred while the policy was in force. If the member owes nothing on account of his policy and the policy has expired, the corporation is no longer authorized to represent him in court. Jurisdiction of the corporation does not include jurisdiction of ex-members who are not in fact indebted on account of the policies which they once held. And it seems equally plain that a court, in such case, can not invest itself with jurisdiction by declaring that it has it, or by finding jurisdictional facts which do not actually exist. The Massachusetts court could not make a conclusive adjudication by finding that the assessments which it ratified were based on

losses or expenses incurred during the time defendants were policy-holders. That would be concluding them by an adverse decision upon an issue which they had no opportunity to contest. The conclusiveness of the judgment depends upon the correctness of one of the findings upon which it rests. But while there can be no doubt about the right of defendants in this action to show that the assessments were not based on liabilities incurred during the period of their membership, and that the judgment pleaded is, therefore, void for want of personal jurisdiction, we think the petition is not defective for failing to allege the facts showing that the court acted within the limits of its authority. It was not for the plaintiff to show the existence of the jurisdictional facts; they should be presumed; it was for the defendants to show their non-existence. *Savin v. Bond*, 57 Md., 228; *Lowe v. Lowe*, 40 Ia., 220; *Bissell v. Wheelock*, 11 Cush. [Mass.], 277; *Leach v. Linde*, 70 Hun [N. Y.], 145, affirmed in 142 N. Y., 628. In *Council Bluffs Savings Bank v. Griswold*, 50 Nebr., 753, 757, it is said: "It will, upon reason and authority, be presumed, in the absence of proof to the contrary, that courts of general jurisdiction of other states possess the authority they assume to exercise, and that the methods of procedure pursued by them, although differing from the established practice in this state, are authorized by the laws of the states in which they act."

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

REVERSED AND REMANDED.

YOUNG MEN'S CHRISTIAN ASSOCIATION OF OMAHA, NEBRASKA, APPELLANT, V. COUNTY OF DOUGLAS AND GEORGE HEIMROD, COUNTY TREASURER OF DOUGLAS COUNTY, APPELLEES.

FILED OCTOBER 18, 1900. No. 9,279.

1. **Exemption From Taxation:** INTENTIONAL USE OF PROPERTY. An intention to use property occupied for business purposes at some uncertain time in the future for purposes which will render it exempt from taxation under the laws of the state will not preclude its being taxed under the general revenue laws, so long as occupied for such business purposes.

2. ———: STATUTES: CONSTRUCTION. Statutes providing for exemption of property from taxation when used for purposes therein mentioned, being an exception to the general rule of taxation and in derogation of the equal rights of all, are to be strictly construed.

3. **Young Men's Christian Association:** PARTIAL USE OF PROPERTY FOR BUSINESS PURPOSES. The Young Men's Christian Association of Omaha, being organized and incorporated for education, charitable and religious work, owned certain real estate, upon which was erected a building, used by it for the purpose of carrying forward the object of its organization, except the first floor thereof, which was rented for business purposes, the rents being applied to the work of the association. *Held*, That the portion of the property occupied for business purposes was not used excusively for educational, charitable and religious work, and therefore not exempt from taxation under the general revenue laws of the state.

ERROR to the district court for Douglas county. Tried below before KEYSOR, J. *Affirmed.*

Acheson & Adams, for appellant.

Howard H. Baldrige, County Attorney, and *H. L. Day, Deputy, contra.*

HOLCOMB, J.

A petition was filed for the purpose of obtaining an order of injunction to restrain the appellees, the county

of Douglas and the county treasurer thereof, from collecting certain taxes alleged to have been illegally assessed against the appellant's property situated in Omaha, Douglas county, and consisting of a city lot and a building erected thereon. In the petition it is alleged that the appellant is a duly organized corporation, under and by virtue of the laws of the state, maintained and existing for school, religious and charitable purposes, and that the property which is attempted to be assessed is exempt under the constitution and the laws of the state.

It is to be conceded at the outset, as it is admitted by the demurrer to the petition which was filed and under which the question was decided, that the object and purposes of the appellant corporation are such as to exempt the property, used exclusively by it for the purposes of its organization, from taxation under the laws of the state. The controversy as to its property being taxable, notwithstanding the exemption referred to, arises, and becomes apparent, from the following allegations in the second paragraph of the petition. After describing the lot of land owned by it, it is said: "That on this lot this plaintiff constructed, about the year 1887, and has ever since been maintaining a large four-story stone building, which building has always been used for said purposes of said Young Men's Christian Association. The first floor of said building the plaintiff is now leasing temporarily for business purposes, the rents thereof, as well as all income from all sources, being used exclusively in maintaining the educational, religious and charitable work of the plaintiff. It is the purpose and intention of the plaintiff to use the first floor for offices, gymnasium, baths, etc., but owing to its restricted income, it is compelled, for the present, to rent the same and apply the rents to the running expenses of the institution until its income from other sources and voluntary donations will pay the expenses of maintenance for the purposes aforesaid." Whether the assessment of taxes sought to be restrained is against the entire property, or only the

portion thereof rented for business purposes, is not disclosed by the petition. It is alleged that there was levied and assessed against the plaintiff and against the said lot of ground taxes for the years 1892, 1893, 1895 and 1896.

The demurrer to the petition raises but one question, and that is whether or not, under the constitution and laws of the state, the plaintiff's property, or the portion thereof rented for business purposes, is wholly and altogether exempt from taxation. It is provided by section 2, article 9, of the constitution that "the property of the state * * * shall be exempt from taxation, and such other property as may be used exclusively * * * for school, religious, * * * and charitable purposes, may be exempted from taxation, but such exemption shall be only by general law." By section 2, article 1, chapter 77 of the revenue laws it is provided: "The following property shall be exempt from taxation in this state: * * * * such other property as may be used exclusively * * * for school, religious, cemetery and charitable purposes." While there is an allegation that the plaintiff intends to use the rooms now rented for business purposes, for offices, gymnasium, and other purposes proper and necessary for carrying out the objects of its organization, we do not think such allegation can materially affect the decision of the case as to the present situation and uses to which the property is put as disclosed by the petition. An intention to use it for such purposes in the future, which would doubtless, when so used, exempt it from taxation, is not a present exclusive use, as contemplated by the constitutional and statutory provisions quoted. In the case of the *Academy of the Sacred Heart v. Irey*, 51 Nebr., 755, it is held that, in order to be exempt from taxation, the property must be used directly, immediately and exclusively for the purposes mentioned in the provisions referred to. It can not, we think, under the allegations of the petition, be successfully contended that, because of an intention to use the

property at some time in the future directly by the association for offices, etc., such intention is a direct and immediate use for such property. As has been aptly said by Mr. Justice Brewer in *Washburn College v. Commissioners of Shawnee County*, 8 Kan., 344, 349: "An intention to occupy is not equivalent to occupation, does not tend to prove it. The pleadings recognize the difference, for they admit the failure while they allege the intention to occupy. An occupation which is to be—though here it is only which may be—is no present use. Nor is ownership evidence of use. Full possession and perfect title are consistent with total failure to use. This is too plain to need either argument or illustration. If the framers of the constitution had intended to exempt all property belonging to literary and charitable institutions from taxation, the language employed would have been very different. They would have used the simple, ordinary language for expressing such intention. The fact that they ignored 'ownership', and made 'use' the test of exemption, shows clearly that they recognized the essential distinction between the two, and established the latter rather than the former as the basis of exemption." In *First Christian Church v. City of Beatrice*, 39 Nebr., 432, it is held that the possession and ownership of a lot which is rented, the rent derived therefrom being set apart to constitute a building fund for the purpose of erecting a church edifice thereon, which the society had resolved to build, was not a use of the property such as would exempt it from taxation under the provisions of the law referred to. It would, therefore, seem that an intention to use, at some indefinite time in the future, the rented portion of the property exclusively for the purposes for which the society is organized can not control in the determination of the legal effect of the present uses of the property as alleged in the petition.

The controversy is thus narrowed to the one question of whether the renting of the first floor of the building for business purposes, when the income or rental is de-

voted to the objects of the association, is an exclusive use of the property for religious and charitable purposes, within the meaning of the law. In arriving at a conclusion with respect to the matter we are to bear in mind that, the exemption claimed being an exception to the general rule of taxation, and in derogation of the equal rights of all, the statute is to be strictly construed. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the legislature; but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption. As is said by many eminent authorities, the exemptions are granted on the hypothesis that the association or organization is of benefit to society, that it promotes the social and moral welfare, and, to some extent, is bearing burdens that would otherwise be imposed upon the public to be met by general taxation, and that from these considerations the exemption is granted. There is, in this case, no question as to the organization which claims the exemption being one serving such beneficial purpose, and entitled to the privileges granted, in so far as its property is used exclusively for such purposes. It is not whether it is entitled to any exemption, but whether the property claimed to be exempt is exclusively used for the purposes of its organization. In determining this, we are to adhere to a strict rule of construction of the language used granting the exemption. *Cincinnati College v. State*, 19 Ohio, 110; *Stahl v. Kansas Educational Ass'n*, 54 Kan., 542; *State v. Assessors*, 35 La. Ann., 668.

It is argued that, the appellant being in the actual possession and use of the property taxed for the legitimate purposes of its charter, and renting two rooms temporarily, applying the rents to the charitable purposes of the organization, the property is within the protection of the statute exempting it from taxation, notwithstanding the temporary renting of the rooms on the

first floor for business purposes. To hold that property rented for business purposes is exempt when the rentals or income therefrom are used exclusively for religious, charitable or educational purposes, is extending the operation of the law further than is warranted by the language used. There is a clear and well defined distinction between the use of property and the use of the income derived therefrom. As was said in *First Christian Church v. City of Beatrice, supra*, p. 436: "It might be that these rents would be exempt under the provisions of the constitution and the statute to which allusion has been made, for it might be contended with much plausibility that the money derived from rents is property to be used exclusively for religious purposes." There may be an exclusive use of the income and not of the property from which such income is derived. Webster defines "exclusive" as "possessed and enjoyed to the exclusion of others; debarred from participation or enjoyment," and "exclusively" is defined, "in a manner to exclude; as, to enjoy a privilege exclusively." If the property be used by appellant exclusively for purposes of its own organization, this would exclude the idea of others using it for an entirely different or secular purpose. The fact that appellant is in the exclusive use of a portion of the property for the legitimate purposes of its organization, does not preclude the occupancy of other portions for purely secular purposes, and thus subject the property so used to the general law of taxation. This has been repeatedly held in other jurisdictions, where laws exempting from taxation property used for charitable, religious and educational purposes have been under consideration; and it occurs to us that the mere fact of proximity cannot vary the rule. Whether it be portions of the same property, or separate and distinct parcels, it is governed by the same rule of construction. Our law is broad and comprehensive, and provides that all property exclusively used for the purposes mentioned is exempt, negativing the idea that property not so used is entitled to such favor. In

Stahl v. Educational Ass'n, supra, where the language under which the exemption was claimed is very similar to that in the present instance, it is said, at page 549, by Horton, C. J.: "This construction omits to give sufficient force to the following language of section 6, viz., 'for the exclusive purposes of religion or education.' The property exempt from taxation must not only have been received, held or appropriated by or for the association, but it must 'be received, held or appropriated for the exclusive purposes of religion or education,' except the ground for a cemetery. Therefore, giving the provisions in the statute creating the exemption a strict construction, the charter must be interpreted to mean that the real or personal property of the association must be received, held or appropriated 'for the exclusive purposes of religion or education only;' not for lease, investment or profit. When its real estate is rented to a tenant, or its funds invested in other property for profit, or loaned at interest, the property thus rented or invested or loaned will be liable to taxation, as much as any other property that is rented or invested or loaned, no matter in whose hands it might be." In *Cincinnati College v. State, supra,* it is held: "The property of literary and scientific societies is only exempt from taxation when used exclusively for literary and scientific purposes. If used for other purposes it is liable to taxation, although the proceeds are in future to be applied for the promotion of literature and science." Says Caldwell, J.: "It would, we think, be rather a forced construction of language to say that this building, with its eight stores, its merchants' exchange, and its other rooms used for miscellaneous purposes, is used exclusively for literary and scientific purposes. * * * But when any society, no matter of what kind, whether scientific, literary, or religious, enters the common business of life, and uses property for the purpose of accumulating money, the government should, and we think the statute does, treat it in the same way persons are dealt with, who are using property in a similar manner, and engaged

in the same business. Government can not discriminate between the uses which different societies or individuals will make of the proceeds of their business, and determine that this society or individual will make a more worthy disposition of the proceeds of his business than that, and therefore the one shall be taxed and the other not." In *Cleveland Library Ass'n v. Pelton*, 36 Ohio St., 253, 258, it is said: "The fact that income derived from rents of parts of the building not used is devoted exclusively to the objects and purposes of the association, and not used for the benefit or profit of its members, can make no difference. The law looks to the property, as it finds it in use, and not what is done with its accumulations." To the same effect are *Gerke v. Purcell*, 25 Ohio St., 229; *State v. Assessors*, 35 La. Ann., 668; *People v. Collison*, 22 Abb. N. Cas. [N. Y.], 52; *Salem Lyceum v. City of Salem*, 154 Mass., 15. We have not overlooked the fact that many of the authorities cited are under exemption statutes differing from ours in some respects, and that some differences exist between most, if not all, statutory provisions governing the subject. Yet, there are principles which are generally applicable to all, and which we have attempted to apply in the present case. We have carefully examined the authorities cited by appellant, and find none of them in serious conflict with the views herein expressed, and, for the most part, the cases cited may be readily distinguished by reason of peculiar conditions surrounding the case decided as disclosed by the opinion rendered, or of special charters granting exemption.

The language of the statute is clear and explicit. Under it all property used exclusively for the purposes mentioned is exempt from taxation. Property not so used is subject to the general laws of taxation. Nor do we think that the proximity of one class of property to the other is material; the sole question being whether the use of the property renders it exempt. It is not necessary that the property should be such as to permit of its separation into distinct and definite parcels or tracts of land.

As is said in *Proprietors of Meeting House v. City of Lowell*, 42 Mass., 538, 541: "There may be several distinct tenements under the same roof; and tenements are as essentially distinct, when one is under the other, as when one is by the side of the other." A portion of appellant's property being used for business purposes, and, therefore, not within the purview and privilege of the statute referred to, we regard it as the evident intention of the legislature that such property is and should be subject to the general revenue laws, as all other property in the state. *Cleveland Library Ass'n v. Pelton, supra; Gerke v. Purcell, supra; Proprietors of Meeting House v. City of Lowell, supra; Cincinnati College v. Yeatman*, 30 Ohio St., 276; *Mayor of Baltimore v. Grand Lodge*, 60 Md., 280; *People v. Collison, supra.*

In reaching a conclusion in this case we do not desire to be understood as holding that all of the property mentioned in the petition of appellant is subject to taxation, but only that part which is used for other than the purposes contemplated by the organization maintained by appellant.

The ruling on the demurrer we regard as a correct expressing of the law, and accordingly affirm the judgment entered therein.

AFFIRMED.

STATE, EX REL. THE IRRIGATORS BANK, V. EDWIN J. WHIPPLE, TREASURER OF SCOTT'S BLUFF COUNTY, NEBRASKA.

FILED OCTOBER 18, 1900. No. 11,491.

1. **Peremptory Writ of Mandamus.** A peremptory writ of mandamus will issue only when it is made to appear that the law specially enjoins upon the defendant the performance of the act which it is sought by the writ to compel.

2. **Banks:** DEPOSITORIES OF COUNTY FUNDS: AUTHORITY OF COMMISSIONERS: TREASURER. A board of county commissioners is without authority to make one of two or more banks, designated as

depositories of county funds, a preferred depository, in which county funds are to be first deposited by the county treasurer until the sum of such deposit shall reach the amount allowed under the law and depository bond of such bank.

3. **County Treasurer:** AUTHORITY: DEPOSITORY ACT. A county treasurer is the custodian of the funds of his office and it is for him, within the provisions and restrictions of the depository act, to deposit and withdraw, as the requirements in the discharge of his official duties shall make necessary, all the funds coming into his custody as such treasurer.

4. **Duty of County Board:** LIMIT OF AUTHORITY. When a county board has acted upon the propositions of different banks applying to be made depositories of county funds, and approved or rejected the bonds presented for that purpose, its powers and authority in the premises cease, and it is without power or authority to control the action of the county treasurer, and direct in which of the depositories, or in what amount, the depositing of county funds shall be had; and when an attempt is made to designate one bank as a preferred depository, such action is a nullity, and without force or effect.

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

James H. Casselman, for plaintiff in error.

Gardner & Mann, contra.

HOLCOMB, J.

From an order of the district court, denying the application for a writ of mandamus and dismissing the action, by error proceeding this case is brought here for review. By the writ the relator (the plaintiff in error) sought to compel the county treasurer of Scott's Bluff county to deposit in relator's bank county funds in the sum of $1,500, the same being half the amount for which its bond as a county depository had theretofore been duly approved by the county board of said county. The nub of the controversy is made apparent from the following paragraph of the petition and affidavit filed as a basis for the issuance of the writ applied for: "That on the 17th day of April, A. D. 1900, the bank of Gering of said

county, submitted to said board a bond in the sum of $8,000 to qualify said bank of Gering as a county depository. Said bond was approved as follows: 'Appointed and approved as a depository for county moneys in excess of $1,500, for which amount the Irrigators' Bank has already been designated a depository,' thereby making said, The Irrigators' Bank a first and preferred depository for county funds, before any sum whatever can legally be deposited with any other county depository."

By section 18, article 3, chapter 18, Compiled Statutes, 1899, it is made the duty of the county treasurer of each county to deposit, and at all times keep on deposit, for safe keeping, in state or national banks, or in some of them doing business in the county, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such county treasurer. The bank applying for the privilege of keeping such moneys to be subject to certain conditions therein named, and also to such regulations as are imposed by law, and the rules adopted by the county treasurer for holding and receiving such deposits. By section 20 it is provided that for the security of the funds so deposited, the county treasurer shall require all such depositories to give bond for the safe keeping and payment of such deposits, and the accretions thereof, which bond shall run to the people of the county, and be approved by the county board; conditioned as in the section provided. By section 21 the treasurer is prohibited from directly or indirectly making any profit out of any moneys in the county treasury belonging to the county, the custody of which the treasurer is charged with. By section 22 his willful failure or refusal to do or perform any of the acts required of him shall constitute a misdemeanor, subject to indictment, and upon conviction, the imposition of a fine not exceeding $5,000. By section 23 it is provided that the treasurer shall not be liable on his bond for money on deposit in banks under and by direction of the proper legal authority, if said bank has given bonds. In the case of

State v. Owen, 41 Nebr., 651, it is held that, under the provisions of the section last quoted, it was the duty of the county board to act on the proposition of each bank to become a depository of current funds of the county, as well as approve the bond incident to that relation.

Construing the different sections of which mention has been made, it would seem quite clear that, as respects the question of depositing county funds, the board of county commissioners is authorized to act upon the application of the different banks, and approve the bonds tendered, thereby constituting such bank a county depository, in which the county treasurer must, in the discharge of his duties, deposit the current funds of the county collected and held by him; that it is the duty of the county treasurer to keep at all times on deposit in the banks so approved as depositories, or some of them, all of the funds, which by law he is required to keep on deposit under the provisions referred to. Nowhere does it appear in the act quoted, either from the words used or any fair implication that may be drawn therefrom, that the board of county commissioners is authorized to make one bank a preferred depository, in which shall be kept all funds to the amount permitted under the bond by it given. In this respect we think the county board clearly exceeded its authority, and its attempt to limit the depositing of funds in one of the banks mentioned to such an amount as might be held by the county treasurer in excess of the amount which might be deposited under the depository bond of the other bank, was an attempt to exercise power not conferred upon it by statute. The county treasurer is the custodian of the funds belonging to his office, and it is for him, within the provisions and restrictions contained in the depository act, to deposit and withdraw, as the requirements in the discharge of his official duties shall make necessary, all the funds coming into his custody as such treasurer.

By the petition the relator seeks, as mentioned in the paragraph quoted, to constitute itself a preferred deposi-

tory in the amount allowed under its bond to the exclusion of other depositories in which such funds may be legally deposited. This, we think, it can not do, and for that reason the petition fails to state a cause of action. In order to justify the issuance of a peremptory writ of mandamus, it must appear that the law specially enjoins upon the defendant the performance of the act which it is sought by the writ to compel. *State v. Livsey*, 27 Nebr., 55. When the county board has acted upon the propositions of the different banks which apply to be made county depositories, and approved or rejected the bonds presented for that purpose, its powers and authority in the premises cease, and it is without power and authority to control the action of the county treasurer, and direct in which of the depositories, or in what amount, the depositing of county funds shall be had. This is fixed by law, within the limits of which the county treasurer may act in his discretion as the receiving and disbursing agent of public funds of the county. The indorsement on the bond of the bank of Gering, which has been approved by the county board, to the effect that it is designated as a depository of the county funds in excess of the $1,500 which might be deposited under the bond given by the relator and approved before that time, was and is a nullity, and is of no force or effect whatever. In reaching this conclusion, we are not unmindful of the fact that the county board is charged with the general duty of managing the finances of the county, and the county business generally. Its authority, however, is derived from the statute. It is a public agent, entrusted with certain powers and duties relating to the government of the county, which are well defined by the provisions of the statute relating to the same. The county treasurer also has certain duties to perform, under authority conferred upon him by statute, in the performance of which the statute, and not the county commissioners, must govern. In the execution of the provisions of the depository act, the scope of the authority and the duty of the county

commissioners are limited to action upon application to be made a depository, and the approval of a bond necessary to its designation as such. Beyond that, the treasurer can not rightfully be controlled in the performance of the duties which are by the act imposed upon him. While some authorities are cited of general application, we are constrained to the view that the statute alone must be looked to for a proper determination of the matter, and have based the conclusions reached upon these provisions alone.

The judgment of the district court is right, and is therefore

AFFIRMED.

ANTON DREDLA, ADMINISTRATOR OF THE ESTATE OF CARL BAACHE, DECEASED, V. HERMAN BAACHE ET AL.

FILED OCTOBER 18, 1900. No. 11,322.

1. **Probate Judge:** CLAIMS AGAINST ESTATE OF DECEDENT: COMMISSIONERS: HEARING BY JUDGE. A probate judge, in the settlement of estates of decedents, has authority and jurisdiction, in the absence of the appointment of commissioners for the purpose, to appoint convenient times and places for the hearing of claims presented against an estate, with a view to their adjustment and allowance; and such hearing may be had prior to the time limited for filing claims to prevent being barred as a legal demand against such estate.

2. **Notice of Hearing.** A notice of the time and place of hearing claims against an estate, with a view to their adjustment and allowance, is required to be given in the manner provided by section 214, chapter 23, Compiled Statutes, 1899, or in such manner as may be directed by the probate court.

3. ———: OBJECT OF NOTICE. Such notice is not for the benefit of creditors alone, but is also for the purpose of advising an administrator or other representative of a decedent's estate of the filing of claims presented for allowance, and permitting an admission of their justness, or objections to their allowance and a hearing thereon.

4. ———: JURISDICTION. A notice of the time and place of hearing claims against an estate with a view to their adjustment and allowance, which, by order of the court, is published for four

consecutive weeks in a legal newspaper published in the county where the estate is being administered, is sufficient to authorize the allowance of claims at the time mentioned which are presented for that purpose and give the court jurisdiction over the person of an administrator of such estate.

5. **Appearance of Administrator:** JURISDICTION. When an administrator appears in a case involving the allowance of a claim against the estate he represents, and asks leave to have the order of allowance vacated and leave to defend, and appeals from the judgment of allowance, such action will be a general appearance in the case; and the court thereby obtains jurisdiction over the entire proceedings.

6. **Appeal:** ESTOPPEL. An appeal from a judgment claimed to have been irregularly obtained estops the party appealing from afterwards relying on the alleged irregularities antecedent to the judgment appealed from.

7. **Acting County Judge:** DE FACTO OFFICER. Where, on account of the illness of the incumbent, a person has been appointed an acting county judge by the commissioners of a county, qualifies for the position, and assumes the duties of the office, and is actually engaged in the discharge of the functions of the office for a period of three months or more under color and claim of right to the office, acquiesced in by the public during all of said time, such officer will at least be deemed and held to be a *de facto* officer.

8. **Acts of Officer De Facto.** The acts and judgments of a *de facto* officer are as valid and binding as though performed and rendered by an officer *de jure*.

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

F. I. Foss and *B. V. Kohout*, for plaintiff in error.

F. A. Boehmer, *contra.*

HOLCOMB, J.

It is argued in this action that the order or judgment of allowance, by the probate judge, of certain claims against the estate represented by the administrator, as plaintiff in error, and in favor of the defendant in error, is utterly void, and for that reason the order upon the administrator to pay said claims as a valid charge against

the estate is erroneous and of no force or effect. The order of payment complained of was made by the probate judge of Lancaster county, where the estate was being administered, and an appeal was taken to the district court, where the order was affirmed, and by error proceeding the case is brought here for review.

The two grounds upon which the order of allowance is challenged as being void are, first, that the court was without jurisdiction to allow the claims at the time the judgment of allowance was entered; and, second, that the judge, or person rendering the judgment, was neither a *de jure* nor *de facto* county judge, and hence the order made is a nullity. A brief recital of the history of the case will assist in a proper understanding of the questions involved in the controversy. After the appointment and qualification of the administrator, the county judge of Lancaster county made an order, notifying the creditors of the estate that he would sit on the 29th day of June and the 29th day of September, 1894, to examine all claims against said estate with a view to their adjustment and allowance; that the time limited for the presentation of claims against the estate was six months from the 28th day of March, 1894; and the time limited for the payment of debts was for one year from said 28th day of March, 1894. The notice was ordered to be, and was, published in the semi-weekly *Nebraska State Journal*, published in said county and state, for four weeks, the first publication being on the 9th day of February, 1894. On the 14th day of April following the claims in controversy were filed in said court as claims against said estate. On the 29th day of June, the day set in the notice for hearing, they were allowed by Joseph Wurzburg, acting county judge. On October 17 the administrator filed a motion and application to set aside the order of allowance, which was denied, and an appeal taken to the district court, where judgment was entered, vacating the order of allowance. From this judgment an error proceeding was prosecuted to this court, and the judgment

of the district court reversed and the appeal dismissed because not taken in time provided by statute. *Baache v. Dredla*, 57 Nebr., 92. On the 17th day of June, 1899, on the application of defendants in error, an order was entered by the county judge, directing the administrator to pay from the assets of the estate all claims theretofore allowed against the estate, including those in controversy. From this last order an appeal was taken to the district court, and from there, by proceeding in error, the case is again here for consideration.

The alleged want of jurisdiction of the probate judge to render the judgment of allowance grows out of the fact that the order was entered on June 29, 1894, without personal notice to the administrator, when the time for filing claims, in order to prevent them from being barred, was fixed in the order and notice at six months from March 28, 1894, viz., September 28 of that year. It is to be observed that in the notice referred to it is provided that the hearing of claims with a view to their adjustment and allowance would be had before the probate judge on June 29 and September 29, 1894; and that the time for filing claims against the estate expired in six months from March 28, 1894. The question is thus presented of whether a probate judge has jurisdiction upon proper notice to pass upon and allow claims against an estate before the time has expired when, by law as fixed by an order of the court, all claims will be barred which have not theretofore been presented for allowance.

Relative to the payment of debts of deceased persons, it is provided by law that it shall be the duty of the probate judge to receive, examine, adjust and allow all claims and demands of all persons against the deceased, giving the same notice as is required to be given by commissioners when appointed for that purpose. It is then provided that when commissioners are appointed, it shall be their duty to appoint convenient times and places when and where they will meet for the purpose of examining and allowing claims; and within sixty days after

their appointment, they shall give notice of the times and places of their meeting, and of the time limited for creditors to present their claims, by posting notices and publishing the same four weeks in some legal newspaper, or in any other manner as the court may direct. Compiled Statutes, 1899, ch. 23, sec. 214. A careful perusal of the section cited, with others pertaining to the subject, leads to the conclusion that a probate judge is not without jurisdiction to act upon claims presented for allowance before the expiration of the time for filing claims after which they will be barred as a demand against a decedent's estate. It appears reasonably clear that in the section mentioned it is contemplated that a probate judge may appoint convenient times and places when he will sit for the purpose of adjusting and allowing claims, which may be presented against the estate, without reference to the time when claims are barred if not filed for adjustment and allowance. The provisions requiring notice of the time when claims will be barred if not filed serves the purpose of forever barring such claims as legal demands against an estate, and does not necessarily govern as to the time a hearing may be had of claims properly exhibited against an estate.

It appears, however, that a hearing of the claims presented within the time allowed by order of the probate court can not be had until notice is given thereof in the manner provided in the section referred to. This may be in different ways as therein stated, or, as in the language of the statute, "in any other manner which the court may direct." We do not agree with counsel for the creditors, that all the requirements of the statute as to notice of the time and place of hearing claims against an estate are solely for the benefit of creditors, and that the administrator is bound to take notice of the proceedings of the probate judge, and be present at any time action may be taken affecting the estate he represents. A reading of the statute convinces us that a fair construction thereof requires that a notice of the time and place of the hearing

of claims shall be given in some form contemplated by the section, for the purposes of affording an administrator, or other representative of a deceased person, an opportunity to admit the justness of a claim exhibited against the estate, or object to its allowance and have a hearing thereon. In administering the estate of a deceased person, exclusive original jurisdiction is by law conferred upon probate courts. *Stevenson v. Valentine*, 38 Nebr., 902, 907. The legislature has not deemed it wise to provide for any particular and formal method of summoning parties into courts, to require formal pleadings and joinder of issues, as in other civil actions. It is, however, the spirit of the law that parties interested in the proceedings had in a probate court, in settling the estates of decedents, shall have an opportunity to be heard on the merits of all claims and controversies growing out of the settlement of such estates, and it is therefore provided that hearings upon claims against an estate shall be at convenient times and places, of which notice shall be given in the manner therein mentioned. The notice required serves the double purpose of advising the creditors of an estate of the time of hearing claims, and the administrator or other representative of the filing of such claims as may be presented for allowance, with the opportunity to admit or object to the same, as may to him seem proper. A proper regard for the rights of those interested in an estate requires that an administrator should have timely notice of all such hearings, in order that the interests of the estate he represents may be fully guarded and conserved. The kind of notice to be given is in the control of a probate judge, and it is his duty to afford an administrator full opportunity to defend against all unjust claims. Whether this has been done in the present case may be doubted. The notice given was only constructive, when a proper regard for the rights of the estate would probably have suggested that it be made actual and personal. A notice, however, was given as directed by the court by publication, and

this, we think, was sufficient to give the court jurisdiction over the person, and its jurisdiction over the subject-matter is given by statute beyond any reasonable doubt. The judgment rendered was, therefore, valid and binding until reversed on appeal, or set aside by a direct proceeding brought for that purpose.

Conceding for the time being that the probate court acquired no jurisdiction over the administrator at the time, and for the purpose of adjusting and allowing claims on June 29, 1894, the administrator thereafter, and in October following, appeared in the case, acknowledged the jurisdiction of the court, and asked to have the order vacated and set aside with leave to appear and defend against the said claims. The subsequent action taken placed the jurisdiction of the court over the entire proceedings beyond the pale of controversy. *Scarborough v Myrick*, 47 Nebr., 795; *Warren v. Dick*, 17 Nebr., 241; *Crowell v. Galloway*, 3 Nebr., 215, 220. At most, the questions affecting the jurisdiction of the probate court were such as to render the judgment voidable only and not void, and the administrator, having appeared in the case, recognizing the judgment and appealing to the district court therefrom, has thereby waived the irregularities, if any, existing at the time of the rendition of the judgment, and can not, after such appeal, be heard to complain of the irregularities antecedent to the judgment appealed from. *Irwin v. Nuckolls*, 3 Nebr., 441; *Ayres v. Duggan*, 57 Nebr., 753. We are therefore of the opinion that the judgment complained of is not void for want of jurisdiction, either over the subject-matter or the person of the administrator, and that counsel's contention in respect to this matter ought not to prevail.

As to the other question involved, it is made to appear from the record that on May 8, 1894, the county judge of Lancaster county made application to the commissioners to appoint an acting county judge on account of the ill-health of the incumbent, and that in pursuance of such request Joseph Wurzburg was appointed to the position

as requested, and that immediately thereafter, in pursuance of such appointment, qualified for the position, took charge of the office, and performed the duties of county judge, and acted as such from May 9, 1894, to some time in August following, when the county judge again resumed the duties of his office. It also appears that on May 16 the county judge decided some cases submitted to him prior to the appointment of an acting county judge, and that on the same day the acting judge was engaged in the actual performance of the duties of the office. With the exception referred to, the county judge performed no other functions of the office during the term of the acting county judge as before mentioned. Whether the county judge was absent from the county, as the law contemplates in the event of an appointment of an acting county judge, does not appear from the record, except as his presence is shown on the 16th day of May, when the decisions referred to were entered by him. Whether Wurzburg was a *de jure* or a *de facto* officer, it is unnecessary here to determine. A discussion of the distinction between the two would be wholly without profit. We may assume that the only question is whether his acts while occupying the position he did are wholly void and unauthorized, or are valid as a *de facto* officer. It is apparent that he was actually engaged in the discharge of the duties of the office during the period mentioned under color of authority by reason of his appointment by the county commissioners and qualification thereunder; that he exercised the functions of the office under color of right and claim thereto, and that such right and authority were acknowledged and acquiesced in by the public and all those dealing with the affairs of the office during the whole period of his incumbency. To constitute a *de facto* officer it is only necessary that he have some appearance of right to the office which would lead the public without inquiry to suppose him to be the officer he assumes to be. Where a person is in the actual possession of an office, in the discharge of the official

duties thereof under such color or claim of right to the office, he will be deemed and held to be a *de facto* officer. *Hamlin v. Kassafer*, 15 Ore., 456; *Brown v. Lunt*, 37 Me., 423, 428; *Ex parte Strang*, 21 O. St., 610; *Conover v. Devlin*, 15 How. Pr. [N. Y.], 477; *Cox v. Houston & T. R. Co.*, 68 Tex., 226; *State v. Carroll*, 38 Conn., 449. We feel entirely satisfied that, in any event, the county judge, acting under the appointment made by the county commissioners, was, while filling the position to which he was appointed, and discharging the duties of the office, a *de facto* officer, whose orders and judgments are to be held as valid and binding as though rendered by an officer whose title was beyond dispute. *Ex parte Johnson*, 15 Nebr., 512; *State v. Lewis*, 11 L. R. A. [N. C.] 105; 1 Black, Judgments, sec. 175; 1 Freeman, Judgments, sec. 148.

It follows from the views herein expressed that the judgment of the district court is in conformity with the law, and should be, and is,

AFFIRMED.

BARBARA KERNER, APPELLANT, V. JOHN W. MCDONALD, SHERIFF, ET AL., APPELLEES, and AUGUST KERNER, APPELLANT.

FILED NOVEMBER 8, 1900. No. 10,953.

Estate by Entirety. The common law rule of estate by entirety does not obtain in this jurisdiction.

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

McCoy & Olmstead, for appellants:

This was an action of injunction brought by Barbara Kerner against John W. McDonald, as sheriff, Henry Held and August Kerner, and was tried on the petition of Barbara Kerner, and answer and cross-petition of August Kerner, setting up the same facts as the petition,

and general demurrers by each of the other defendants to each of said pleadings.

The trial court, upon the hearing, sustained the demurrers and entered a decree for defendants McDonald and Held. Barbara and August Kerner separately appealed to this court.

The facts essential to an understanding of the case are, briefly stated, as follows: On and prior to March 9, 1887, August and Barbara Kerner were husband and wife, and on that day Barbara Kerner contracted with one Charles F. Strong for the purchase by her from him of certain land in the city of Omaha, Nebraska, which was to become her own property for a consideration of $1,200 to be paid by her out of her individual estate. On the same day, upon request of the plaintiff, Strong and wife executed and delivered to Barbara and August Kerner a warranty deed of the premises, with the purpose and intent common to each of the parties to the deed of thereby conveying to the Kerners an estate by entirety. But the deed was a plain warranty deed, in which neither the marriage relation of the Kerners, nor the particular kind of estate intended to be conveyed to and received by them, was specially mentioned. Neither of the Kerners ever acquired any interest in said land except by virtue of said deed, and Barbara Kerner never granted or gave to August Kerner any especial power or agency over her estate or interest in the whole or any part thereof, or any right to use the same. Neither of said Kerners was in actual possession of said land and it had not been used since they became its owners, and it was not improved. Barbara Kerner, out of her individual estate, paid the entire purchase price, and claims that it was and is owned by her and her husband as an estate by entirety and is not subject to execution of any judgment against August Kerner alone. Held obtained a judgment against August Kerner, in the county court of Douglas county, which was duly transcripted to the district court of that county, and, in due time, procured

an execution to be issued thereon and delivered to McDonald as sheriff. The judgment was not for any necessaries furnished the Kerner family. The sheriff, finding no personalty out of which to make the judgment, threatened to sell, not the half, but the entire premises, as the property of August Kerner. Barbara Kerner in writing notified the sheriff of her claim, that she and her husband were grantees of Strong by one deed and owned the land by entirety and that during their joint lives the judgment could not be made therefrom. She in her petition also asserted that enforcement of the execution against said land would impair the obligation of their contract of conveyance and would deprive her of her property without due process of law and deny her the equal protection of the laws and claimed the protection of paragraph 1, section 10, article 1, and section 1, amendment 14 of the constitution of the United States in support thereof. But the sheriff, still persisting in levying on the said land and selling the same to pay said judgment, and Held being a resident of Wyoming and having no property in this state except said judgment, this injunction action was begun to prevent an irreparable injury to Barbara Kerner and the clouding of her title to said land.

The question before the court in this case then is whether the common law rule of estates by entireties has always been and is now in force in this state, by which rule, when there is granted to two persons, who are then husband and wife, an estate by one instrument, the estate belongs to both of them, not by moieties, but by the whole, and will on the death of one belong, as if from the date of the grant, wholly to the survivor (2 Blackstone Com. [Cooley's 3d ed.], *182, note 2; Kent Com., *132; 4 Kent Com., *362, *363; 1 Washburn, Real Property [5th ed.], *424-*426; 9 Am. & Eng. Ency. Law [1st ed.], 40, 850); and, if such rule is in force, whether it is applicable to this case, so that Barbara and August Kerner will be said to have received and to hold said premises by the

entirety, and whether, by reason of those facts, and especially because of the fact that all of the purchase price of said premises and the taxes thereon were paid by Barbara Kerner with her own separate funds, it ought to be adjudged that during her life, if she dies before her husband, and forever, if she survives him, the whole of said premises and every interest therein, and the use and enjoyment of the whole thereof, shall be hers free of all acts, judgments and claims of the appellees against said August Kerner.

Throughout the United States the law of entirety is, almost without exception, confirmed by the judicial decisions in the absence of affirmative prohibitive legislation. It is in force in the following states, as confirmed by their judicial decisions, and no doubt it is in force in other states and will be so declared by their courts when the occasions arise: *Corinth v. Emery*, 63 Vt., 505; *Brownson v. Hull*, 16 Vt., 309; *Pray v. Stebbins*, 141 Mass., 219; *Phelps v. Simons*, 159 Mass., 415; *Wright v. Saddler*, 20 N. Y., 320; *Farmers Bank v. Gregory*, 49 Barb. [N. Y.], 155; *Bertles v. Nunan*, 92 N. Y., 152; *Hiles v. Fisher*, 144 N. Y., 306; *Grosser v. City of Rochester*, 148 N. Y., 235; *Buttlar v. Rosenblath*, 42 N. J. Eq., 651; *Fulper v. Fulper*, 54 N. J. Eq., 431; *Parry's Estate*, 188 Pa. St., 33; *Bramberry's Estate*, 156 Pa. St., 628; *McCurdy v. Canning*, 64 Pa. St., 39; *Clark v. Wootton*, 63 Md., 113; *McCubbin v. Stanford*, 85 Md., 378; *Bank v. Corder*, 32 W. Va., 232, 241-243; *Bruce v. Nicholson*, 109 N. Car., 202; *McLeod v. Tarrant*, 17 S. Car., 773; *Gresham v. King*, 65 Miss., 387; *Oglesby v. Bingham*, 69 Miss., 795; *McDuff v. Beauchamp*, 50 Miss., 531; *Hemingway v. Scales*, 42 Miss., 1, 16; *Cole Mfg. Co. v. Collier*, 31 S. W. Rep. [Tenn.], 1000; *Chambers v. Chambers*, 92 Tenn., 707; *Chandler v. Cheney*, 37 Ind., 408; *Carver v. Smith*, 90 Ind., 223; *Brown v. Brown*, 133 Ind., 476; *Thornburg v. Wiggins*, 135 Ind., 178; *Michigan Beef & Provision Co. v. Coll*, 74 N. W. Rep. [Mich.], 475; *Dickey v. Converse*, 76 N. W. Rep. [Mich.], 80; *Doane v. Feathers' Estate*, 78 N. W. Rep. [Mich.], 884; *Bennett v. Child*, 19 Wis.,

383; *Brown v. Baraboo*, 90 Wis., 151; *Fiedler v. Howard*, 99 Wis., 388; *Simpson v. Biffle*, 63 Ark., 289; *Branch v. Polk*, 61 Ark., 388; *Bains v. Bullock*, 31 S. W. Rep. [Mo.], 342; *Simons v. McLain*, 51 Kan., 160; *Shinn v. Shinn*, 42 Kan., 1; *Baker v. Stewart*, 40 Kan., 442, and cases cited; *Wilson v. Johnson*, 4 Kan. App., 747; *Noblitt v. Beebe*, 23 Ore., 4.

The law of entireties is established as the law of this state by legislative enactment, or, at any rate, is not prohibited or repealed by any legislation.

At the first session of the territorial legislature, and on March 16, 1855, the legislature passed "An act to put into force in this territory the common law of England," which act was carried forward and reenacted on February 12, 1866, as part of the Revised Statutes. That act reads: "So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted and declared to be law within said territory." By this common law act, it will be noted, it was expressly declared, in effect, that the law of entireties was adopted and established as the law of Nebraska.

The married woman acts do not affect the estate by entireties, and such estates may be created and exist since the passage of those laws the same as they did before. The only effect of the married woman acts on entireties is to take away all right in the husband, as common law agent of the wife. *Farmers Bank v. Corder*, *Grosser v. Rochester*, *Hiles v. Fisher*, *Simpson v. Biffle*, *Noblitt v. Beebe*, *Carver v. Smith*, *Bains v. Bullock*, *Baker v. Stewart*, *Buttlar v. Rosenblath*, *Doane v. Feather's Estate*, *ubi supra*; *Humberd v. Collings*, 20 Ind. App., 93.

But, whatever the effect of section 28, we think that that section was afterwards repealed and never reenacted. At the second session of the legislature, in 1856, there was passed "An act for revising, consolidating,

and preparing a general code for the territory of Nebraska," but section 28 was not contained therein.

On February 15, 1864, the legislature again enacted a "consolidation of the general laws," the title of the act being "An act to revise and consolidate the laws of a general nature, passed at the second session of the legislative assembly of this territory." It was the intent of this act not to bring forward any acts or part of acts not brought forward or enacted at the second session of the legislature, thus repealing section 28 of the act of February 21, 1855, if it had not been repealed before.

On February 12, 1866, "the Revised Statutes of 1866" was enacted, the title being "An act for revising, consolidating and re-enacting the civil and criminal codes, and the laws of a general nature, of the territory of Nebraska." Section 2 of the Revised Statutes was the repealing clause and reads, so far as pertinent here, as follows: "All acts and laws of general nature relative to civil and criminal laws and proceedings of this territory, passed prior to 1866, and all acts and parts of acts conflicting with the provisions of this revision, are hereby repealed."

Aside from section 28, which has been repealed, and never was intended to apply to deeds to husbands and wives, there never has been and is not now any statute in Nebraska declaring that a plain deed to two persons, whoever they may be, conveys to them estates in common. At all events the true intent of the parties to the deed must be given effect.

In chapter 31 of the Consolidation of January 26, 1856, it was provided: "Sec. 63. In the construction of every instrument creating or conveying, or authorizing, or requiring the creation or conveyance of any real estate, or interest therein, it will be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." And this continues the law of Ne-

braska today. If the common law rule as to entireties has been and is in force in this state, then, the deed in the case at bar having been made to the appellants, the law presumes, without any evidence, in or out of the deed, other than the deed itself and the proof of the fact of their marriage at the time of the delivery of the deed to them, that they contracted for and received an estate by entirety in said property.

But, if this law is not in force in this state, to the extent that a plain deed would be by itself sufficient evidence of an estate by entirety, and therefore that presumption was wanting, still, by virtue of section 53, chapter 73, Compiled Statutes, 1899, that presumption is supplied by the allegation in the petition, which the demurrer admits to be true, that the deed was made and delivered with the agreement and intent, common to all the parties thereto, that estates by entirety were to be granted to each married couple grantee.

Nelson C. Pratt and *Edward M. Wellman, contra.*

NORVAL, C. J.

This case involves the question of whether, in this state, the doctrine of entirety of estate is in force. This law grew out of the relation of husband and wife, as the same existed at common law, and it was a necessary corollary of that statute; for at common law, the moment a woman married, she ceased to exist as an entity, but simply became merged in her husband, and came wholly under his dominion. Of course, if at marriage she ceased to exist as an entity, she lost the ability to own anything, hence out of this legal fiction, of necessity, arose the doctrine, that if there be granted by one instrument to two persons, who are husband and wife, an estate it is owned by both of them, not by moieties, but as a whole, and will on the death of one belong, as if from the date of the grant, wholly to the survivor. We will discuss the questions thus presented as if no statutory enactment ever existed

on the subject other than chapter 15 of the Compiled Statutes, whereby it is provided that so much of the common law as is applicable, and not inconsistent with the constitution of the United States, etc., is adopted and declared to be the law within this state. Is the law of entireties applicable in this state? In other words, is it in harmony with the marriage relation as it now exists? It is urged that the whole of the common law exists by force of this statute, except where it has been expressly changed by legislative enactment, unless it be inconsistent with the constitution of the United States, the organic law of the territory (and presumably of the constitution of the state). With this statement we can not agree, for the term "as is applicable" has also a meaning, and it is evidently intended to mean, so much as is applicable to our institutions. Now, it is evident that the whole of the common law of husband and wife is not now and never has been in force in this state. Take, for instance, that common law rule whereby the husband was, under certain circumstances, permitted to inflict corporal punishment upon his wife. It would hardly be contended that such rule of law existed here, in the absence of special statutory enactment. The principle is too repugnant to all modern ideas of the relation of husband and wife to have a place in our jurisprudence. Hence, it is plain that not all common law of England is in force in this state. We do not imagine that such would be declared to be the law anywhere, yet it was once, without dispute, the common law of England. As a matter of fact, law is not a fixed science, but advances or retrogrades with the advancement or retrogression of society; and the law permitting corporal punishment of the wife by the husband has ceased, because we are a more highly civilized people than were our ancestors, and such a thing would now be looked upon with abhorrence by all right thinking men. Many principles of law have changed with the passing of time, through the gradual change of thought on the part of society and

the flux and change of social organization; many others have ceased because the reason which called them into existence has ceased, and it seems to us that to this last named principle may be referred the law of estates by entirety. The old common law idea of the oneness in the relation of husband and wife is fast disappearing. The identity of the woman is not lost in her husband; she is no longer under his dominion or control. On the contrary, in law, husband and wife are now considered as equals, the relation as a dual equality, not as one, and that one very much the husband. Hence, there seems to be no better reason for holding that a conveyance of an estate to two persons, they being husband and wife, by one instrument, creates an estate in entirety, than to hold that the conveyance of an estate to two persons not husband and wife will create a like estate, and not an estate. The reason for the law of entirety having ceased, with the reason, the law itself is no more. It would seem clear that, taking the modern view of the marriage relation, there is no reason for the doctrine of estates in entirety, but that estate created in both husband and wife should at once be assimilated to like estates created in other persons not husband and wife. We are of the opinion, that in the absence of statute declaratory thereof, the doctrine of estates by entirety is repugnant to our institutions, and to the American sense of justice to the heirs, and, therefore, not the common law of this state. The district court having held in harmony with the views herein expressed, the judgment is accordingly

AFFIRMED.

NOTE.—"It is true, that at one time the common law favored, by reason of the right of survivorship, title by joint tenancy. For it thus, as was supposed, tended to combine or unite the feudal services, consolidate tenures and strengthen the feudal connection. And this was its policy. Of course, the reason would cease with the abolition of the tenures; and neither in England nor in this country are these estates favored." *Hoffman v. Stigers*, 28 Ia., 302, 306. Affirmed in *Bader v. Dyer*, 106 Ia., 715, 719.

J. STERLING MORTON ET AL. V. JOHN C. WATSON.

FILED NOVEMBER 8, 1900. No. 11,066.

1. **Disbarment:** CONFLICTING EVIDENCE. Where, in a disbarment proceeding instituted against an attorney, the evidence is fairly conflicting, a finding based thereon will not be disturbed on review.

2. ———: PRIOR PENDING INDICTMENT: POSTPONEMENT OF CONSIDERATION. Where disbarment proceedings are founded, in part, upon facts made the basis of a prior pending indictment or information against the same attorney, the court may, where no abuse of discretion is shown, postpone the consideration of the specification in the proceeding to disbar involved in the criminal case until the latter is terminated.

3. **Taxation of Costs.** In disbarment proceedings costs can not be taxed against the informers, at least where the informers acted in good faith in bringing the alleged misconduct of the attorney to the attention of the court.

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

Warren & Jackson, for plaintiffs in error.

Sloan & Moran, Matthew Gering, John V. Morgan, L. W. Colby and *Frank Irvine, contra.*

NORVAL, C. J.

An information was presented to the district court of Otoe county, charging John C. Watson with unprofessional conduct involving moral turpitude and a violation of the Criminal Code. The information was signed by J. Sterling Morton and other foremost citizens of the county, was verified by one of their number, and contained various charges against said Watson, accusing him of having been guilty of numerous acts, any of which, if true, it is claimed, would disqualify him from practicing his profession as attorney at law. A committee of members of the bar was appointed by the court to investigate into the truth or falsity of said charges, and make report

thereon to the court. Watson appeared, a hearing was had and the committee made report finding that certain of said charges had not been sustained by a preponderance of the evidence, and that one of the specifications it refused to consider, because Watson was at said time under indictment, or information, of a criminal nature, for a criminal charge in connection therewith. The lower court approved said report, dismissed the proceeding against Watson, and taxed the costs thereof against those who signed the information. From said ruling and decision they prosecuted error proceeding, alleging that there was error in approving the report of the committee and in refusing to consider the specification before mentioned, and that the lower court erred in taxing the costs of the proceeding against the informants. We are of the opinion that no error was committed in approving the report. The evidence bearing upon the charges on which Watson was given a hearing was more or less conflicting, so much so that we can not say that there was any abuse of discretion in the court below approving and confirming the report of the committee.

The specification which the committee refused to consider charged Watson with forgery of a promissory note. It was found that he was under indictment for said alleged offense at the time the hearing was had, and for that reason said committee refused to consider the charge therein contained. We do not hold that it is indispensible that a hearing of this nature should be suspended because a criminal prosecution is pending charging the person against whom a disbarment proceeding is being taken with the same facts until the criminal cause is terminated. A finding in a disbarment proceeding either adverse to or in favor of the person accused perhaps would in no way affect such criminal action; nor would a verdict of either guilty or not guilty in a criminal action be binding on a court in a disbarment proceeding wherein the same act is charged. But we have no doubt that it was within the sound discretion of the court, and

its committee, to refuse to take up the specification covered by the pending indictment until the criminal prosecution had ended. When the criminal cause shall have been determined, it will be the duty of the court to investigate the matters embraced in the specification not yet considered.

There was error in the ruling of the lower court taxing the costs against the informants. A proceeding of this nature is neither in its form or substance a civil or a criminal action. It partakes of the nature of neither. A disbarment proceeding is not an action within the meaning of that term as employed in the Code. The parties who signed the information upon which this proceeding was based were not plaintiffs in a case. On the contrary, they were more nearly friends of the court, their action having been evidently actuated by a desire to assist it in an inquiry into the conduct of one of the members of its bar. To designate them as parties to an action, whereby they might be mulcted in costs, should the charges preferred be not sustained, would strongly tend to discourage disclosures of wrongful conduct upon the part of members of the legal profession; and would, therefore, be against sound public policy. At law, costs are the mere creatures of statutes. As there is no law specially providing for taxation of costs in proceedings of this nature, and as the awarding of costs depends upon statute, the lower court was without power to tax them against these informers, who, in the sense employed by the Code, were no parties to the proceedings.

It is claimed, however, that in taxing the costs of the proceeding the lower court endeavored to carry out the terms of a stipulation filed by certain attorneys who appeared in the proceeding. The terms of this agreement are in controversy. It is claimed that the stipulation in its original form provided that the costs should be taxed to the losing party, while in its present form it specifies that they shall be taxed according to law. The form of the stipulation we believe to be immaterial, as the statute

makes no provision for costs and the stipulation did not attempt to cover costs not provided for or fixed by law.

For reasons stated, the judgment awarding costs is reversed and the proceedings are remanded.

REVERSED AND REMANDED.

F. W. SCOTT V. SARAH JANE FLOWERS.

FILED NOVEMBER 8, 1900. No. 9,963.

1. **Industrial School:** CONSTITUTIONAL LAW: STATUTE. Section 12, article 8, of the constitution, which declares that "The legislature may provide by law for the establishment of a school or schools for the safe keeping, education, employment and reformation of all children under the age of sixteen years, who for want of proper parental care, or other cause, are growing up in mendicancy or crime," is a limitation on the power of the legislature, and section 5, article 1, chapter 75, of the Compiled Statutes, to the extent that it prescribes an age greater than that fixed in the constitution for such commitment, is unconstitutional and void.

2. **Language of Statute:** MEANING OF CONSTITUTION. A youth who is incorrigible is "growing up in crime," within the meaning of that term as employed in said section of the constitution, and a statute prescribing for the commitment of incorrigible youths to the reform school is not, for that reason, contrary to the terms of said section.

3. **Sufficiency of Complaint:** FALSE IMPRISONMENT. A complaint filed in the county court under said section 5, article 1, chapter 75, charging no crime, but incorrigibility merely, states no cause for commitment to the industrial or reform school, and a person so arrested and committed has a cause of action against the person filing the same, for false imprisonment.

4. **Joint Tort-Feasors:** LIABILITY. Joint tort-feasors are jointly and severally liable for their wrongful acts.

5. **Action:** FALSE IMPRISONMENT: MALICIOUS PROSECUTION: JOINDER: A cause of action for false imprisonment may be joined in the same petition with a cause of action for malicious prosecution when both arose out of one and the same transaction.

6. ———: ———: EVIDENCE: NEWSPAPER PUBLICATIONS. In an action for false imprisonment, plaintiff may prove newspaper publications containing an account of his arrest and imprisonment, without comment thereon.

7. **Error:** EVIDENCE. Error can not be successfully predicated upon the admission of testimony, where the same line of testimony has been received in the cause without objection.

8. **Instruction:** WITHDRAWAL OF EVIDENCE: CURE OF ERROR. The withdrawal of evidence from the consideration of the jury by an instruction cures any error in the admission.

ERROR to the district court for Lancaster county. Tried below before CORNISH, J. *Affirmed.*

Wolfenbarger & Williams, for plaintiff in error:

It is claimed by the defendant in error that the act creating the Girls' Industrial School at Geneva is unconstitutional. This position is untenable. As has been often repeated, all acts of the legislature are presumed to be constitutional, and no act will be declared invalid unless plainly and irreconcilably in conflict with the constitution. Sutherland, Statutory Construction [1891 ed.], sec. 33; *State v. Van Duyn*, 24 Nebr., 586; *State v. Bemis*, 45 Nebr., 724; *Pleuler v. State*, 11 Nebr., 547; Black, Constitutional Law [1895 ed.], pp. 58, 59, sec. 28; *Tabor v. Cook*, 15 Mich., 322.

The act establishing the Girls' Industrial School for juvenile delinquents is not in violation of section 1, article 1, constitution of Nebraska, entitled "Bill of Rights." "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, and the pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." Bill of Rights, art. 1, sec. 1.

The liberty guaranteed by the constitution is not absolute and unqualified, and has never been so held by any court in this country; but it exists in proportion to wholesome restraint. Webster's Works, vol. 2, 393; Tiedeman, Limitations of Police Power [1886 ed.], sec. 30; Cooley, Constitutional Limitations [6th ed.], pp. 412-416, 704; 18 Am. & Eng. Ency. of Law [1st ed.], p. 739, "Police

Power"; Black, Constitutional Law [1895 ed.], p. 290, sec. 108; *Chicago, B. & Q. R. Co. v. State,* 47 Nebr., 549.

It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriæ* to protect and provide for the comfort and well-being of such of its citizens, as by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves, and all constitutional limitations must be so understood and construed as not to interfere with the proper and legitimate exercise of this important governmental function. *County of McLean v. Humphreys,* 104 Ill., 378; *Milwaukee Industrial School v. Supervisors Milwaukee County,* 40 Wis., 328; *Ex parte Crouse,* 4 Whar. [Pa.], 9; *Roth v. House of Refuge,* 31 Md., 329.

The act establishing the Girls' Industrial School for juvenile delinquents is not in violation of section 2, article 1, of the constitution. Section 2 of article 1 reads: "There shall be neither slavery nor involuntary servitude in this state, otherwise than for punishment of crime, whereof the party shall have been duly convicted." Slavery is "the condition of a slave; that civil relation in which one man has absolute power over the life, fortune and liberty of another, while penal servitude is the condition of being bound to service; the state of a person who is subjected voluntarily or otherwise to another person as his servant." Black's Law Dictionary [1891 ed.], pp. 1084, 1101. There is nothing in the law governing the Girls' Industrial School which by reasonable intendment contemplates the reduction of the inmates to either slavery or involuntary servitude.

Said act is not in violation of section 11, article 1, of the constitution, wherein it is provided: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and

a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." A proceeding for commitment of a girl to the industrial school for mendicancy, vagrancy, or incorrigibility can not be deemed a criminal prosecution. *Prescott v. State*, 19 Ohio St., 184; *Ex parte Ah Peen*, 51 Cal., 280; *Foley v. State*, 42 Nebr., 233.

Said girls' industrial school act is not in violation of section 6, article 1, of the constitution. "The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve men in courts inferior to the district court." Constitution, art. 1, sec. 6. This provision of our organic law does not create nor extend the right of trial by jury. It simply preserves the right in those cases where juries were demandable when the constitution was adopted. *Sharmer v. McIntosh*, 43 Nebr., 509; *Omaha Fire Ins. Co. v. Thompson*, 50 Nebr., 580; Proffatt, Jury Trial [1877 ed.], sec. 87; *Raymond v. Flavel*, 40 Pac. Rep. [Ore.], 158; Black, Constitutional Law [1895 ed.], pp. 446-451; *Byers v. Commonwealth*, 42 Pa. St., 89; *People v. McCarthy*, 45 How. Pr. Rep. [N. Y.], 97. In Black's Constitutional Law, above cited, pages 446 to 451, a large variety of proceedings are enumerated, wherein jury trial is unnecessary because none was required at common law. The law as to commitment of minors to industrial schools is wholly statutory. Hockheimer, Custody of Infants [2d ed.], sec. 96. The law unquestionably is that trial by jury is not essential to a valid commitment to an industrial school. Hockheimer, Custody of Infants [2d ed.], sec. 99; 6 Am. & Eng. Ency. of Law [2d ed.], p. 982; *In re Mason*, 28 Pac. Rep. [Wash.], 1025; *Farnham v. Pierce*, 141 Mass., 203; *In re Donohue*, 1 Abb. N. Cas. [N. Y.], 1; *Jarrard v. State*, 116 Ind., 98; *Wares, Petitioner*, 161 Mass., 70.

The act establishing the Girls' Industrial School is not in conflict with section 3, article 1, of the constitution, which is as follows: "No person shall be deprived of life, liberty or property, without due process of law." For

the proper interpretation of "due process of law," see *Ex parte Ah Peen*, 51 Cal., 280; *County of McLean v. Humphreys*, 104 Ill., 378; Tiedeman, Limitations of Police Power [1886 ed,], sec. 50; *Sears v. Cottrell*, 5 Mich., 250.

The act establishing the Girls' Industrial School is not in conflict with section 12, article 8, of the constitution, which follows: "The legislature may provide by law for the establishment of a school or schools for the safe keeping, education, employment and reformation of all children under the age of sixteen years, who for want of proper parental care, or other cause, are growing up in mendicancy or crime." Courts of chancery have always exercised control over minors, whatever their age, and the constitutional provision in no sense limits the power in the legislature to exercise such control through industrial school laws. On the contrary such power is confirmed.

The defendant in error can not question the validity of the law, as it applies to minors over sixteen years of age, and such question can not properly be considered in advance of a case involving the rights of a minor who comes within the age limits which must have been exceeded in the case for hearing. *Sears v. Cottrell, supra.*

Halleck F. Rose and *Wilmer B. Comstock, contra.*

Halleck F. Rose: The statute does not authorize the commitment of minors to the reformatory except upon a hearing, after notice, in which the accused is represented by a friend or specially appointed guardian. Proceedings under reformatory statutes must show that due regard was had to the rights of the minor or commitments will not be upheld. *People v. Catholic Protectory*, 38 Hun [N. Y.], 127, 101 N. Y., 195; *In re Heery*, 51 Hun [N. Y.], 372; *People v. Catholic Protectory*, 106 N. Y., 604; *Goodchild v. Foster*, 51 Mich., 599; *Ballenger v. McLain*, 54 Ga., 159.

So much of the reform school act as may be construed to permit the commitment of a girl to the reform school

until she is twenty-one years of age, for incorrigibility, not amounting to crime, in *ex parte* proceedings, is palpably and irreconcilably in conflict with section 12 of article 8 of the constitution, and therefore void.

The complaint under which Sarah Flowers was arrested and imprisoned states no legal cause for her commitment to the reform school.

Laws which are clearly unconstitutional must be so declared without reference to expediency. *Coffman v. Bank of Kentucky*, 40 Miss., 29.

The constitutional provisions have, apart from any specific negative, been held to be incorporated for the sole purpose of restraining legislative action. *Richards v. Raymond*, 92 Ill., 615; *Powell v. Board of Education*, 97 Ill., 375; *Collins v. Henderson*, 11 Bush [Ky.], 74; *Roach v. Board of Directors*, 77 Mo., 484; *Otken v. Lamkin*, 56 Miss., 758; *Gordon v. Cornes*, 47 N. Y., 608.

Constitutional provisions, except when expressly permissive, are mandatory. *Varney v. Justice*, 86 Ky., 596.

NORVAL, C. J.

In 1896 F. W. Scott filed a complaint in the county court of Lancaster county charging that Sarah Jane Flowers, a girl of fourteen years, was "incorrigible, and from lack of proper parental care and control is growing up in idleness and vice." On this complaint she was, after examination and evidence taken by the county court, committed to the industrial school for girls at Geneva; said hearing being *ex parte*. Afterwards she was released, and by her next friend, Lucretia Flowers, commenced this action in the district court of Lancaster county against said Scott for damages, setting forth in the petition two counts, one for false imprisonment, the other for malicious prosecution, the latter being taken from the jury by instructions of the court. Verdict was in her favor on said first cause of action, and judgment rendered thereon, from which said Scott prosecutes error to this court.

The principal question involved is the proper construction to be given section 12, article 8, of the constitution of this state, and this will be first considered. On the trial of the cause in the lower court the following instruction was given: "Under the constitution and laws governing in this commonwealth all persons by nature are free and entitled to their liberty. Involuntary servitude, except for punishment for crime after conviction with due process of law, is not allowed. The right of the accused to appear and defend against charges of crime, to demand the nature of the accusation against him, to meet the witnesses against him face to face, to compel witnesses to testify and to have a speedy trial by an impartial jury is guaranteed to all persons by the fundamental law of the land. These rights are guaranteed to all persons, including minors, except as limited by section 12 of article 8 of the constitution, which reads as follows: 'The legislature may provide by law for the establishment of a school or schools for the safe keeping, education and employment of all children under the age of sixteen years, who, for want of proper parental care, or other cause, are growing up in mendicancy or crime.' The prosecution complained of in this action was under an act of the legislature, which, in parts of it, oversteps the bounds of these constitutional limitations. After hearing the argument of counsel, the court holds that so much of said act as permits, or may be construed to permit, the commitment of a child to the reform school until it is twenty-one years of age for disobedience, willfulness, or incorrigibility not amounting to a crime, in an *ex parte* proceeding, is void. The complaint made by the defendant under which plaintiff was arrested charges no crime nor offense against her warranting her commitment to the girls' industrial school. The arrest and detention of plaintiff was therefore unlawful." It will be observed that the trial court ruled that the act of the legislature referred to is without the scope of the section of the constitution quoted in the instruction, in that so

much of the act as may be construed to permit the commitment of a child to the reform school for disobedience, willfulness or incorrigibility, not amounting to a crime, in an *ex parte* proceeding, is void. With all the reasons assigned by the court for so deciding, we can not agree; but should the act be unconstitutional for any other cause, the arrest and commitment of plaintiff was unlawful. We understand the term "growing up in crime," as employed in said section of the constitution, as referring, not only to a minor who is a criminal, who has been or is now committing a crime, but that it also refers to a status, a tendency in the direction of crime. The state industrial schools are reformatory institutions, not penal, in their nature, are founded and maintained by the state for the purpose of protecting society against the likelihood of children of tender years becoming criminals, should they continue in a course whose natural and probable outcome will be their becoming members of the criminal classes. Now, the complaint charged this girl with incorrigibility. Who is more likely to eventually become a criminal than a youth who is so far advanced in following his own will as to have become incorrigible, incapable of being corrected or amended, bad beyond correction, irreclaimable, by those on whom society and the laws place the duty of training him in proper conduct as a member of society? Clearly, an incorrigible youth is "growing up in crime," within the meaning of this term, taking it in its broadest sense, as was certainly intended by the framers of that section of the constitution that it should be considered. Whether any parts of the bill of rights set forth in the constitution are applicable to laws governing the procedure to be adopted concerning the commitment of incorrigible youths to the industrial schools, we will not pause to consider. Such proceedings are not, however, necessarily criminal in their nature. These institutions are not of a penal character, but are reformatory. Many who are sent there are not criminals; and even the adjudged criminals committed to them are

not consigned there for punishment merely, but rather for the purpose of reforming them.

But it is further urged that, whereas said section of the constitution provides that it is the duty of the legislature to establish schools for the safe keeping, education, etc., of all children under the age of sixteen years of the classes mentioned therein, section 5, chapter 75, Compiled Statutes, which declares that those under the age of eighteen years, being of that class, may be committed, is repugnant to said section 12, article 8, of the constitution and void. It is contended that by this clause or section of the fundamental law all limitations as to age are created, and an act overstepping that limitation in that particular is void and of no effect. If this is the proper interpretation of this section of the constitution, it is the duty of this court to so hold regardless of consequences. This section of the constitution is capable of but one of four constructions: First, it is a grant of power; second, it is merely a command to the legislature to create one or more schools for the safe keeping, education, employment and reformation of all children under the age of sixteen years of the class designated in the section, leaving it to the lawmaking body to provide for the commitment to such school not only of persons over the age of sixteen years, but of those not embraced within the class designated in the constitution; third, it was the intention of the framers of that instrument that all children under the age of sixteen, no matter what their characters or the nature of the crime they may have committed, be committed to the reform school, and punished criminally; fourth, the constitution inhibits the legislature from extending the benefits of these institutions or schools to all persons over the age of sixteen years, no matter how capable they might be of reformation. To determine which of these constructions shall obtain, it is proper not only to consider the mischief sought to be remedied, but to compare the language of the section with other provisions of the fundamental law and thus

ascertain the intention of its framers as well as the purpose of the people of the state in adopting the same. One of the objects of the section was, in one sense, the reformation of those of the class designated. It could not have been intended that all children under sixteen years, no matter what their crime, should be committed to the reform school, and escape punishment for their infractions of the Criminal Code, otherwise, even the murderer would escape punishment, if under that age, and it would be an absurdity to say that the framers of the constitution intended this. It is very evident that said section can not, in justice to society, or in view of the mischiefs from which it might suffer, be so interpreted as to justify the court in adopting such a construction as would inhibit the punishment of criminals under the age of sixteen years. So the third construction must be rejected as being not only unreasonable, but unsound. The rendering of the section of the constitution that it was merely a command to the legislature, and not a limitation, is equally untenable. Such an interpretation would permit the legislature to enact laws authorizing the commitment to reform schools by it established, not only of persons of any age, but for any causes it might deem proper. This construction would sustain a law providing for the commitment to the reform schools of persons who have reached their majority. The statement of the proposition shows its absurdity. That the framers of the constitution never intended said section 12 as a command to the legislature is disclosed when other sections of the fundamental law are considered. Section 2, article 3, of that instrument declares: "The legislature shall provide by law for an enumeration of the inhabitants of the state," etc. Section 19, same article, provides: "Each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session," etc. Section 6, article 8, the article containing the section relating to reform schools, reads thus: "The legislature

shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." Section 1, article 9, provides: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation," etc. In all these sections of the constitution the framers have chosen language indicative of a command, as that the legislature shall do a particular thing, while in section 12, article 8, words imparting an imperative command to the legislature are entirely wanting. Again, section 6, article 9, of the constitution declares: "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, benefitted." This provision evidently is not a command to the legislature, but is rather a limitation upon the power of the lawmaking body, as are the provisions of the constitution under consideration. The word "may" in constitutions and statutes is frequently construed "shall," where such was the evident purpose of the framers. But no such meaning can be imputed to the word "may" in section 12, article 8. The constitutional provision was not a grant of power to the legislature. This is manifest, since state constitutions are not grants of authority, but limitations of power. State legislatures can exercise such powers as are not inhibited by the fundamental law. To construe the provisions in question as a grant of authority is to impute to the framers the doing of a useless and idle thing.

The first three constructions not being permissible, we are forced to the conclusion that said section of the constitution was designed and intended as a restriction upon the legislative authority. Then, if it was the purpose of the makers of the constitution, as we so conceive it to have been, that not only those who are criminals and have been convicted of crime, and are deemed capable of reformation but also those so far "growing up in crime" as to have become incorrigible may be committed to such

institution, it must be that the framers of that instrument meant that the limitation of age during which either of said classes could receive the benefit of such institutions is sixteen years, and not a greater age. Whether or not the framers of that section were wise in so fixing the age limit, it is not our province to discuss. This branch of the state government can only expound the constitution, not amend it; and it seems clear to the court that the constitution inhibits the legislature from providing for the commitment to the industrial schools of children of any class, either of an incorrigible nature or criminals in fact if beyond the age of sixteen years. For the reason that this section 5, article 1, chapter 75, of the Compiled Statutes prescribes that boys or girls under the age of eighteen years may be committed to the industrial school, it is contrary to section 12, article 8, of the constitution, and is void. Therefore, if said complaint was framed and filed under the provisions of said section 5, it did not state a cause for commitment, and the arrest and commitment of said Flowers in the proceedings had under such complaint were a nullity, and constituted false imprisonment, for which said Scott, who preferred the charges therein set forth, would be liable to her in damages. From the preceding we must not be understood as holding that a person over the age of sixteen years, who has been convicted of violating the Criminal Code may not be committed to the reform or state industrial schools. The regularity of such commitments is not questioned in this proceeding.

The same conclusion would follow, but for different reasons, if the complaint had been filed by Scott under the provisions of sections 6, 7 and 8 of said article 1, chapter 75, Compiled Statutes, which follow:

"Sec. 6. When a boy or girl of sane mind, under the age of sixteen years, shall be convicted before a justice of the peace or other inferior court, of any crime, mendicancy, vagrancy, or incorrigibility, it shall be the duty of said magistrate, before whom he or she may be con-

victed, to forthwith send such boy or girl, together with all the papers filed in his office on the subject, under the control of some officer to a judge of a court of record, who shall then issue an order to the parent or guardian of said boy or girl, or such person as may have him or her in charge, or with whom he or she last resided, or any one known to be nearly related to him or her, or if he or she be alone and friendless, then to such person as said judge may appoint to act as guardian for the purposes of the case, requiring him or her to appear at a time and place stated in said order, to show cause why said boy or girl should not be committed to the state industrial school for training and reformation.

"Sec. 7. Said order shall be served by the sheriff or other qualified officer, by delivering a copy thereof, personally, to the party to whom it is addressed, or leaving it with some person of full age at the place of residence or business of said party, and immediate return shall be made to said judge of the time and manner of such service. The fees of the sheriff or other officer under this chapter shall be the same as now allowed by law for like services.

"Sec. 8. At the time and place mentioned in said order, or at the time and place to which it may be adjourned, if the parent or guardian to whom said order may be addressed shall appear, then in his or her presence, or if he or she fails to appear, then in the presence of some competent person whom the said judge shall appoint as guardian for the purpose of the case, it shall be lawful for the said judge to proceed to take the voluntary examination of said boy or girl and to hear the statements of the party appearing for him or her, and such testimony in relation to the case as may be produced, and if upon such examination and hearing, the said judge shall be satisfied that the boy or girl is a fit subject for the state industrial school, he may commit him or her to said school by warrant."

It is true that section 6 fixes the maximum age limit at

sixteen years, the period designated in the section of the constitution which we have heretofore been considering. So that said section 6 does not contravene the fundamental law. But said section 6 and the subsequent sections of the same article prescribe a different method of procedure from that required by section 5. Under the last named section the complaint is required to be made, and the proceedings are required to be had before a court of record, while section 6 governs cases where a boy or girl under sixteen years is convicted "before a justice of the peace or other inferior court, of any crime, mendicancy, vagrancy, or incorrigibility," and such magistrate has sent the papers in the case and the accused boy or girl to a judge of a court of record, who is to hear and decide whether such boy or girl is to be committed to the state industrial school. Sarah Flowers was not proceeded against under said section 6 before a justice of the peace or other inferior court, nor convicted therein of "any crime, mendicancy, vagrancy, or incorrigibility." The proceedings which resulted in her commitment to the State Industrial School for Girls at Geneva were instituted before the county court, a court of record, hence section 5, and not section 6, governs and controls. That plaintiff was committed to the industrial school under the provisions of section 5, is conceded by counsel for defendant.

It is argued by the same counsel that the consequential loss resulting to plaintiff is not the basis of an action for false imprisonment against Scott, since, had the county court performed its duty, there would have been no false imprisonment. It is true that the court made the finding and order of commitment; but the false imprisonment would not have occurred if no complaint had been filed. Defendant instituted the proceeding which resulted in the imprisonment of the plaintiff, and he can not escape liability because some one else equally with him was guilty of the wrong. Tort-feasors are jointly and severally liable for the damages flowing from their acts. And

it is no answer to say that plaintiff has a right of action for false imprisonment against the county judge.

The court below refused to require the plaintiff to elect on which of the two causes of action stated in her petition she would go to trial, and this refusal is assigned for error. This ruling was entirely proper, since, under the Code, a cause of action for false imprisonment may be joined in the same petition with a count for malicious prosecution, as both causes of action arose out of the same transaction. Code of Civil Procedure, sec. 87; 8 Ency. Pl. & Pr., 844.

It is also insisted that plaintiff was permitted to reinstate her cause of action for malicious prosecution, after having dismissed the same. This contention we are unable to verify from the record. It does appear that counsel for plaintiff orally proposed to the court to dismiss her cause of action for malicious prosecution without prejudice, whereupon defendant asked for and insisted upon a continuance of the case; and thereupon plaintiff, to prevent a postponement of the trial, withdrew her proposal to dismiss said first cause of action. But all this did not amount to a dismissal and reinstatement of the cause of action. No order of dismissal or reinstatement was ever made by the court or entered upon its journal. Moreover, there was no recovery upon the first count of the petition. So defendant was not prejudiced by the alleged abuse of discretion by the trial court.

Newspaper accounts of the arrest and commitment of plaintiff were allowed to be introduced and read to the jury, the genuineness and authenticity of the publication and the extent to which they had been circulated having been first established. The articles in question contained mere plain statements or accounts of the arrest and commitment and were competent as affecting the question of damages. *Minneapolis Threshing Machine Co. v. Regier*, 51 Nebr., 402, 407.

The rulings of the trial court on the admission of tes-

timony now assailed by the unsuccessful party will not be specifically noticed. Generally, the testimony objected to consisted of a description of the Industrial School for Girls at Geneva, and an account of the restraints imposed upon plaintiff and her treatment while confined in said institution; of her being compelled to sleep with a colored girl, and of her journey from the county court to the industrial school. The evidence, in the main, was properly received as bearing on the question of damages. *Abrahams v. Cooper*, 81 Pa. St., 232; *Kindred v. Stitt*, 51 Ill., 401; *Wheeler v. Hanson*, 37 N. E. Rep. [Mass.], 382; *Filer v. Smith*, 96 Mich., 347, 355. Some testimony of doubtful propriety was received over the objection of defendant, but the error in its reception, if any, was cured by the admission of similar testimony without objection. Defendant was not prejudiced by the testimony adduced showing the release of plaintiff from the industrial school, since proof of her early discharge tended to mitigate the damages.

Fault is found with the admission of testimony tending to establish the cause of action for malicious prosecution, but defendant's rights were not jeoparded thereby, for the reason that the jury was expressly instructed to disregard such evidence in the consideration of the case, and the cause of action it was introduced to support was dismissed by the trial court. *Darner v. Daggett*, 55 Nebr., 198; *American Fire Ins. Co. v. Landfare*, 56 Nebr., 482.

We have carefully reviewed and considered the evidence, and we fail to discover that the damages awarded by the jury were excessive. A verdict for $2,500, the jury thought, would no more than compensate plaintiff for the actual injury sustained; and in this view we concur.

The judgment is

AFFIRMED.

MARY BAKER, ALIAS MARY MARQUETT, V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1900. No. 10,722.

State Industrial School: STATUTE: CONSTITUTIONAL LAW. That part of section 5, article 1, chapter 75, Compiled Statutes, which provides for the commitment to the state industrial school of any boy or girl under the age of eighteen years "who for want of proper parental care is growing up in mendicancy and vagrancy, or is incorrigible," contravenes section 12, article 8, of the constitution, and is void.

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

Clark & Allen, for plaintiff in error.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy, contra.*

NORVAL, C. J.

Mary Baker, alias Mary Marquett, a girl of the age of fifteen years, was charged in the county court of Lancaster county with being incorrigible. A general demurrer to the complaint was interposed, which was overruled, and on the trial she was adjudged guilty as charged and ordered committed to the industrial school for girls at Geneva until she arrives at the age of twenty-one years. On error proceeding to the district court said order was affirmed. The cause is now before us for review.

The constitutionality of section 5, article 1, chapter 75, Compiled Statutes, is the sole question presented by the record before us, and that was determined in favor of the contention of plaintiff in error in the opinion in the case of *Scott v. Flowers,* filed herewith. The decision in that cause is decisive of this. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM M. CLINTON V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED NOVEMBER 8, 1900. No. 9,270.

1. **Employee of Railroad Company:** ACCEPTANCE OF DAMAGE: RELEASE. An employee of a railroad company who has accepted from it damages for injuries sustained can not recover benefits for such injury from the relief department of such corporation under an agreement of membership releasing the company from liability in case of such acceptance.

2. **Stare Decisis.** *Chicago, B. & Q. R. Co., v. Bell*, 44 Nebr., 44, and *Chicago, B. & Q. R. Co. v. Curtis*, 51 Nebr., 442, followed.

ERROR to the district court for Lancaster county. Tried below before HALL, J. *Affirmed.*

Field & Brown, for plaintiff in error.

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

NORVAL, C. J.

William M. Clinton brought this action in the district court of Lancaster county for benefits which he claimed to be due him as a member of the Burlington Voluntary Relief Department for injuries received by him in the year 1890, while an employee of defendant. By the terms of his certificate of membership in said association or department, he was entitled, under stipulated conditions, to certain sums of money during the continuance of his disability, and to certain other sums which it is not necessary to set forth at length, the certificate being identical in its terms with that litigated in the case of the *Chicago, B. & Q. R. Co. v. Bell*, 44 Nebr., 44, and other cases hereinafter mentioned. Said certificate provided further that the acceptance of benefits from said relief department would operate as a release and satisfaction of all claims for damages against said railway company for such injury; and also that if the beneficiary should bring suit against said railway company for damages on account of

any injury, then payments of benefits from the relief fund on account of such injury should not be made until such suit was discontinued; and if such suit should proceed to judgment or be compromised, all claims upon the relief department fund for benefits on account of such injury should be precluded. After his injury, plaintiff accepted certain payments from said relief fund on account of said injury, and afterwards he commenced an action against said railroad company to recover from it on account of said injuries, wherein he was successful, the judgment so recovered against it having been paid by said company prior to the commencement of this action. In this cause he seeks to recover for the payment of such benefits as would have been due him from said relief fund, had he not recovered said judgment for damages against the railroad company. Judgment was rendered against him in the lower court, and he brings the case here for review.

It is conceded that no new question of law is presented in this case, but that the court is asked to overrule a number of decisions adverse to the claim of plaintiff, particularly those of *Chicago, B. & Q. R. Co. v. Bell, supra,* and *Chicago, B. & Q. R. Co. v. Curtis,* 51 Nebr., 442. Obedient to the very urgent request contained in an able brief filed by counsel for plaintiff, we have at some pains examined those cases, and are satisfied that the law is therein correctly enunciated, and we see no reason for overruling them. They are in line with a long series of decisions by courts of other states, and are the law. We do not see that any useful end would be subserved by adverting to them at length, and will therefore content ourselves with stating that, in affirming the judgment of the lower court, we follow those decisions. There being no questions involved in this case different to those decided in the case noted *supra,* the judgment of the lower court is, therefore,

AFFIRMED.

STATE, EX REL. MRS. A. M. DAVIS, TRUSTEE, RELATOR, V. JOHN F. CORNELL, AUDITOR, RESPONDENT.

FILED NOVEMBER 8, 1900. No. 11,641.

1. **Claims Against State:** LEGISLATIVE AUTHORITY: REFUSAL OF AUDITOR. The legislative authority to draw money from the state treasury for the satisfaction of a just claim against the state does not become extinguished by the wrongful refusal of auditing officers to exercise their functions within the proper time.

2. **Continuous Official Duty.** When the law imposes a duty upon a public officer to do an official act at a particular time, the obligation is, ordinarily, a continuing one, and the courts will, when it is practicable, coerce performance after the appointed time has gone by.

ORIGINAL application for mandamus to require the respondent to issue a warrant to the relator for certain money allowed her as trustee of the Home for the Friendless. *Writ allowed.*

J. H. Broady and *H. A. Babcock*, for relator.

SULLIVAN, J.

The relator, Mrs. A. M. Davis, as trustee of the Society of the Home for the Friendless, exhibited to the auditor of public accounts a claim for $6,017.31 against the state and demanded that the same be examined and adjusted as required by law. The auditor, after some delay, considered and allowed the claim; but the secretary of state, to whom it was presented on August 3, 1899, refused to approve it. Afterwards, however, the district court of Lancaster county, by a peremptory mandamus, commanded him to approve it, and he did so. The present action was then commenced to require respondent to issue a warrant upon the treasury in favor of the relator for the amount allowed. The answer admits the recitals of the alternative writ, but calls attention to the fact that, while the claim was presented in due time to the auditor and secretary of state, it was not approved by the

latter officer until after the appropriations made by the legislature of 1897 were exhausted. The question thus raised, and it is the only one argued by counsel, is whether the appropriation of 1897 for the Home of the Friendless ceased, under the circumstances here disclosed, to be available at the end of the first fiscal quarter after the adjournment of the legislature of 1899. No adjudged case has been brought to our notice that seems to be at all in point. Authorities cited by the attorney general, *State v. Babcock*, 22 Nebr., 33, *People v. Needles*, 96 Ill., 575, *People v. Lippincott*, 64 Ill., 256, *People v. Swigert*, 107 Ill., 494, sustain the view that no lawful claim against an appropriation can come into existence after the end of the period for which the appropriation was made; but beyond this they do not go. Section 19, article 3, of the constitution requires that "Each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter." When a fund has been set apart in obedience to the provision quoted, it is, of course, the intention of the constitution that those who become entitled to any portion of it shall receive such portion, and that at the expiration of the designated period the appropriation shall cease to be effective as to the unexpended balance. Such balance, within the meaning of the constitution, is the portion of the fund remaining after all proper claims against it have been paid. The legislative authority to draw money from the treasury for the satisfaction of a just claim does not become extinguished by the wrongful refusal of auditing officers to exercise their functions within the proper time. A creditor of the state does not forfeit his right to money due him because the state's agents refuse to perform duties with which they are charged. The declaration in section 19 aforesaid, that "all appropriations shall end with such fiscal quarter," is made on the assumption that the authority given by appropriation bills will be ex-

ercised in favor of all persons having valid claims on the treasury; it does not intend that such authority shall cease when, by reason of official misconduct, it has not been exercised to the extent it should have been. The legality of the relator's claim has been judicially established, and it is the duty of the state to pay it—to do now what it should have done before. When the law imposes a duty upon a public officer to do an official act at a particular time the obligation is, ordinarily, a continuing one, and the courts will, when it is practicable, coerce performance after the appointed time has gone by. Whether the legislative authority to draw money from the treasury for the payment of governmental expenses lawfully incurred before the end of the period for which the appropriation was made becomes extinguished in any case before such expenses have been paid, or the right to demand payment barred by limitation under the provisions of section 6, article 3, chapter 83, Compiled Statutes, 1889, was not discussed by counsel and is, therefore, not decided. The peremptory writ should be, and it is, allowed.

WRIT ALLOWED.

EDWARD W. CHASE V. SWIFT & COMPANY.

FILED NOVEMBER 8, 1900. No. 9,316.

1. **Business Corporation:** MEDICAL AID TO SERVANT: AUTHORITY OF MANAGER. The manager of a business corporation has no implied authority to furnish medical aid and assistance to a servant of the corporation who has been injured outside the line of his duties.

2. **Evidence:** INSTRUCTION. Evidence examined, and found to warrant a peremptory instruction in favor of the defendant.

ERROR to the district court for Douglas county. Tried below before DICKINSON, J. *Affirmed.*

Weaver & Giller, for plaintiff in error.

Hall & McCulloch, contra.

SULLIVAN, J.

Edward W. Chase, a practicing physician of the city of Omaha, brought this action against Swift & Co., an Illinois corporation, to recover for professional services rendered to employees of the defendant who had been injured in some manner during the progress of a strike in the fall of 1894. A jury impaneled to try the cause found, in obedience to a peremptory instruction, that the plaintiff had no cause of action, and judgment was accordingly rendered against him. The judgment is right and must be affirmed. The defendant was the owner of a packing-house which was being operated under the direction and management of its superintendent, A. C. Foster. The employees upon whom Dr. Chase attended were brought from Kansas City to South Omaha to take places of other employees of the defendant who had gone out on a strike; and the theory upon which the action was prosecuted was that the superintendent had agreed to take care of any of the new men who should be injured by the strikers in consequence of having engaged in the service of the company. There is some dispute as to what Foster agreed to do, and it is not clear to what extent he was authorized to bind his principal. But resolving all doubts in favor of the plaintiff, we are unable to see that the evidence received, plus the evidence offered and excluded, proved or tended to prove that the defendant was under any obligation to pay for medical services rendered to the wounded men. When, where or why they were injured does not appear, and hence there is nothing to indicate that Foster was within the scope of his apparent authority, as an agent of the company, in directing plaintiff to give them medical treatment. It is certain that they were not hurt while in the actual service of the defendant, and, there being no proof that they were assaulted by the strikers or that there was any causal relation between their injuries and the service in which they were engaged, it seems quite clear that it was not within the

apparent range of Foster's agency to employ a physician to attend them.

The judgment is

AFFIRMED.

DOUGLAS CONES V. GEORGE A. BROOKS.

FILED NOVEMBER 8, 1900. No. 9,293.

1. **Attorney's Lien:** GENERAL OR RETAINING. An attorney has a general or retaining lien upon all papers, books, documents or money of his client coming into his hands in the course of his professional employment.

2. ———: SCOPE: POSSESSION: NOTICE. Such lien depends upon possession, and attaches only to papers, books, documents or money in the hands of the attorney, and it is effective without notice to any one.

3. ———: ENFORCEMENT. An attorney can not enforce, by action, his general or retaining lien upon a note, bond or other obligation to pay money.

4. ———: CHARGING OR SPECIFIC: ADVERSE PARTY: NOTICE. An attorney has a charging or specific lien upon money in the hands of the adverse party to an action or proceeding. Such lien is not perfected until notice has been given to the party in possession of the fund.

5. ———: ———: ———. The notice of a charging or specific lien of an attorney need not be in writing or placed among the files in the case. Any notice that the claim is made and that it will be asserted is sufficient.

6. **Cases Explained and Distinguished.** *Lavender v. Atkins*, 20 Nebr., 206; *Elliott v. Atkins*, 26 Nebr., 403; *Sheedy v. McMurtry*, 44 Nebr., 499, explained and distinguished.

7. **Petition.** Petition in suit to enforce an attorney's lien examined, and found to state facts sufficient to support the action.

ERROR to the district court for Pierce county. Tried below before ROBINSON, J. *Reversed.*

Douglas Cones, for himself, and *Benjamin Lindsay* with him.

J. H. Berryman and *Berryman & Meserve, contra.*

SULLIVAN, J.

Douglas Cones, a practicing lawyer of Pierce county, instituted this action against George A. Brooks to obtain satisfaction of a claim for professional services. The petition is in three counts. The first charges that the plaintiff rendered services to Breyer, Roepke and Ahlmann, trustees, in an action brought by them against the defendant herein upon a promissory note. The second states that the trustees assigned their cause of action to Carl Korth, and that the plaintiff continued as attorney in the case and rendered valuable services therein. The third asserts an attorney's lien for a general balance upon the note in suit. The district court sustained a general demurrer to the petition, and the plaintiff having declined to plead further, judgment was rendered against him. We learn from the briefs of counsel that the decision in favor of defendant resulted from the conclusion of the trial judge that the plaintiff had failed to give due notice of his lien. This being the only question argued in this court, we shall not consider any other. Section 8, chapter 7, Compiled Statutes, 1899, is as follows: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." This statute, which is declaratory of the common law, gives an attorney a lien upon all papers, books and documents of his client which have come into his possession in the course of his professional employment. It also gives him a like lien upon any money in his hands belonging to his client. These liens are known as general or retaining liens; they depend upon possession and do not attach to anything not in the hands of the attorney; they are complete and effective without notice to any one. *Sanders v. Seelye*, 128 Ill.,

631; *Pierce v. Underwood*, 103 Mich., 62; *Hurlbert v. Brigham*, 56 Vt., 368; *Diehl v. Friester*, 37 Ohio St., 473; *Ward v. Craig*, 87 N. Y., 550. An attorney can not, however, enforce by action a general lien upon a note, bond or other obligation for the payment of money, because the lien attaches only to the evidence of the debt and not to the money in the hands of the debtor. It amounts to a mere right to retain possession of the papers as against the client, until the attorney is fully paid. *In re Wilson*, 12 Fed. Rep., 235; *McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn., 281; *Tillman v. Reynolds*, 48 Ala., 365; 3 Am. & Eng. Ency. Law [2d ed.], 464; 13 Ency. Pl. & Pr., 144.

The statutory and common law lien upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed is a charging or specific lien, and is not perfected until notice has been given to the party in possession of the fund. Such notice is necessary to prevent a *bona fide* settlement of the controversy by the litigants and payment by the debtor to the creditor in ignorance of the attorney's rights. *Williams v. Ingersoll*, 89 N. Y., 508. The notice need not be in writing or placed among the files of the case. Any notice of the existence of the claim, and that it will be asserted, is sufficient. *Young v. Dearborn*, 27 N. H., 324; *Braden v. Ward*, 42 N. J. Law, 518. The statute does not require that the notice shall be in any specific form, or that it shall be given in any particular way; and we have no right to add anything to the law by construction. These views are not in conflict with any of the past adjudications of this court; but it may be that they are not in accord with some intimations and *dicta* found in the earlier cases. *Lavender v. Atkins*, 20 Nebr., 206, *Elliott v. Atkins*, 26 Nebr., 403, and *Sheedy v. McMurtry*, 44 Nebr., 499, upon which counsel for defendant rely, are cases in which there was no money in the hands of the adverse party to which an attorney's lien could attach. The question of notice was not so involved as to make any of these cases a precedent for this. In regard

to the notice the petition states: "And that this plaintiff had and claimed a lien upon said promissory note and the moneys due thereon was well known to the said George A. Brooks." It also alleges that plaintiff was in possession of the note, claiming a lien thereon at the time the litigation was settled, and that the defendant had knowledge of that fact. It is also charged in the petition that the settlement between Brooks and Korth was made for the purpose of preventing the plaintiff in this case from obtaining satisfaction of his claim. These allegations were sufficient. The petition shows that the plaintiff is entitled to recover for the services rendered by him to the trustees and to their assignee in the action against Brooks. The judgment is, therefore, reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

RICHARD S. HORTON, TRUSTEE IN BANKRUPTCY OF THE GREATER AMERICA EXPOSITION, V. STATE, EX REL. WILLIAM HAYDEN ET AL.

FILED NOVEMBER 8, 1900. No. 11,517.

1. **Peremptory Writ of Mandamus:** NOTICE: PUBLIC OFFICERS. The statute authorizing issuance of a peremptory mandamus without notice has reference to cases in which the refusal of a public officer to discharge an official duty is so obviously inexcusable and the necessity for prompt action so imperative, that notice must be dispensed with in order to prevent a failure of justice.

2. ———: ———: PRIVATE CORPORATION. But while it is competent for the legislature to authorize courts in a proper case to coerce official action without notice and an opportunity to the recalcitrant to be heard, no such power can be exerted against a private corporation or the officers by which its functions are performed.

3. **Judicial or Governmental Power:** NOTICE: DAY IN COURT. No person can be deprived of his property or other valuable right by

the exercise of judicial or other governmental power, without notice to such person and reasonable opportunity to be heard in his defense.

4. **Pleading:** MANDAMUS: VERIFIED PETITION: ACTION OF TRIAL COURT. When the trial court has treated a verified petition for a writ of mandamus as a pleading, it will be so considered by this court when the case is brought here for review.

5. **Mandamus:** ADEQUATE REMEDY AT LAW. The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.

6. **Motion for New Trial.** A motion for a new trial is proper only where there has been a trial of an issue of fact on the pleadings.

7. **Final Judgment:** REVIEW. A final judgment based upon a pleading defective in substance may be reviewed without a motion for a new trial having been filed and ruled upon.

8. **Error:** PROPER PARTY. Any party prejudiced by a judgment rendered against him may, by taking the proper steps, have the same reviewed.

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

James W. Hamilton, Geo. A. Day and *Richard S. Horton,* for plaintiff in error.

C. J. Smyth and *George E. Prichett, contra.*

SULLIVAN, J.

This proceeding in error brings before us for review a judgment rendered by Cunningham R. Scott, one of the judges of the district court for the fourth district, allowing a peremptory writ of mandamus against the Greater America Exposition and certain of its officers. The application for the writ states that the Greater America Exposition is a corporation organized under the laws of the state of Nebraska for the purpose of holding an exposition and transacting business therein, with its principal place of business in the city of Omaha, Douglas county, Nebraska; that W. S. Streator is the auditor of said exposition, Dudley Smith is secretary thereof and

C. J. Smyth one of the directors and chairman of the executive committee of the corporation; that the board of directors of said corporation, pursuant to its articles of incorporation, had elected the following directors, C. J. Smyth, William Hayden, P. E. Iler, J. B. Kitchen and H. J. Penfold, an executive committee, of which C. J. Smyth was chosen chairman, and that said executive committee had all the powers of the board of directors when said board was not in session in reference to all matters which the board had not reserved to itself, and that the board of directors was not in session at the time referred to in the application, and had not reserved to itself the matters referred to in the application. The application further states that on the 3d day of July, 1899, Hayden Bros. had subscribed for $10,000 of the capital stock of the Greater America Exposition for the purpose of having the stock in that amount issued to them, but that about a month previous thereto the board of directors of the corporation had ordered the stock books of the corporation closed at noon, July 1, 1899, and that said stock, therefore, could not be and was not issued to them, and that the payment by them of $10,000 to the corporation was for the sole purpose of having issued to them said capital stock; that having learned these facts, they withdrew their subscription for said stock and presented to the executive committee of the corporation the claim that the $10,000 be returned to them; that on the 12th day of July, 1899, the said executive committee, at a regular meeting, resolved that the $10,000 should be returned to them on the ground that the officers of the executive committee had no right to accept any subscription for stock after the 1st day of July at 12 o'clock, and directed the auditor of the corporation to draw a warrant to them for the amount, and that their action in that regard was regular, lawful and in all respects the act of the corporation; that therefore the executive committee had determined that no money should be paid out of the treasury of the exposition, except upon a warrant drawn

upon the treasury, signed by the chairman of the executive committee and the secretary and auditor of the exposition, and that such warrants are ordinarily drawn and signed by the auditor in obedience to the orders of the executive committee, and by him presented to the chairman of the executive committee for his signature, and that said auditor, upon being requested so to do, had refused to draw and deliver to Hayden Bros. the warrant for $10,000, as he had been ordered to do by the executive committee. The application further states that the petitioners are without adequate remedy at law, and prays that a peremptory writ of mandamus might issue to the Greater America Exposition, W. S. Streator, auditor, Dudley Smith, secretary, and C. J. Smyth, chairman of the executive committee, commanding that said auditor draw and issue a warrant to and in favor of Hayden Bros. upon Frank Murphy, treasurer of the corporation, unconditionally ordering said treasurer to pay them the sum of $10,000 forthwith, and that said secretary and chairman of the executive committee sign and deliver the same to the petitioners. On July 15, 1899, Judge Scott considered this application at chambers and, without notice to the respondents and in their absence, allowed the peremptory writ. Afterwards the Greater America Exposition failed, and the plaintiff in error, having, as its trustee in bankruptcy, succeeded to its rights, entered his appearance in the district court of Douglas county and became, on his own motion, a party to the suit. He now contends that the peremptory mandamus was improvidently issued and that the judgment under consideration should be reversed. It will be noticed that while the special relief sought by the relators was merely the issuance of a warrant, the real object of the action was to obtain $10,000 alleged to be due from the corporation on an implied contract. The writ put Hayden Bros. in possession of the means by which the money claimed by them might be secured; it gave them the key to the corporate treasury. If the treasurer of

the corporation obeyed the command of the warrant which the auditor, secretary and chairman of the executive committee were required to issue, it is quite evident that the Greater America Exposition was, by the judgment in question, deprived of $10,000 without a judicial hearing, or, in other words, without due process of law. Section 648 of the Code of Civil Procedure declares: "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases, the alternative writ must first be issued." This statute undoubtedly provides for the issuance of the peremptory writ without notice where the court or judge can clearly see that the refusal of the respondent to perform some duty resulting from his office, trust or station, can admit of no possible justification. Cases may arise in which the refusal of a public officer to discharge an official duty is so obviously inexcusable and the necessity for prompt action so imperative that notice must be dispensed with in order to prevent a failure of justice. In this class of cases the respondent loses nothing by the judgment and no right secured to him by either the state or federal constitution is infringed. But while it is doubtless competent for the legislature to authorize the courts in a proper case to coerce official action without notice and an opportunity to the recalcitrant to be heard, we are of the opinion that no such power can be lawfully exerted against a private corporation or the officers by which its functions are performed. It is a fundamental principle of justice that before a person can be deprived of his property, or any valuable right, by the exercise of judicial or other governmental power, he must be warned of the proceeding against him and be afforded a reasonable opportunity to be heard in his defense. *South Platte Land Co. v. Buffalo County*, 7 Nebr., 253; *Harwood v. North Brookfield*, 130 Mass., 561; *Shove v. Manitowoc*, 57 Wis., 5. In this case the peremptory mandamus was wholly un-

authorized and, but for the subsequent voluntary appearance of the plaintiff in error, the judgment allowing it would be certainly void. But even if Judge Scott had jurisdiction of respondents by virtue of the statute quoted, his decision would have to be reversed for the manifest error committed in assuming that there could be no valid defense to the action. The asserted right of Hayden Bros. is not clear, and it is not apparent that the refusal of the auditor to issue the warrant was inexcusable. The executive committtee may have rescinded its resolution, or the resolution may have been void because one of the relators participated in the meeting at which it was adopted. The trial judge had no information in regard to the matter other than that contained in the verified application, which is described in the record as a "petition" and which was evidently designed to serve the purposes of a motion and affidavit. All the facts upon which Judge Scott acted are in the record as part of the motion, and they also appear in the judgment allowing the writ. There is no sufficient reason why the relators' affidavit touching the matters upon which they based their claim to the warrant should be regarded as indisputable. *Home Ins. Co. v. Scheffer*, 12 Minn., 261; *State v. Board County Commissioners*, 42 Minn., 284.

There is also another ground for reversing the judgment, and that is the insufficiency of the facts upon which it rests to constitute a cause of action. "This writ," says the statute, "may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." Code of Civil Procedure, sec. 646. If the Greater America Exposition was indebted to Hayden Bros., it was its duty to pay him; it was its duty to cause its servants to do whatever was necessary to cancel the debt. If the auditor refused to draw a warrant, the executive committee might discharge or displace him, or provide a different method of obtaining money from the corporate treasury. The failure of the auditor to issue a warrant was neither more nor less than the failure of

the corporation to pay its debt, an omission on its part to execute the purpose expressed in the resolution of its managing board. The remedy of the relators was to sue on their contract; they could not proceed against the auditor by mandamus or other form of action, for he owed them no duty. A different rule, of course, obtains where a claim has been allowed by the proper authorities of a municipal or public corporation, because the method by which such bodies make payment to their creditors is fixed by law. Their property can not be reached by execution, and the officers whose duty it is to issue and pay warrants can not be quickly deposed for non-performance of official duty. In this class of cases, therefore, mandamus is the creditors' only efficient remedy.

Having shown that the writ was improvidently issued, we will now inquire whether, according to the practice of this court, the judgment is subject to revision. Counsel for relators contend that it is not, because the errors committed by Judge Scott were not brought to his notice by a motion for a new trial. Upon this point it is, we think, sufficient to say that there was no trial or semblance of a trial. The petition, which, in the absence of an alternative writ, must be regarded as a pleading, was considered and held to state facts sufficient to entitle the relators to the relief demanded. The question decided was one of law and not of fact. A motion for a new trial is proper only where there has been a trial of an issue of fact on the pleadings. When judgment has been rendered by default and no issue of fact has been tried and determined, a motion for a new trial is not only unnecessary but is, as was said in one case, an unintelligible request. *Leach v. Sutphen*, 11 Nebr., 527; *O'Donohue v. Hendrix*, 13 Nebr., 255; *Farris v. State*, 46 Nebr., 857; *Corwin v. Thomas*, 83 Ind., 110; *Foley v. Foley*, 120 Cal., 33.

The case of *Clark v. Nebraska Nat. Bank*, 49 Nebr., 800, upon which counsel for relators confidently rely, has been carefully examined, and with respect to it we wish only

to remark that while it does decide that an order denying a motion to vacate a final order made in the absence of the defendant may be reversed on error, it does not decide that a final order or judgment so made or rendered may not be reviewed without such a motion.

Another argument of counsel for relators is that the judgment is not prejudicial to the corporation, and consequently should not be set aside. The Greater America Exposition was made a party to the action; the writ went against it; it was the real party in interest and as such had a right to defend for itself and for its agents. Under these circumstances there can be no doubt about its right to prosecute error. Not only is the petition insufficient to support the judgment, but the judgment itself shows upon its face that it should not have been rendered.

REVERSED AND REMANDED.

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

FILED NOVEMBER 8, 1900. No. 11,481.

Joint Petition in Error: ASSIGNMENTS. Assignments of error in a joint petition in error not good as to all who join in the petition must be overruled as to all.

ERROR to the district court for Lancaster county. Tried below before CORNISH, J. *Affirmed.*

Sawyer & Snell, for plaintiff in error.

Stewart & Munger, contra.

SULLIVAN, J.

This action was brought by Edgar G. Stearns, a wholesale merchant of Chicago, against Louis Poska and others to recover possession of certain goods which the plaintiff

claims were sold by him to L. Berkson, one of the defendants, on the faith of representations made by Berkson to a mercantile agency, and which proved to be false. At the conclusion of the oral argument we were all disposed to think that no material error had been committed at the trial and that the decision of the district court would have to be approved. A critical examination of the record has not only confirmed our first impression, but has convinced us that the judgment must, for technical reasons, be affirmed.

L. Berkson filed no answer to the petition and is, therefore, not entitled to a reversal of the judgment on account of errors occuring at the trial. No other errors are alleged, and the defendants having all joined in the petition in error, the several assignments must be overruled, not only as to L. Berkson, but also as to the others who have cast in their lot with him. *Gordon v. Little*, 41 Nebr., 250; *Levy v. South Omaha Savings Bank*, 57 Nebr., 312; *Moseman v. State*, 59 Nebr., 629, *American Bank v. Hand*, 59 Nebr., 273.

The judgment is

AFFIRMED.

CITIZENS STATE BANK OF COUNCIL BLUFFS, IOWA, APPELLEE, V. CHARLES F. IDDINGS, APPELLANT.

FILED NOVEMBER 8, 1900. No. 9,297.

1. **Marshalling Securities:** CREDITORS: COMMON DEBTS. The doctrine of marshalling securities applies only to cases in which two or more creditors are seeking to satisfy their claims out of property of the same common debtor.

2. **Creditor:** COMMON DEBTOR. Where a creditor has two common debtors, not sustaining to each other the relation of principal and surety, one of them can not claim exemption from liability on the ground that the other ought to be first sued and compelled, if possible, to satisfy the debt.

APPEAL from the district court of Lincoln county. Heard below before NORRIS, J. *Affirmed.*

Wilcox & Halligan, for appellant.

Harl & McCabe and *T. C. Patterson, contra.*

SULLIVAN, J.

This action, which is based upon a foreign judgment, was brought by the Citizens State Bank of Council Bluffs against Charles F. Iddings in the district court of Lincoln county. The plaintiff was successful at the trial, and the defendant having, as he contends, interposed an equitable defense, brings the record here for review by appeal. The facts essential to an understanding of the case are these: Iddings was a grain merchant doing business at North Platte in this state. On or about November 14, 1891, he shipped over the road of the Union Pacific Railroad Company two cars of wheat to the Brown Brothers Grain Company at Council Bluffs, Iowa, and at the same time sent them the bills of lading by mail. The grain company, having in due course received the bills of lading and being then insolvent and about to suspend business, pledged them to the plaintiff as partial security for a $9,000 loan. The railway company delivered the wheat to the grain company without authority from the bank and over the objection of defendant, who had learned, while the wheat was in transit, that the grain company had failed. Afterwards Iddings, on the theory that the sale to the grain company had been rescinded, replevied the wheat and disposed of it for his own benefit. During the pendency of the possessory action in the Iowa court, the bank intervened and asserted its rights under the bills of lading. The court found that Iddings was entitled to the property as against the grain company, but that the bank was entitled to it as against Iddings. Judgment was accordingly given for $800, the value of the wheat, in favor of the bank and against Iddings, and a like judgment was rendered in favor of Iddings and against Brown Brothers Grain Company.

Both judgments are unsatisfied, the one in favor of the bank being the basis of the present suit.

The defendant herein insists that the court should require the plaintiff to satisfy its claim against the grain company by enforcing against the railway company the right of action resulting from the wrongful delivery of the wheat. To do this would be inequitable; it would be palpably unjust. The negligence of the railway company resulted to the advantage of Iddings; it enabled him to obtain possession of property that should have gone to the bank. The wrongful act that gave the bank a cause of action against the carrier, enabled Iddings to seize and appropriate to his own use two cars of wheat to which he was not entitled. By two distinct wrongful acts the plaintiff lost the property covered by its bills of lading. The carrier gained nothing by either tort, while the defendant profited by both. It does not seem that a court of equity should, under these circumstances, bestir itself for defendant's protection. It is further insisted that the $9,000 loan was secured by other bills of lading; that the grain thus pledged was wrongfully delivered by the same carrier to the grain company; that an action has been instituted by the bank to recover of the carrier the value of the property so diverted, and that this action should not proceed to judgment until it is determined that the other has proven fruitless. It is claimed that the doctrine of marshalling securities is applicable to this case. We think it is not. It is, of course, a well established rule of equity that where there are two creditors of a common debtor, who has several funds, all of which can be reached by one creditor and only part of which can be reached by the other, the former must first seek satisfaction out of that fund which the latter can not touch. *Davenport Plow Co. v. Mewis*, 10 Nebr., 317-321; *Lee v. Gregory*, 12 Nebr., 282, 284. This doctrine is applicable only to cases in which two creditors are pursuing the same common debtor. This is a case in which a creditor has two common debtors, one of which

claims exemption from liability on the ground that the other ought to be first sued and compelled, if possible, to satisfy the debt. Iddings is not in this action seeking to enforce his judgment against the grain company; he is merely seeking to prevent the bank from enforcing its judgment against him. The case is not different in any essential particular from one in which a mortgagee sues for conversion of part of the chattels covered by his mortgage. We have never understood that in such an action the wrongdoer may defend on the ground that he has a claim against the mortgagor and that the remaining security is sufficient to satisfy the mortgage debt. The case of *Haas v. Bank of Commerce*, 41 Nebr., 754, is, we think, exactly in point. That was a suit on a promissory note by an indorsee who held it as collateral security. One defense was that the note had been obtained by fraud, and that plaintiff, who was an innocent holder, had sufficient other collateral to which he should be compelled to resort before proceeding to judgment against the defendant. Upon this branch of the case the court, speaking through IRVINE, C., at page 761, said: "It is claimed that the case in this aspect is brought within the principle whereby the holder of a junior security upon a fund may compel the holder of the senior security upon that fund, who also holds other security, to exhaust such other security before proceeding against the fund which is held by both. We do not think that this doctrine of marshalling has ever been applied to any such case as that under consideration. It has been frequently decided that the doctrine referred to will never be applied except in the case of a common debtor to both creditors for the protection of the junior creditor, and then only where it may be done without injustice, and will not compel a resort to dubious securities. It is equally well established that a creditor holding two or more securities for the same debt may proceed to enforce either or all of them, and will not, as a general proposition, be required to proceed in any particular order. In this

case the makers of the other notes were not before the court, and for that reason alone the plaintiff in error was not entitled to the relief he sought. *Dorr v. Shaw*, 4 Johns. Ch. [N. Y.], 17. The makers of other notes may have had similar defenses or equal or even superior equities. But aside from this, the plaintiff in error had no right at this time or in this manner to seek such relief. There are cases where somewhat similar relief has been granted in favor of one who occupied the position of a surety, but we know of no case like the present."

Our conclusion is that the judgment of the district court is right and should be

AFFIRMED.

ANNA L. FISK V. RUSSELL THORP, JR., ADMINISTRATOR, ET AL.

FILED NOVEMBER 8, 1900. No. 11,404.

1. **Bill of Exceptions:** EVIDENCE: PRESUMPTION. In the absence of a proper bill of exceptions, on error to this court, it will be conclusively presumed that there was introduced before the trial court sufficient evidence to sustain the order or judgment rendered.

2. **Appearance:** JURISDICTION. By appearing in a case, and invoking the powers of the court to set aside a judgment as having been irregularly obtained, jurisdiction is given to the court over the parties appearing as to all proceedings had in the case.

3. ———: VACATION OF JUDGMENT: AUTHORITY OF COURT. Such appearance in no way militates against the authority of the court to hear and determine an application to vacate a judgment because of an alleged irregularity in obtaining it.

4. **Vacation of Judgment:** TENDER OF ANSWER: MOTION: STATUTES. Under the provisions of section 602 *et seq.* of the Civil Code, in a proceeding to vacate a judgment on account of irregularity in obtaining it, it is not necessary to tender an answer with a motion to vacate such judgment. Under these provisions, the court may first try and determine upon the grounds to vacate, and then determine whether there is a valid defense. This may be found from the evidence offered in support of the motion filed asking the vacation of the judgment.

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

Allen G. Fisher, for plaintiff in error.

Albert W. Crites, contra.

HOLCOMB, J.

We are asked in this case to review the proceeding had in the district court on a motion to set aside and vacate a deficiency judgment rendered against defendants in error, and reverse the order entered sustaining such motion. The motion was filed after the term at which the judgment was rendered, and the application is made under the provisions of subdivision 3, section 602, of the Civil Code, on the ground of "irregularity in obtaining a judgment."

By error proceeding, from a similar order of the trial court on the same motion, the case has once before been here for review. In the opinion then rendered, it was held that the court had no jurisdiction at chambers to hear and decide the motion, and was also without power to order a change of venue of the hearing on its own motion, and the order entered vacating the judgment was reversed, and the cause remanded for further proceedings. *Fisk v. Thorp*, 51 Nebr., 1. The principal error alleged and relied on in the present proceedings, as argued in the brief of counsel for plaintiff in error, relates to the alleged insufficiency of the evidence to support the order entered by the trial court vacating the deficiency judgment. We are precluded from examining into or considering the alleged error complained of in this respect, for the reason that no proper bill of exceptions containing the evidence on which the trial judge acted has been settled, allowed and preserved as a part of the record in the case. We have heretofore, on the application of the defendants in error, quashed the purported bill of exceptions presented as a part of the record.

In its absence, we are without means to determine upon what evidence the court acted, and all presumptions in the case should, under the uniform holdings of this court, be resolved in favor of the correctness of the orders and judgments of the trial court. In the absence of a proper bill of exceptions, it will be conclusively presumed that there was introduced before the trial court sufficient evidence to sustain the order entered. *Van Etten v. Test*, 49 Nebr., 725, 728. This disposes of all questions presented for the determination of which resort must be had to the evidence in the case.

The question of jurisdiction of the trial court over the defendants in error is argued, but we do not understand that this question arises in the case. Whatever may have been the status of the case as to jurisdiction, the defendants in error have admitted and acknowledged jurisdiction by appearing and invoking the powers of the court to set aside the deficiency judgment rendered against them. Such appearance gives to the court jurisdiction over them as to all proceedings of the entire case. *Crowell v. Galloway*, 3 Nebr., 215, 220; *Warren v. Dick*, 17 Nebr., 241, 243. But this fact in no way militates against the authority of the court to hear the application to vacate the judgment because of the alleged irregularity in obtaining it.

It is also urged that the court erred in rendering the order vacating the judgment without an answer being filed tendering a defense to the plaintiff's cause of action. By reference to sections 604, 605 and 606 of the Code it will be observed that the proceedings to vacate a judgment on account of irregularity in obtaining it shall be by motion; that the court may first try and decide upon the grounds to vacate, before trying or deciding the validity of the defense, and that a judgment shall not be vacated until it is adjudged that there is a valid defense. *Western Assurance Co. v. Klein*, 48 Nebr., 904. The proceedings thus indicated seem to have been followed, and in the absence of any evidence, we assume the court was

justified in reaching the conclusion shown by the order entered therein. It is not required in such instances that there shall be tendered an answer, but only that the court shall find from the evidence that a valid defense exists. This may be found from evidence offered in support of the motion filed asking the vacation of the judgment.

It is also insisted that the motion to vacate the judgment, being a joint one, ought not to have been sustained, because the proof was insufficient as to the defendant Russell Thorp. Whether it was or not, we are unable to ascertain from the record before us, and must, as before stated, assume that it was.

We find no error in the record, and the order complained of is accordingly

AFFIRMED.

S. W. MCGREW, EXECUTOR OF THE ESTATE OF ALICE M. COLEMAN, DECEASED, V. STATE BANK OF HUMBOLDT, NEBRASKA.

FILED NOVEMBER 8, 1900. No. 11,184.

1. **Allowance of Claim Against Estate:** ENTRY OF RECORD NUNC PRO TUNC. An order allowing a claim against an estate on November 15, 1897, *held* to be a valid judgment as of that date, and the fact that it was not journalized or spread at large upon the probate record until April 27, following, does not affect its validity as such judgment from the time of its actual rendition.

2. ———: ———: REMEDY BY APPEAL. *Held, also,* That the order of the probate judge, allowing the claim in controversy as a proper demand against the estate, was valid and binding, and had the force and effect of a judgment against the estate, until appealed from, or, by other proceedings, reversed or vacated in some of the modes prescribed by statute.

3. **Judgment:** ENTRY. *Held, also,* That the judgment of the probate court was not the act of recording the judgment entered on the probate record on April 27, but that which it considered, adjudged, and decided on November 15, previous, when, in acting upon a matter over which it had authority and jurisdiction, it allowed the claim in controversy.

4. ———: EXPIRATION OF TERM. *Held*, That the judgment having been rendered on November 15, 1897, and the term of court at which it was rendered having expired, the probate court was without authority or jurisdiction to vacate or modify the judgment at its discretion thereafter, and could only act in respect to the matter according to fixed principles of law.

5. ———: MOTION TO VACATE. *Held, also*, That the motion to vacate the judgment having been presented at a term subsequent to its rendition, the court could not properly grant the same, except upon some of the grounds enumerated in the statute; and none being presented, its action in vacating its former judgment was erroneous.

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

B. Frank Neal and *H. J. Dobbs*, for plaintiff in error.

Isham Reavis and *Reavis & Reavis, contra.*

HOLCOMB, J.

This cause is submitted on a printed abstract of the record, and briefs of counsel. From the record it appears that in the due course of administration of the estate of Alice M. Coleman, deceased, had in the probate court of Gage county, there was filed on the 9th day of October, 1897, a claim against said estate in the form of a promissory note, executed by the said Alice M. Coleman. On November 15, the claim was allowed by the probate judge as a proper demand against the estate, the order of allowance being evidenced by the following record of indorsement on the claim filed for allowance: "Allowed for $355.33 this Nov. 15, 1897. M. B. Davis, County Judge." On the note was the following entry or indorsement: "This Nov. 15, 1897, allowed against the estate of R. W. Coleman and also Alice M. Coleman. M. B. Davis, County Judge." There appears from the record presented no proceedings in said estate had prior thereto, and we assume that a proper notice had been given for the filing of claims against the estate and fixing a day for their allowance and adjustment, and that in pursu-

ance of such notice, the claim in controversy was filed and allowed. On March 4, following, there was filed in the probate court a motion to set aside the order of allowance of the claim and grant a rehearing. This motion was presented by the plaintiff in error as executrix of the estate of Alice M. Coleman, deceased. The motion assigned three grounds as reasons for vacating the judgment: First, that said note was not signed by the said Alice M. Coleman, nor by her authorized to be signed; second, that it was not executed on the faith and credit of the said estate, and was, in fact, the note of R. W. Coleman, and made for his sole and individual use and benefit, and that said deceased had no interest in the note or benefit therefrom, and as to her and her estate is fraudulent and void; third, that it is an attempt to bind the estate of the wife for the separate and individual debts of her husband other than for necessaries, and is within the inhibitions of chapter 53, Compiled Statutes of Nebraska. A hearing was had on the motion on March 11, which resulted in an order vacating and setting aside the order of allowance, and a hearing on the claim was set for April 6, and on that day continued to April 27. On the day set for hearing, objections were interposed by the claimant to the proceedings had under the motion filed to vacate the order of allowance, for want of jurisdiction, which were overruled, and, upon further hearing, the claim was disallowed. Upon error proceeding prosecuted to the district court the proceedings had in the probate court on the motion to vacate the judgment of allowance were reversed and set aside, and the order of allowance first made reinstated. From the judgment of reversal rendered in the district court the case is brought here on petition in error for review.

The plaintiff in error bases his argument in favor of a reversal of the judgment of the district court upon the proposition that the judgment of allowance of the claim in controversy was not rendered until April 27, on the same day the claim was disallowed, and that, therefore,

the probate judge was authorized to vacate and set aside the judgment of allowance, it being at the same term it was rendered. This contention rests upon the enrollment or entry of the judgment of allowance upon the probate records, as shown by the following record made by the probate judge of said county:

"In re Estate of Alice M. Coleman, deceased.

"Claim of State Bank of Humboldt, Nebraska, against the estate of Alice M. Coleman, deceased, was filed October 9, 1897, a copy of which is as follows:

"In the County Court of Gage County, Nebraska.

"In the matter of the estate of A. M. Coleman, Deceased,

"In Account with State Bank of Humboldt, Nebraska.

"Address, Humboldt, Nebraska.

		Dr	Cr.
Date.	Description of Claim.	Amount.	Total.
	One note dated April 4, 1897 for..... due in 90 days with Int. at 10 % per annum from maturity on which Int. has been paid to Sept. 20, '97, the same being signed by R. W. Coleman and A. M. Coleman, copy of note being as follows:	.....	$350 00

"$350.00. HUMBOLDT, NEB., Apr. 14, 1897.

"Ninety days after date we, or either of us, promise to pay to the order of the State Bank of Humboldt, three hundred fifty and no 100 dollars, for value received, with ten per cent interest per annum from maturity until paid.

"Due Sept 20 97. No. 5092. R. W. COLEMAN.

"P. O. Beatrice, Nebr. A. M. COLEMAN.

"[On the margin]: Payable at the State Bank of Humboldt, Humboldt, Nebraska.

"Said claim is indorsed as follows: 'Allowed for $355.33 this Nov. 15th, 1897. M. B. Davis, County Judge.'

"Said note is indorsed as follows: 'This Nov. 15, 1897, allowed against the estate of R. W. Coleman and also Alice M. Coleman. M. B. Davis, County Judge.'

"STATE OF NEBRASKA, COUNTY OF GAGE, SS.

"I hereby certify that the foregoing record was made April 27th 1898 in the county court of Gage county, Nebraska. M. B. DAVIS, *County Judge.*"

We are unable to agree with counsel in his contention in this regard. We think it is established by the record that the order allowing the claim was made as certified in the record, on November 15, 1897. It was on this date, as shown by the record, that the judgment was rendered, and the fact that it was not journalized or spread at large upon the record until April 27 does not militate against its validity as a binding judgment from the time of its actual rendition. The executor, in his motion to vacate the judgment and grant a rehearing, has recognized the judgment as having been rendered at the time it purports to be. The entry of the judgment on the record of the probate court is the evidence of its rendition, but is not the act of judicially determining the case and making the order of allowance. It is the evidence of the judgment that was rendered by the probate judge, and proves its rendition to have been made on November 15, previous. The order of the probate judge allowing the claim in controversy as a proper demand against the estate was valid and binding, and had the force and effect of a judgment against the estate, until appealed from, or, by other proceedings, reversed or vacated in some of the modes prescribed by statute. *McCormick v. McCormick*, 53 Nebr., 255; *Sheedy v. Sheedy*, 36 Nebr., 373; *Yeatman v. Yeatman*, 35 Nebr., 422; *Rogers v. Redick*, 10 Nebr., 332. The judgment of the probate court was not the act of recording the judgment entered on the probate record on April 27, but that which it considered, adjudged and decided on November 15 previous, when, acting upon a matter over which it had authority and jurisdiction, it allowed the claim presented as a legal demand against the estate for the sum of $355.33. Freeman, Judgments, sec. 38; *Van Orman v. Phelps*, 9 Barb. [N. Y.], 500; *Fleet v. Youngs*, 11 Wend. [N. Y.], 522, 528; *Crim v. Kessing*, 89

Cal., 478; *Los Angeles County Bank v. Raynor*, 61 Cal., 145; *Sieber v. Frink*, 7 Colo., 148; *Baker v. Baker*, 51 Wis., 538. The judgment having been rendered on November 15, 1897, and the term of court at which it was rendered having expired, the probate court was without authority or jurisdiction to vacate or modify the judgment at its discretion thereafter, and could only act in respect to the matter according to fixed principles of law. *Slater v. Skirving*, 45 Nebr., 594; *Brownlee v. Davidson*, 28 Nebr., 785; *Volland v. Wilcox*, 17 Nebr., 46; *Hansen v. Bergquist*, 9 Nebr., 269.

By section 602 of the Code, provision is made whereby in the county and district courts judgments or orders may be reversed, vacated or modified by the court rendering them after the term at which rendered for any of the reasons therein mentioned. In this case, under the motion to vacate the judgment, no reasons were assigned which are contemplated in the section referred to. In fact, no grounds for setting aside the judgment are presented. All that is claimed as a basis for the proposed action is that the representative of the deceased person had a valid defense against the claim allowed by the probate judge. This alone is not sufficient; there must also exist as a cause for vacating a judgment some of the grounds mentioned in the statute. We are cited to a number of authorities holding to the proposition that the time for taking an appeal does not begin until the enrollment or entry of the judgment sought to be appealed from. We do not think the principles alluded to governing appeals are applicable to the statute with reference to applications to vacate or modify judgments after the term at which rendered. Whether or not the entry of the judgment at the date mentioned constitutes an irregularity in obtaining it, as is said in *Slater v. Skirving, supra*, it is not necessary to determine. The general rule is that a judgment is rendered, and the time begins to run, from the time it is announced as the decision of the court having jurisdiction over the matter decided.

Says POST, J., in *Bickel v. Dutcher*, 35 Nebr., 761, 764: "We can agree with the learned author of the majority opinion [referring to *Horn v. Miller*, 20 Nebr., 98], that for some, perhaps most, purposes the date of a judgment is the time when the decision was made and announced by the court, rather than the time when it was entered upon the records." In this case, we think the conclusion is irresistible that the judgment of allowance was rendered November 15th, 1897, and the motion to vacate the same having been presented at a term subsequent thereto, the court could not properly grant the same, except upon some of the grounds enumerated in the statute; and none being presented, its action in vacating its former judgment was erroneous, and was rightfully held so by the judgment of the district court on error to that tribunal.

It follows that the judgment of the district court is right, and should be affirmed, which is accordingly done.

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE, V. COUNTY OF HITCHCOCK ET AL., APPELLANTS.

FILED NOVEMBER 8, 1900. No. 9,226.

1. **Summons:** ISSUANCE: SERVICE: WAIVER. Ordinarily a defendant may waive the issuance and service of summons in an action, and enter a voluntary appearance in the case, such appearance being equivalent to actual service of summons in the manner provided by statute.

2. ——: ——: ——: ——: AUTHORITY OF ATTORNEY. An attorney of a municipal corporation, without authority therefor, can not waive the issuance and service of summons and enter the voluntary appearance of the defendant in an action.

3. **Service of Municipal Corporation:** STATUTE. The service of process upon a municipal corporation, as provided by section 57, chapter 14, article 1, Compiled Statutes, while required to be served upon the mayor or chairman of the board of trustees, or, in his absence, upon the clerk, or, in his absence, by leaving a

certified copy in the office of the clerk, is upon the corporation in its corporate capacity, and not upon the individual.

4. ———: WAIVER: AUTHORITY OF CHAIRMAN: BOARD OF TRUSTEES. A chairman of the board of trustees of a village defendant is not empowered to waive the issuance and service of summons, and to enter the voluntary appearance of the defendant in an action, without authority of the village board acting in its corporate capacity as a body politic.

5. **Courts of General Jurisdiction:** PRESUMPTION. In courts of general jurisdiction the rule is that the proceedings taken, including questions of jurisdiction, are presumed to be regular and in conformity with law. Where, however, the record discloses the jurisdictional steps taken, and it is made to appear that no jurisdiction was acquired over the defendant, the rule invoked is rendered unavailing.

6. **Court Without Jurisdiction:** VOID JUDGMENT. Where a court is without jurisdiction over a defendant, the judgment rendered is void, and may be attacked as such by anyone whose rights are affected by its rendition, and its invalidity shown in any action in which it may be called in question.

7. **Unauthorized Appearance:** VOID JUDGMENT. The unauthorized appearance in a case, where no process has been served upon a defendant, is wholly void as to such defendant for whom such unauthorized appearance was made.

APPEAL from the district court of Hitchcock county. Heard below before NORRIS, J. *Affirmed.*

L. H. Blackledge, for appellants.

E. R. Duffie, Charles F. Manderson, J. E. Kelby, F. M. Flansburg, R. O. Adams and *W. S. Morlan, contra.*

HOLCOMB, J.

By injunction the plaintiff and appellee seeks to restrain the collection of taxes to the amount of 110 mills on the dollar valuation attempted to be levied for the satisfaction of certain purported judgments rendered against the village of Trenton, one of the appellees. On the trial of the case in the court below it was found that all the judgments save one, were void for want of jurisdiction in the court rendering them, and a decree entered enjoining perpetually the collection of nine-tenths

of the special taxes so attempted to be levied. From this decree the action is by appeal brought here for further consideration.

The appellants the Shickle, Harrison & Howard Iron Company and the county of Hitchcock, present a joint brief, arguing for a reversal of the judgment below. A joint brief is also filed on behalf of the appellee railway company and the village of Trenton. No other appearances are made in the appeal proceedings. The jurisdiction of the court rendering the judgment in favor of appellant the Shickle, Harrison & Howard Company, who are the largest of the village creditors, depends upon the following instrument filed in the case in that court, no other appearance of any kind being found in the record. The paper referred to is as follows, omitting the title: "Comes now the defendant, the village of Trenton, and by its officers, the chairman of its board of village trustees, and its attorney they being duly authorized by order of record of the village board, hereby waives the issuance and service of summons in the above entitled cause, and enters the voluntary appearance of said defendant herein and also waives the giving of security for costs in this action by the plaintiff.

"Dated this 21st day of January, 1895.

"[SEAL.] H. B. SEELEY,

"*Chairman of the Board of Village Trustees of the Village of Trenton, Defendant.*

"Attest: A. L. TAYLOR, F. M. FLANSBURG,

"*Village Clerk.* *Village Attorney.*"

A petition had been filed January 5, and the so-called appearance was filed the 23d of the same month. At the May term of the court following, judgment was rendered against the village as by default. The claims against the village appear to have been for material used for the construction of a waterworks system, for which bonds had been voted by the taxpayers in the sum of $5,000. The expenses incurred in the construction of the system, however, seem to have greatly exceeded the pro-

ceeds derived from the bonds, and the judgments referred to were obtained, and for their satisfaction, resort was had to the special levy mentioned.

The controlling question presented is whether the court acquired jurisdiction over the village by the filing of the instrument heretofore copied. The question is one by no means free from doubt. Ordinarily, a defendant may waive the issuance and service of summons, and enter a voluntary appearance in a case, such appearance being equivalent to actual service of summons in the manner provided by statute. Code of Civil Procedure, sec. 72; *Merchants Savings Bank v. Noll*, 50 Nebr., 616. Whether or not a municipal corporation, whose officers derive their powers solely from the statute, may make such an appearance as is contemplated by the section referred to, and waive the issuance and service of summons, is not necessarily involved in this action, and need not therefore be considered. The proposition herein to be determined is as to the authority of an attorney and chairman of the board of trustees of a village to waive the issuance and service of summons in an action against the village in the manner hereinbefore mentioned, and thereby give to the court jurisdiction to render a valid and binding judgment against such village. That an attorney can not, without authority therefor, make such an appearance, we regard as the law of this state and well supported by authority. *Ellis v. Ellis*, 13 Nebr., 91; *Star v. Hall*, 87 N. Car., 381; *Atchison, T. & S. F. R. Co. v. Benton*, 42 Kan., 698; *Bridgeport Savings Bank v. Eldredge*, 28 Conn., 555, 556.

It is urged, however, that the chairman of the board of trustees, being the person upon whom service of summons is required to be had, may properly waive its issuance, and enter a voluntary appearance for the corporation in an action against it. There is certainly no direct authority for such action, nor does it appear to us to be based on any well recognized rule of construction to hold that such authority is lodged in a presiding

officer of a municipal corporation as an implied power, under the different sections of the statute bearing on the subject. By section 56, chapter 14, article 1, Compiled Statutes, 1899, cities of the second class and villages, as therein defined, shall be bodies corporate and politic, and may sue and be sued. By section 57 it is provided that "the corporate name of each city or village governed by this chapter shall be the 'city (or village) of ———,' and all and every process and notice whatever affecting such corporation, shall be served upon the mayor or chairman of board of trustees, and in his absence, upon the clerk, or in the absence of such officers, then by leaving a certified copy at the office of the clerk." The service contemplated in the foregoing section, which is to be made upon the chairman, or, in his absence, upon the clerk, or, in the absence of both, by leaving a copy at the office of the clerk, is upon the corporation in its corporate capacity, and not upon an individual officer of the corporation. The officers chosen to represent the village must act in a body, and the action of an individual member, it would seem, ought not to bind the corporation to any greater extent regarding questions involved in litigation or incident thereto, than in all other matters affecting the interests and welfare of the village. It will hardly be contended that the chairman of a village board could in matters of litigation stipulate away the rights of the village regardless of the question of authority from the village board; and yet we see no difference in principle in the proposition last stated and the one involved herein. In support of the foregoing, we cite *Grand Island & N. W. R. Co. v. Baker*, 45 Pac. Rep. [Wyo.], 494. It is not contended that the chairman of the board of village trustees had express authority from the said board for the action taken, although such is recited in the appearance filed. On the contrary, the record discloses that no such authority was ever given. It is true that in the record it is shown that a motion was carried by the village board, authorizing the chairman "to con-

fess judgment to Shickle, Harrison & Howard Iron Company, to the amount of their bill less freight." We do not think this can be construed as authorization to enter the appearance attempted; nor did appellant rely on it, since no effort was made to act thereunder by a confession of judgment. Such being the case, the action taken by the chairman and village attorney was upon their individual responsibility, and in no way binding upon the village, and no jurisdiction was thereby acquired by the district court over the village. The method by which jurisdiction over the village might be acquired was clearly pointed out in the statutes, and if the plaintiff chose to rely upon some other, it alone must suffer the consequences of its own actions. We think it a wholesome rule that, in obtaining judgments against a municipal corporation, the defendant shall be brought into court, either by a properly served process duly issued, or that in its corporate capacity it acts within the scope of the authority conferred upon it by statute, and in such manner as to show that the action taken is that of the corporation, rather than of an individual who may be a member of a body chosen to conduct the affairs of such corporation. The supreme court of Kansas, in *Salina Nat. Bank v. Prescott*, 57 Pac. Rep., 121, has held that the president of a private corporation, upon whom service of summons is required to be had, may waive the issuance and service thereof, and enter the appearance of the defendant company of which he is the chief officer; following *City of North Lawrence v. Hoysradt*, 6 Kan., 170. The rule of procedure announced in the case last cited is directly in conflict with that announced by this court in *Howell v. Gilt Edge Mfg. Co.*, 32 Nebr., 627, wherein it is held that a judgment by confession can only be entered by the debtor personally, with the assent of the creditor, or by an attorney or agent who shall produce his warrant of authority and make it a part of the record in the case. In the other case, the decision is based upon the broad ground that authority to serve upon the presi-

dent of a corporation a summons carries with it the reciprocal authority to waive the issuance of summons, and enter a voluntary appearance in the action. While this rule may hold good as to private corporations, we do not think the reasons for the rule can apply to officers of a municipal corporation deriving their powers only from the statute. On the other hand, the supreme court of Wyoming has held, in *Grand Island & N. W. R. Co. v. Baker, supra,* that a board of county commissioners has no authority, in the absence of express statutory provisions therefor, to appear in an action and confess judgment against the county in favor of a plaintiff in such action, nor to authorize an attorney so to do.

It is urged that the authority of the parties who entered an appearance for the village in this action can not be inquired into in a proceeding of the nature of the present action, nor can the judgment rendered in another action be assailed in the manner attempted by this proceeding. We are mindful of the rule that in courts of general jurisdiction the proceedings taken, including questions of jurisdiction, are presumed to be regular and in conformity with law. Where, however, the record discloses the jurisdictional steps taken, and it is made to appear that no jurisdiction was acquired over the defendant, the rule invoked is rendered unavailing. If the court was without jurisdiction over the defendant, then the judgment rendered is void, and may be attacked as such by any one whose rights are affected by its rendition, and its invalidity shown in any action in which it may be called in question. It has been frequently held, upon principles appearing sound and wise, that an unauthorized appearance in a case, where no process has been served upon a defendant, and it has not been ratified or confirmed, is wholly void as to such defendant for whom such unauthorized appearance was made. *Kirschbaum v. Scott,* 35 Nebr., 199; *Kepley v. Irwin,* 14 Nebr., 300; *Shelton v. Tiffin,* 6 How. [U. S.], 163; 2 Ency. Pl. & Pr., p. 690, and numerous cases therein cited.

The other judgments, for the satisfaction of which the levy was made, save the one heretofore referred to, were entered under circumstances which, under the rule laid down in *Howell v. Gilt Edge Mfg. Co., supra,* render them void and without force or effect. The judgment of the district court should, therefore, stand affirmed, which is ordered accordingly.

AFFIRMED.

SOLOMON HOFFINE V. ANDREW J. EWINGS.

FILED NOVEMBER 8, 1900. No. 11,433.

1. **Instructions.** Instructions copied in the opinion examined, and the giving of the same *held* to be without prejudicial error.

2. **Adverse Possession.** Where a person claims title to real estate by reason of adverse possession, it is necessary to prove that such person for a period of ten years next before the commencement of the action was in actual, continued and notorious possession of the land claimed, claiming the same against all persons. *Horbach v. Miller*, 4 Nebr., 31, followed.

3. ———: CONSTRUCTIVE POSSESSION. Possession of real estate for a period long enough to ripen into a good title, among other essential elements, must be characterized by opposition to, and inconsistency with, the constructive possession of the legal proprietor, as well as all others asserting or claiming title to such property.

4. **Construction of "Hostile" Applied to Possession.** The word "hostile," when applied to the possession by an occupant of real estate holding adversely, is not to be construed as showing ill-will or that he is an enemy of the person holding the legal title, but is applied to an occupant who holds and is in possession as owner and therefore holds such possession against all other claimants of the land. *Ballard v. Hansen*, 33 Nebr., 861, followed.

5. **Word "Hostile" Used in Instructions.** The use of the word "hostile" in an instruction, as describing the character of the possession of real estate under which title is claimed by adverse possession, while not to be commended, *held* not prejudicial error.

6. **Instructions, How Construed.** Instructions are to be considered together, to the end that they may be properly understood, and when so construed, if, as a whole, they fairly state the law ap-

plicable to the evidence, error can not be predicated upon the giving of the same.

7. **New Trial:** NEWLY-DISCOVERED CUMULATIVE EVIDENCE. A new trial will not be granted for newly-discovered cumulative evidence, unless the proposed evidence be of such a weighty character as would probably change the result of the trial.

8. ———: NEWLY-DISCOVERED EVIDENCE: RULE. Before a party can rightfully claim a new trial on the ground of newly-discovered evidence, he is required to show that he could not, by the exercise of reasonable diligence, have discovered and produced the proposed evidence at the trial had in the case.

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

John C. Watson, John V. Morgan and *Frank Irvine,* for plaintiff in error.

Sloan & Moran, contra.

HOLCOMB, J.

As presented to us, a proper disposition of this action hinges upon the correctness of certain instructions given to the jury and excepted to, and the ruling of the trial court on a motion for a new trial on the ground of newly-discovered evidence. The action is one of ejectment. The land in controversy is known as accretions caused by the recession of the channel of the Missouri river, on the borders of which the land lies. The plaintiff claims as the legal holder and owner of the title to the land to which the land in controversy is an alleged accretion, as aforesaid. The defendant claims by virtue of adverse possession. The trial to the court and a jury resulted in a verdict for the plaintiff, upon which judgment was rendered in his favor. The defendant prosecutes error.

Two instructions are complained of, being Nos. 4 and 5. With the instructions to which exceptions are taken, we give also the first instruction, believing it will assist in a more intelligent understanding and discussion of the other two.

"Inst. No. 1. That under the pleadings, the law and the evidence in this case the only question for your consideration is the question of adverse possession of the property in controversy set up by the defendant Solomon Hoffine in his answer herein, wherein he alleges that he has been in the actual, open, notorious, and exclusive possession of the land in controversy, claiming the same adversely to the plaintiff and all the world for more than ten years next before the commencement of this action; and the burden is upon the defendant to establish such defense by a preponderance of the evidence.

"Inst. No. 4. You are instructed that adverse possession sufficient to defeat a legal title must be hostile in its inception and continue uninterruptedly for ten years. It must also be open, notorious, adverse and exclusive and must be held during all of such time under a claim of ownership by the occupant, and all of these facts must be proved by a preponderance of the evidence.

"Inst. No. 5. If you believe from the evidence that the defendant, Solomon Hoffine, not less than ten years prior to the commencement of this suit, entered into possession of the lands in controversy and cultivated said lands or fenced the same, or erected improvements of any kind thereon or did other acts of such a character as to clearly show that he was occupying said lands and claiming the same as his own, and during all of said ten years continued to so occupy said lands, claiming during all of said time to be the owner of the same, and never during any of said period of ten years abandoned said land, but during all of said time continued openly, notoriously, adversely and exclusively to occupy and claim the same as his land, then you are instructed that said acts on the part of said defendant Hoffine would constitute adverse possession within the meaning of the law and would entitle the defendant to a verdict at your hands. But if the defendant Hoffine has failed to establish any of said acts by a preponderance of the evidence your verdict should be for the plaintiff."

It is urged that the fourth instruction is erroneous, because of the use of the word "hostile" in the manner in which it appears therein. It may be stated in the outset that an examination of the authorities in this state discloses that the word is infrequently used in expressing the character or nature of the possession of real estate which may in time ripen into a perfect title. At the same time it is to be borne in mind that it is not every possession, however long and continuous, which will give to an occupant of real estate a good title thereto as against the holder of the legal title. The authorities are uniform, and grounded on fundamental principles, to the effect that such possesion must be in opposition and adverse to the constructive possession of the holder of the legal title. It must be under a claim of ownership which is inimical to the possession of the legal proprietor and all others. In *Horbach v. Miller*, 4 Nebr., 31, 48, which may be regarded as the parent case on the subject in this state, an instruction "that if they [the jury] believed from the evidence that the plaintiff in error, for ten years next before the commencement of the action, was in the actual, continued, and notorious possession of the land in controversy, claiming the same as his own against all persons, they must find for the plaintiff in error," was approved as a correct statement of the law. "The possession must be inconsistent with the title of the true owner, and not subject to the rights of other parties." *Gatling v. Lane*, 17 Nebr., 77, 79. "Such possession, when adverse, is sufficient if actual, open, notorious, and exclusive to give the party in possession title to the property." *Crawford v. Galloway*, 29 Nebr., 261, 267. "* * * it is necessary that he should actually hold the land as his own during that period, in opposition to the constructive possession of the legal proprietor." Second paragraph syllabus, *Smith v. Hitchcock*, 38 Nebr., 104. In the opinion in the same case, on page 109, says the author: "To constitute her possession or occupancy adverse, she must have actually held and occupied the property as

her own, and in opposition and hostility to the concurrent and constructive possession of the owner of the legal title. There is no evidence in the record that establishes, or tends to establish, * * * that she ever held after her entry in hostility to the defendant in error." Says LAKE, C. J., in *Roggencamp v. Converse*, 15 Nebr., 105, 108: "They claimed on the trial, and produced an abundance of evidence to show that the plaintiff's possession was simply as lessee under the title conveyed by the deed, and not in hostility to it." From the excerpts above given, the views of this court as to the character and requisites of the possession required in order to obtain title are readily discernible.

Counsel suggests that the words "hostile" and "hostility," although proper when employed between those versed in law and skilled in technical terms, are objectionable when used to jurymen, as they are apt to take them to signify ill-will, enmity, antagonism and the like. It is true, words sometimes convey different meanings to different minds, and have a technical as well as a common meaning. We do not, however, think the distinction contended for can be recognized. The test is whether, by a fair interpretation of the words used, in connection with other instructions, the jury could have been misled into an erroneous understanding of the law of the case as presented to them by the court. Possession of real estate for a period long enough to ripen into a good title, among other essential elements, according to the views above expressed, must be characterized by opposition to, and inconsistency with, the constructive possession of the legal proprietor, as well as all others asserting or claiming title to such property. This essential element is, as we have seen, at times expressed as "hostile" or "in hostility." Whether this expression conveys the meaning intended as clearly and accurately as some other term might, it is unnecessary here to determine. The decisive question is whether its use in the instruction excepted to is prejudicial error. For its disapproval chief reliance

is placed on the expression by this court through MAXWELL, C. J., regarding the use of the word in the same connection in the case of *Ballard v. Hansen*, 33 Nebr., 861, 864. In the instructions given the jury in that case the words "hostile" and "hostility" were used in defining the character of the possession required, *e. g.*, "Adverse possession, as relied upon by the plaintiffs in this action, is the open, actual, exclusive, notorious, and hostile occupancy of land, and claim of right, with the intention to hold it against the true owner and all other parties," etc. In reviewing the proceedings of the trial court in the case mentioned this court held, as announced in the third paragraph of the syllabus, as follows: "The word 'hostile' when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill-will, or that he is an enemy of the person holding the legal title, but means an occupant who holds, and is in possession, as owner, and therefore against all other claimants of the land." In the opinion of the court regarding the point decided in the syllabus quoted the learned author says, at page 865: "The word 'hostile,' which Webster defines as 'belonging to an enemy; appropriate to an enemy; showing ill-will and malevolence, or a desire to thwart and injure; occupied by an enemy or a hostile people; inimical; unfriendly; as, a hostile force; hostile intentions; a hostile country; hostile to a sudden change' (Ed. of 1881, 640), does not correctly state the character of the occupancy necessary to create adverse possession. There need be no ill-will, malevolence, or desire to injure any one, and the element of hostility in that sense does not necessarily enter into the case. What was meant, no doubt, was that the possession of the plaintiff below must be adverse or against the party holding the legal title." Further on the writer says: "In most instances it will be found that the adverse occupant has entered under a claim of right, and where such occupation has been adverse, open, notorious, and exclusive for the statutory period, that is sufficient. The word

'hostile,' therefore, does not correctly express the character of the occupancy required, but as this was against the plaintiff below, the defendant below can not complain on that ground." In view of the decision of the court on the point referred to as expressed in the syllabus, which must govern as to the point decided under the holdings of this court, and the language of the author in support of the same, the views last expressed can only be regarded as expressing the individual views of the author, and have no binding force as an opinion of the court on the subject. It was unnecessary to decide, and it was not decided therein, if resort be had to the syllabus in order to determine the question decided, that the use of the word in the instruction was without prejudice, as it was against the defendant below, and the defendant could not, therefore, complain, since it had been before determined that the word had been used in the sense first mentioned, and with such meaning was proper. In the sense of being inimical, adverse or opposed to the right of possession of the holder of the legal title and all others, the use of the word can hardly be said to be erroneous. As synonyms of the word Webster gives inimical, unfriendly, antagonistic, opposed, adverse, etc. "Synonymous" means conveying the same or approximately the same meaning. We thus have "adverse," which is most frequently used in defining the character of the possession required, given as synonymous with the word "hostile." Whether we view the statute favorably as one of repose or otherwise, we think the principle remains that a possession, to ripen into a good title, must be in opposition to all others, including the legal owner, and that this element embraces the idea of hostility in the milder sense of that term; that the use of the term in such connection in judicial proceedings, while not to be commended, is sanctioned by the authorities and that prejudicial error will not arise therefrom.

By resort to the decisions of the courts of other states, we find that the word, in the sense in which we have ap-

plied it, is of general use. In *Clark v. Kirby,* 25 S. W. Rep. [Tex.], 1096, 1097, it is said: "The statute would not begin to run until the possession became adverse and hostile to the owner." To the same effect are *Headrick v. Fritts,* 93 Tenn., 270; *Allen v. Allen,* 58 Wis., 202; *Davenport v. Sebring,* 52 Ia., 364; *Pease v. Lawson,* 33 Mo., 35. We therefore conclude that the use of the word in the instruction quoted does not constitute prejudicial error.

It is also urged that the instruction under consideration is faulty because requiring hostility at the inception of the possession. We regard a fair construction of the language used as conveying the idea that an adverse possession must exist at the beginning of the period under which title is claimed, and continue so uninterruptedly for ten years. The meaning conveyed is that the possession, from the inception to the end of the period required, was under a claim of ownership, and therefore opposed to the constructive possession of the owner of the legal title and all others. There is in the record evidence to prove that the defendant entered into possession of the land in controversy with the permission of the then owner and as his tenant at will, without claim of ownership or other element of adverse possession. Such possession, if it existed, would not be in opposition to the rights of the legal owner, and under it, while so existing, nothing could be claimed by the defendant while so in possession. *Carson v. Broady,* 56 Nebr., 648, 651; *Clark v. Kirby, supra.* The defendant in his answer alleges an occupancy of the land adverse in its character at its inception to the legal title of the plaintiff and his grantors. This was denied in the reply. Under no theory of the case could he recover, except by proving that his original entry on the land in the beginning was inimical to the plaintiff's rights. The instruction, therefore, appears to be, not only without prejudice, but pertinent to the issues and the evidence. The last sentence in this same instruction is quoted incorrectly and criticised as misleading. The mistake in copying this portion of the instruction probably accounts

for the criticism. By referring to the instruction heretofore set out it will be observed that it gives the essential facts or elements of the possession required before a good title can be perfected, and states that such facts must be proved by a preponderance of the evidence. This portion of the instruction, we think, is not calculated to mislead, nor does it incorrectly state the law. Practically the same criticism is passed upon the last sentence of the fifth instruction. As construed by counsel, the statement that a failure to establish any of the acts mentioned in the instruction as essential to the perfection of a legal title by adverse possession, is made to apply to the different acts by which a claim to ownership may be inferred; and hence, if defendant failed to prove all of the acts mentioned indicative of a claim of ownership, he could not recover. We hardly think the language used susceptible of the construction thus given. Such a construction, it appears to us, would not be giving to the language used its ordinary and natural meaning. The facts which are to be proven by a preponderance of the evidence are those necessary for the defendant to establish in order to make out his case under the pleadings. It required that the proof should preponderate in his favor as to adverse possession being taken ten years prior to the commencement of the suit; that at the beginning, and under the possession thus entered into, the defendant did some act or acts, either one of more of those mentioned in the instruction, of a character to show clearly that he claimed the land as the owner; that during such period he did not abandon his possession, but during all the time, continued openly, notoriously, adversely and exclusively to occupy and claim the property as his own. This, we think, is substantially the effect of the instruction, and these facts we regard as essential elements to be established by a preponderance of the evidence in order to justify a verdict for the defendant.

In considering the instructions to which exceptions are taken we have constantly borne in mind that the instruc-

tions are to be considered together, to the end that they may be properly understood and construed, and we are impressed with the conviction that the instructions given, as a whole, fairly state the law applicable to the evidence, and that error can not be predicated upon the giving of the same.

In the motion for a new trial one of the grounds assigned was newly-discovered evidence. Affidavits were filed in support of the same, and the ruling of the court in refusing the motion is urged as error. From an examination of the record relating to the motion, we reach the conclusion that the ruling was correct. The proposed evidence we regard as cumulative in character, and not of sufficient weight to render a different verdict probable. The greater portion of defendant's testimony was directed to establishing the time when it was claimed he entered into adverse possession of the land in controversy. This was fixed by the evidence as in the spring of 1883, the exact time not being given. The proposed evidence fixes the time as being March or April of that year. There seems to be no serious controversy over the fact that under a contract of sale afterwards executed, defendant bought certain land in section 36, immediately north and adjoining the land in controversy, and that he began to improve this land, and make preparations to reside upon it, and that work to that end was begun in the spring of 1883, and that a residence was established during the fall of that year. From these facts, the inference is sought to be drawn that he entered into possession of the land in controversy, which is spoken of as the "made lands." Much of the evidence given, and that proposed in the affidavits in support of the claim of newly-discovered evidence, is more in the nature of conclusions of witnesses than statements of fact. They assume that because he entered into possession of the land purchased, he obtained thereby also the possession of the land in controversy, which he claims by a right of adverse possession. No clear distinction is made between

the two tracts, and the evidence is more or less confusing by reason thereof. The exact time when he entered into possession of the land in controversy, if he did in the spring of 1883, is not, under the evidence, made a vital point in the case. If his theory is accepted, then any time before May 16 of that year is all that is required; and this fact is sought to be established by all or nearly all of the witnesses who testified in his behalf. The evidence opposed to this did not raise an issue as to possession near May 16, either before or after, but long subsequent thereto. So that if possession was shown to have been taken in the spring of 1883, it was clearly prior to the date when it must be taken in order to have existed for ten years before commencement of the action. While in the affidavits in support of the motion for a new trial it is said, in substance, that the affiants are acquainted with the identical land in controversy, and know that the defendant was in possession of it, and claimed the same as the owner, cutting wood, cleaning up under-brush, etc., thereon in March and April, 1883, it is quite apparent from the record, in connection with the affidavits, that they referred to the defendant taking possession of the land in 1883, which land was afterwards conveyed to him by deed, and have reference to the same acts testified to by the defendant and many others who appeared in his behalf on the trial of the case. A new trial will not be granted for newly-discovered cumulative evidence, unless the proposed evidence be of such weighty character as would probably change the result of the trial. *Hill v. Helman*, 33 Nebr., 731; *Gran v. Houston*, 45 Nebr., 813; *Flannagan v. Heath*, 31 Nebr., 776. A stronger reason for sustaining the trial court in its action on the motion is the obvious lack of diligence exercised on the part of the defendant in procuring the evidence to which the motion has reference. The affidavits show the parties to have been old acquaintances of the defendant, that they lived just across the river in Iowa and Missouri, but a short distance from where the defendant had resided

during all of the time covered by the evidence in the case; that they had resided there for twenty years or more, some of them during all their lives; that they assisted the defendant when he moved, from the neighborhood where they resided, to this state; that they had visited him and boarded with him during the period he claimed to have taken possession of the land in controversy; that they had been acquainted with each other during all of the period mentioned and for a long time prior thereto; that during the pendency of the litigation, which covered a period of several years, they were accessible, and the evidence could without difficulty have been procured. Other witnesses bearing the same name, relatives of the defendant, testified in the case. No effort seems to have been made either to discover the evidence or to secure it. There appears to have been an utter lack of diligence on defendant's part regarding the matter. He must have known of its existence, and the most charitable view to be taken is that he had forgotten the fact of the presence of these parties at the time they say they were with him and knew of his entrance into the possession of the land in controversy, at the time claimed. This is not sufficient to excuse defendant and authorize a new trial. *Upton v. Levy*, 39 Nebr., 331. The record discloses that one trial has been had prior to the one now under consideration. The defendant was advised that his claim was disputed and his right to the land challenged. It was incumbent upon him to make every reasonable preparation to sustain the cause of action pleaded in his answer. He must exercise vigilance in securing the evidence of witnesses to sustain his claim as asserted in his pleadings. This, we think the record shows, he failed to do; and before a party can rightfully claim a new trial on the ground of newly-discovered evidence, he is required to show that he could not, by the exercise of reasonable diligence, have discovered and produced the proposed evidence at the trial had in the case. *Fitzgerald v. Brandt*, 36 Nebr., 683;

Smith v. Hitchcock, 38 Nebr., 104. His motion for a new trial was, therefore, we think, properly overruled.

From the examination we have been able to give the record, we feel that substantial justice has been administered to the parties litigant, and no good purpose can be subserved by prolonging the litigation. The judgment of the trial court is

AFFIRMED.

STATE OF NEBRASKA V. BURLINGTON & MISSOURI RIVER RAILROAD COMPANY.

FILED NOVEMBER 21, 1901. No. 11,219.

1. **Enactment of Laws:** CONSTITUTIONAL PROVISION MANDATORY. The provisions of section 11, article 3, of the constitution, relative to the mode of enacting laws, are mandatory.

2. **Title Part of Act:** SUBJECT OF LEGISLATION: EXPRESSED IN TITLE. The title to a legislative act is a part thereof, and must clearly express the subject of legislation.

3. **Enrolled Bill:** PRIMA FACIE EVIDENCE. An enrolled bill in the office of the secretary of state is only *prima facie* evidence of its passage.

4. **Legislative Journals:** CONTRADICTION: CONTROLLING EVIDENCE. Where the legislative journals unequivocally contradict the evidence furnished by the enrolled bill, the former will control. *Webster v. City of Hastings*, 59 Nebr., 563.

5. ——: INVALID ACT. A statute is invalid which the legislative journals show was never passed in the mode prescribed by the constitution.

6. **Reading of Statute Before Each House.** A statute is invalid which is not read in each house of the legislature on three different days.

7. **Invalid Statute.** Chapter 60, Session Laws, 1887, is void, as the act as enrolled was not passed by the legislature in the mode prescribed by section 11, article 3, of the constitution.

ORIGINAL action in the supreme court to recover penalties under section 9, article 8, chapter 72, of the Compiled Statutes, in the sum of $25,000. Submitted on demurrer to petition. *Dismissed.*

Constantine J. Smyth, Attorney General, for the state.

Green, Breckenridge & Kinsler, J. W. Deweese and *Frank E. Bishop, contra. Charles F. Manderson,* of counsel.

Woolworth & McHugh, amici curiæ.

NORVAL, C. J.

On July 13, 1897, one T. H. Tibbles filed a complaint with the state board of transportation charging that the Burlington & Missouri River Railroad Company in Nebraska was exacting and receiving unjust and unreasonable rates on the shipments of live stock. A hearing was had before said board of the matter alleged in said complaint, which resulted in an order being entered on November 26, 1897, that the defendant, on or before December 5, 1897, restore the car load rates in force prior to August 10, 1897. Subsequently the board extended the time for taking effect of said order until December 16, 1897. The state claims that the defendant has violated said order of the state board of transportation, and this action was commenced in this court to recover the sum of $25,000 as penalties for such alleged violation, for which provision is made in section 9, article 8, chapter 72, Compiled Statutes. A demurrer to the petition has been interposed, upon which the cause has been submitted for our consideration.

The legislature in 1885 passed an act entitled "An act to provide a board of railroad commissioners, to define their duties and to provide for their salaries." Session Laws, 1885, ch. 65, Compiled Statutes, 1885, ch. 72, art. 8, By this act the attorney general, secretary of state and auditor of public accounts were constituted the board of railroad commissioners. Chapter 60 Session Laws, 1887, is entitled "An act to regulate railroads, prevent unjust discrimination, provide for a board of transportation, and define its duties, and repeal articles 5 and 8 of chapter

72, entitled 'Railroads' of the Revised Statutes and all acts and parts of acts in conflict herewith." Compiled Statutes, 1887, ch. 72, art. 8. Said chapter 60 provided for a state board of transportation composed of the state officers already mentioned, together with the state treasurer, and clothed it with power to determine and establish reasonable rates of transportation for common carriers of freight. One of the questions raised by the demurrer is whether the state board of transportation has a legal existence. In other words, was chapter 60, Session Laws, 1887, passed by the legislature in the manner prescribed by the constitution? If the act was unconstitutional, then the order of the board of transportation of November 26, 1897, was invalid, and no penalties were incurred by the defendant by reason of any violation thereof. Section 11, article 3, of the constitution provides: "Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage. No bill shall contain more than one subject, and the same shall be clearly expressed in its title." This section has been frequently before this court for consideration, and its provisions have been repeatedly held to be mandatory, and that any legislation in disregard thereof is unconstitutional and void. The title to a legislative bill must clearly express the subject of legislation. It will be observed that the title to chapter 60, Session Laws 1887, as disclosed by the enrolled bill in the office of the secretary of state, among other things mentions the repeal of "articles 5 and 8 of chapter 72, entitled 'Railroads,' of the Revised Statutes." The Revised Statutes of Nebraska contains no chapter numbered 72, nor yet one entitled "Railroads," and chapter 72, General Statutes of 1873, relates to the "seat of government," and is not subdivided into articles. It is chapter 72, Compiled Statutes, 1885, which bears the title of "Railroads," and contains articles 1 to 9, inclusive. If it were articles 5 and 8 of this chap-

ter that was intended to be repealed by chapter 60, Session Laws, 1887, this portion of the subject of legislation was not with clearness and certainty expressed in the title of the bill as enrolled.

But said chapter 60 is invalid for reasons more substantial. It is conceded that no bill bearing the title to the enrolled act known as chapter 60, Session Laws, 1887, was ever introduced in either house of the legislature, but the contention of the state is that the act in question originated in the senate and was known as Senate File 41. The title by which it was introduced was "A bill for an act to repeal article 8, of chapter 72, entitled 'Railroads,' of the second edition of the Compiled Statutes of the State of Nebraska." The purpose of that bill was solely the repeal of the law creating the board of railroad commissioners, passed in 1885, and such object was with sufficient clearness expressed in the title of the act, but it contained no provision for the creation of a state board of transportation. But it is argued by the attorney general that said Senate File No. 41 was amended in the senate and duly passed by both houses of the legislature of 1887. It appears that Senate File No. 41, after having been read in the senate on two different days, was referred to, and reported back by the appropriate committee under the title by which it was introduced. Thereafter all after the enacting clause was stricken from the bill, and what now constitutes the act creating the board of transportation was substituted, but the title remained unchanged, and in this condition the act was read the third time, placed upon its passage and received the required number of affirmative votes to carry the same. The journal of the senate, after stating these facts, recites: "A constitutional majority having voted in the affirmative, the bill was passed and the title agreed to as amended." The journal of the senate does not disclose that the original title under which the act was introduced was ever amended in that body, unless such fact is revealed by the quotation just made. The journal of the

house discloses that it was reported to the lower house by the secretary of the senate that that body had passed "Senate File No. 41, a bill for an act to repeal article 8 of chapter 72, entitled 'Railroads,' of the second edition of the Compiled Statutes of the state of Nebraska." The journal of the house shows that the bill was read the first and second times in that body under the title now appearing on the enrolled bill. Under the same title the bill was referred to and reported back by the railroad committee with a majority and minority report. Subsequently the journal of the house states that "Senate File No. 41, a bill for an act to repeal article 8 of chapter 72, entitled 'Railroads,' of the second edition of the Compiled Statutes of the state of Nebraska, was read the third time and put upon its passage," and a constitutional majority, upon the call of the yeas and nays, having voted in favor of the bill, it was "passed and the title was agreed to." Thereafter the clerk of the house notified the senate that the house had passed "Senate File No. 41, a bill for an act to repeal article 8, of chapter 72, entitled 'Railroads,' of the second edition of the Compiled Statutes of the state of Nebraska." Subsequently the committee on engrossed and enrolled bills reported to the senate that it had carefully examined and compared "Senate File No. 41, an act to regulate railroads, prevent unjust discrimination, provide for a board of transportation and define its duties, and repeal articles 5 and 8, of chapter 72, entitled 'Railroads,' of the Revised Statutes, and all acts and parts of acts in conflict herewith, * * * and find the same correctly enrolled." On the same day the senate journal states that "The president *pro tem.* signed Senate File No. 41, a bill for an act to repeal article 8, of chapter 72, entitled 'Railroads,' of the second edition of the Compiled Statutes of the state of Nebraska." The house journal likewise recites that the speaker signed Senate File No. 41 under the title last aforesaid. Subsequently the committee on engrossed and enrolled bills of the senate and house reported to their respective bodies that they had

presented to the governor for his approval and signature Senate File No. 41 under the title now appearing upon the enrolled bill, and the governor, through his private secretary, reported to the senate that he had signed the bill under the same title.

It will be observed that Senate File No. 41, when introduced and at various days of its pendency before the legislature, contained one title and at other periods of legislation and when presented to and signed by the governor possessed another or entirely different title. It is, however, argued by the attorney general that the title under which Senate File No. 41 was introduced was changed in the senate before its passage by that body as disclosed by the recital in the manuscript copy of the senate journal with reference to that bill that "a constitutional majority having voted in the affirmative, the bill was passed and the title agreed to as amended." What amendment to the title of the bill, if any, was made in the senate the journal of that body does not inform us; and the silence of the journal on that subject it is contended is no proof that the original title which Senate File No. 41 bore was not amended to conform to the title which the enrolled bill now bears and *State v. Frank*, 60 Nebr., 327, is cited in support of the proposition. Whether or no this argument is well founded it is unimportant that we now pause to consider, since the history of the progress of the bill through the two houses of the legislature establishes beyond controversy that the bill as enrolled was not read at large on three separate days in each house, or that the constitutional majority of the senate and house voted in favor of its passage, as required by the constitution to become a law. It is true the enrolled bill is *prima facie* evidence of its passage, but it is not conclusive evidence upon the subject. In *Webster v. City of Hastings*, 59 Nebr., 563, Mr. Justice SULLIVAN observed: "The rule established by our former decisions is that the due authentication and enrollment of a statute affords only *prima facie* evidence of its passage; and that the leg-

islative journals may be examined for the purpose of ascertaining whether the measure was enacted in the mode described by the constitution. If the entries found in the journals expressly and unequivocally contradict the evidence furnished by the enrolled bill, the former will prevail. The journals, being the records of legislative proceedings kept in obedience to the command of the constitution, are considered the best evidence of what affirmatively appears in them regarding the enactment of laws." That this doctrine is sound there is no room for doubt, especially in the light of section 418 of the Code of Civil Procedure, which declares that "The proceedings of the legislature of this state, or any state of the union, of the United States, or of any foreign government are proved by the journals of those bodies respectively, or of either branch thereof," etc. The journals of the house and senate therefore furnish the best evidence of the history of the passage of a bill or of the proceedings of the legislature relative thereto. The legislative journals not only fail to disclose that chapter 60, Session Laws, 1887, passed both houses of the legislature with the title which the enrolled bill bears, but those journals affirmatively show that Senate File No. 41, chapter 60, Session Laws, 1887, passed both houses of the legislature with the title which the bill had when introduced in the senate. Manifestly it was not passed nor adopted by the legislature under, or with, any other title. Senate File No. 41 was read in the house twice under the title disclosed by the enrolled bill, then read the third time, placed upon its passage and adopted under the title which the bill bore when introduced in the senate. How this happened we are not advised. But it is certain that the enrolled bill with the title it now contains was not read in the house on three different days; hence it could not become a valid law. The title of an act is an essential part of it. This must be true, since the constitution not only requires that a bill shall have a title, but that the same shall clearly express the subject of legislation. No law passed with-

out a title is valid. Constitution, sec. 11, art. 3; *Weis v. Ashley*, 59 Nebr., 494; *Webster v. City of Hastings*, 59 Nebr., 563. It follows that a majority of the members of each house of the legislature must vote in favor of the passage of a bill and of every part thereof in order to make it a valid enactment, and a majority of the members of the legislature never having voted for the adoption of the title which the enrolled Senate File No. 41 bears, the mandatory provisions of the constitution have been disregarded in its passage, and the enactment is invalid. We do not say that it is essential that the legislative journals should give the title of a proposed act; but when they attempt to do so, they furnish the best evidence of the title which the bill had at that time. We regret that there is no escaping the conclusion that Senate File No. 41 is unconstitutional and void. It was not our intention to have passed upon the question at this time, and we should not have done so had not counsel for the state pressed us for a decision thereon, since the case could have been more readily decided on another point urged by the defendant.

For the reasons stated the demurrer to the petition is sustained, and the action

DISMISSED.

HOLCOMB, J., concurring.

Although not entirely agreeing with the course of reasoning pursued by the chief justice in the foregoing opinion, I concur in all the propositions stated in the syllabus, and regard as irresistible the conclusion that the act under consideration failed to pass both branches of the legislature in compliance with the commands of the constitution.

STATE OF NEBRASKA V. FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY.

FILED NOVEMBER 21, 1900. No. 11,218.

Stare Decisis: CONSTITUTIONAL LAW: ENACTMENT OF STATUTE: CONSTITUTION MANDATORY: TITLE PART OF ACT: ENROLLED BILL PRIMA FACIE EVIDENCE: LEGISLATIVE JOURNAL CONTROLLING EVIDENCE: INVALID STATUTE. Decision in *State v. Burlington & M. R. R. Co.*, just decided, followed.

ORIGINAL action in the supreme court to recover penalties under section 9, article 8, chapter 72, of the Compiled Statutes, in the sum of $25,000. Submitted on demurrer to petition. *Action dismissed.*

Constantine J. Smyth, Attorney General, for the state.

Benjamin T. White and *James B. Sheean, contra.*

Woolworth & McHugh, amici curiæ.

NORVAL, C. J.

The same questions are involved in this case as in *State v. Burlington & M. R. R. Co.*, 60 Nebr., just decided, and for the reason stated in the opinion filed in that case the demurrer to the petition herein is sustained, and the action

DISMISSED.

CHARLES W. LITTLE V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1900. No. 11,213.

1. **Practicing Medicine.** One who, without complying with the statute establishing a state board of health and prohibiting the practice of "medicine, surgery and obstetrics" without a license, practices medicine is liable to the penalty prescribed by such. *State v. Buswell*, 40 Nebr., 158.

2. **Construction of Statutes:** INTENTION OF LEGISLATURE. In construing statutes effect should be given to the intention of the legislature.

3. **Osteopathy:** CERTIFICATE OF BOARD OF HEALTH: PENALTY FOR PRACTICING WITHOUT LICENSE. One who practices what is known as osteopathy without obtaining a certificate from the state board of health is a practitioner of medicine as defined by article 1, chapter 55, Compiled Statutes, and is liable to the penalty prescribed specifically for practicing medicine without a license.

4. **Statute:** TITLE OF ACT. Section 17, article 1, chapter 55, Compiled Statutes, is within the purview of the title of the act.

5. **Surgery and Obstetrics:** TITLE OF AN ACT: PRACTICE OF MEDICINE. "Surgery and obstetrics," as those terms are popularly understood, are embraced in the title of an act to regulate the art of healing.

6. **Regulative Statute Not Prohibitive.** The statute is not prohibitive in its effects, but attempts to regulate the practice of the of healing.

7. **Information:** SEPARATE COUNTS: SEPARATE MISDEMEANORS OF SAME NATURE. Several misdemeanors of the same kind may be set forth in as many counts of an information, and the prosecutor is not required to elect upon which count he will proceed.

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

Abbott, Selleck & Lane, for plaintiff in error:

The supreme court of Kentucky has had a statute almost exactly like ours under consideration. It was in an action brought for the purpose of enjoining the board of health from interfering with the practice of osteopathy. The title of the act which they were so considering was: "An act to protect citizens of this commonwealth from empiricism." In that case the court held that the practice of osteopathy did not come within the terms of the statute, and was not prohibited. *Nelson v. State Board of Health,* 57 S. W. Rep., 501, decided June 20, 1900.

Constantine J. Smyth, Attorney General, Paul Pizey, Assistant, and *T. C. Munger, contra:*

We must differ from opposing counsel in this state-

ment that the Kentucky statute is almost exactly like ours. The court held that it was exactly unlike ours, because the penalties provided by the last section of the act must be limited by that which is referred to in the title and previous sections, to-wit, the practice of medicine in some of its branches in the state. In other words, the Kentucky statute is so narrow that it only applies to persons who are graduates of some school or system of medicine.

Abbott, Selleck & Lane, in reply:

The Kentucky statute makes it unlawful for any one to practice medicine or attempt to treat any sick or afflicted person by any system or method whatever, without first complying with the provisions thereof.

NORVAL, C. J.

Charles W. Little comes on error from the district court of Lancaster county, he having been there convicted of practicing medicine without having procured a license as required by article 1, chapter 55, Compiled Statutes. He is what is known as a practitioner of osteopathy, the practice of which consists principally in rubbing, pulling and kneading with the hands and fingers certain portions of the body and flexing and manipulating the limbs of those afflicted with disease, the object of such treatment being to remove the cause, or causes of trouble. He urges a number of errors, the principal contention, however, being that his occupation does not fall within the definition of a practitioner of medicine as found in section 17 of the said article. This court, however, is of the opinion that those who practice osteopathy for compensation come within the purview of the statute as clearly as those who practice what is known as "Christian Science," and therefore this case falls within the principle of *State v. Buswell*, 40 Nebr., 158. With the rule announced in that case we are fully satisfied, although it is possible that

the decisions of some other courts are in conflict with it. The doctrine declared in that case will carry out the legislative intent, and effect the object of the statute, which is "to protect the afflicted from the pretentions of the ignorant and avaricious," no matter whether the persons pretending to heal bodily or mental ailments do or do not profess to "follow beaten paths and established usages." In construing statutes, effect should be given to the intention of the legislature. It is argued that osteopaths do not profess to treat any physical or mental ailment, but that they merely seek to remove the cause of such ailment or disease, and therefore do not come within the definition mentioned. The writer is not deeply versed in the theory of the healing art, but he apprehends that all physicians have the same object in view, namely the restoring of the patient to sound bodily or mental condition, and whether they profess to attack the malady or its cause, they are treating the ailment, as the word is popularly understood. We can therefore see no good reason why the practice of osteopathy does not fall within the provisions of the statutes under which defendant was prosecuted, as clearly so as do ordinary practitioners, or those who profess to heal by what is known as Christian Science. *Eastman v. People*, 71 Ill., App., 236.

Some technical objections it will be necessary to notice before finally disposing of the case. It is urged that no penalty is imposed for the alleged offense, since after the section defining the offense was amended so as to include a wider scope of offenses, the one for which he was prosecuted being included among those injected into the section by the amendment, and the section imposing the penalty was not re-enacted at the same time the other section was amended. The argument is that the penalty can apply only to those offenses included in the section amended as originally enacted. The objection is perhaps ingenious, but untenable. Had the legislature intended that no penalty should attach to the new classes of offenses denounced in the section as

amended, it is more reasonable to suppose that it would have amended the section denouncing the penalty so as to leave no room for doubt that no penalty was intended, rather than that it should leave the latter unchanged. The fact that it was left in its original condition seems to furnish indubitable proof that the legislature was satisfied with this section and that it was intended to include and define the proper punishment for all offenses defined in the amended section.

Another objection is that the definition included in section 17 is wider than the title of the act, the title being, among other things, "to regulate the practice of medicine," and further, that the act attempts to regulate not only the practice of medicine, but also the practice of surgery and obstetrics. We have no doubt but that the legislature had the power to define what acts would constitute the practice of medicine, which it had done in section 17. Further, as popularly understood, surgery and obstetrics are each a part of the healing art—the art of medicine. In this country, as a rule, the surgeon, physician and obstetrician are usually comprised in one and the same person, and he who practices these arts combined is popularly considered as practicing medicine, no matter which one of the three arts he may at any given time be utilizing. The objection is untenable.

It is insisted that the statute under consideration is void because it is prohibitive in its scope and effect. The construction of the act which counsel places upon it we are unwilling to adopt. The statute undertakes to regulate, and is not prohibitive in its nature. Any one who has complied with the provisions may practice medicine in this state. It is prohibitive only as to those who have not been duly licensed by the state board of health to practice the art of healing.

The information contained sixteen counts, each charging a misdemeanor in violating the statute in question. It is claimed the court erred in not requiring the county attorney to elect upon which count he would proceed.

The ruling was proper, as the offenses charged were of a similar kind. *Hans v. State*, 50 Nebr., 150; *Hurlburt v. State*, 52 Nebr., 428.

A number of other objections are urged in the brief of defendant, all of which have had due consideration, and we have failed to discover that any reversible error has been pointed out by his counsel.

The verdict is supported by ample evidence. The judgment is

AFFIRMED.

CRAWFORD COMPANY, APPELLANT, V. HATHAWAY ET AL., APPELLEES.

FILED NOVEMBER 21, 1900. No. 10,087.

1. **Trial Court:** WRONG REASON FOR DECISION. A reversal can not be had merely because the trial court gave a wrong reason for its decision.

2. **Invalid Portion of Act:** INDUCEMENT TO PASSAGE OF RESIDUE. Where the invalid portion of an act formed an inducement to the passage of the residue, the whole act falls.

3. ———: ———: RELYING ON INVALID STATUTE. One can not successfully rely upon a statute, when he at the same time insists that a material portion thereof is unconstitutional, where it is obvious that the part claimed to be invalid formed an inducement to the passage of the remainder.

4. **Riparian Owner:** COMMON LAW RIGHT: ABROGATION: STATUTE. The act of February 19, 1877 (Session Laws, p. 168), did not abrogate the common law rights of riparian owners as they theretofore existed in this state.

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

Hamer & Hamer, Allen G. Fisher, Justin E. Porter and *Willis D. Oldham*, for the appellant:

Crawford is a village in Dawes county, Nebraska. It is situated at the junction of two railways, one being the Burlington and the other the Elkhorn. The village is situate upon the banks of White river. Immediately

above the village the Fort Robinson military reservation begins. At this fort is stationed a large number of regular soldiers in the service of the United States. Generally a cavalry regiment is kept there. In 1891 Charles J. Grable, William T. Forbes and other citizens of the village of Crawford began to agitate the construction of a canal which should furnish water to the village as a protection from fire, for domestic use of its citizens and to farmers for irrigation. Crawford is in an arid part of the state, and, without water for domestic use and for the purpose of sprinkling the streets and lawns, it would not be habitable. It has never had any adequate source of supply except White river. By reason of the proximity of the fort, which is situated on the river about two miles above the village, the water from the river, at the village, is rendered unfit for use. The sewage from the fort runs into the river and destroys its purity. To obtain pure water for the use of the citizens of the village, it was proposed to go up the river above the fort and divert the water from the river and bring it down through the reservation and around the fort to the village. The proper notice was duly posted on June 16, 1891, and work was begun on the ditch. The defendant, Leroy Hall, owns a mill on White river below the town of Crawford. He claims the right to the water by prescription, as a riparian proprietor. The land was taken under the preemption law, and settled upon on the 16th day of April, 1885, by defendant's grantor, Llewellyn B. Hall. The claim of defendant Hall to this water by right of prescription is absurd. *Mills v. Traver*, 35 Nebr., 292; *Carroll v. Patrick*, 23 Nebr., 834; *Nichols v. Council*, 9 S. W. Rep. [Ark.], 305; *Sparks v. Pierce*, 115 U. S., 408; *Gibson v. Chouteau*, 13 Wall. [U. S.], 92.

Samuel Maxwell, Albert W. Crites and *W. H. Fanning*, for appellee Leroy Hall:

Except as modified by statute, the common law doc-

trine with respect to the rights of private riparian owners prevails in this country. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Nebr., 798.

The riparian owner upon a stream of water is entitled in the absence of grant, license or prescription, to the usual natural flow of water in the stream without material alteration. *Plattsmouth Water Co. v. Smith*, 57 Nebr., 579.

The statement of the case by the plaintiff is partisan and unfair, and is dehors the record. The enterprise which it is seeking to promote is a matter of private speculation.

The cause was argued orally for the appellant by *Francis G. Hamer* and *Willis D. Oldham;* for the appellee Leroy Hall by *Samuel Maxwell.*

Francis G. Hamer: At common law the right existed to use water from a running stream for domestic purposes. This right arose from the very necessity of the case. Pursuing this principle and applying it to our arid district, the right to use it for irrigation would exist there. This was not judicial legislation. It was wholesome judicial interpretation. The common law would apply to us, except as modified by our changed conditions and environments. We received the common law from England, where they do not irrigate, not from Lombardy or Peru, where they do irrigate.

The act found on page 168 of the Session Laws of 1877 was simply a legislative recognition of the pre-existing rights, which existed both by the principles of the common law and the general act of congress of 1866, which affected us as a territory and which conferred a right which was vested, and was not repealed by the enabling act or the state constitution, and there was no such an attempt to repeal either in the constitution or the enabling act.

Willis D. Oldham contended that congress, by the pas-

sage of the arid land act of 1866, plainly recognized the fact that we had a section of country in this republic in which common law conditions did not exist so far as running water was concerned, and in which it would be impracticable to determine rights to running water by the application of common law principles. That in a country where water is useful for agricultural purposes and where the sovereign power grants, for a nominal consideration, water for the purposes of irrigation, the maxim that "the water runs, and let it run without diminution or alteration," does not apply, but instead thereof we must substitute "water irrigates, and let it irrigate."

Samuel Maxwell: The appellant is asking for judicial legislation, nothing less. At what meridian in this state will the court draw the arbitrary line?

NORVAL, C. J.

This is an appeal from the district court of Dawes county, on the part of the Crawford Company, a corporation, which was the plaintiff below. We think no clearer or fairer statement of this case can be made than that contained in the brief of Judge Maxwell, the venerable counsel for Leroy Hall, and we therefore copy it verbatim.

"The appellant brought an action in the district court of Dawes county against Leroy Hall and others to adjudicate certain rights of the parties and to enjoin Hall, who was charged with making threats to tear down a dam erected by the appellant in White river, in Dawes county, by which nearly all the water in the river was diverted from its channel and caused to flow through the plaintiff's ditch. Issues were made up and the cause submitted to the court, which found that no threats had been made by Hall to tear down or injure the dam, and therefore the injunction against him was unauthorized and without just cause, and thereupon the court finds

'that plaintiff is not entitled to an injunction, and that the defendant, Leroy Hall, is entitled to an injunction against plaintiff as specified herein, and the court, for the purposes only of the injunction herein allowed, further finds that the defendant, Leroy Hall, is a riparian proprietor upon the White river, as alleged in his said answer, and that he and his grantors have been such riparian proprietors for a period of ten years and upwards immediately preceding the bringing of this suit, and he is entitled to all the rights of a riparian proprietor thereon, including the flow of the waters of said stream, as they were wont to do from time immemorial; that the said plaintiff on or about the —— day of January, A. D. 1896, by means of a dam, ditch, headgate, reservoirs, aqueducts, flumes and other appliances then in its possession, did divert the waters of said stream from the natural bed and channel thereof, at a point above the riparian lands of said defendant, Leroy Hall, and have continued to so divert them until this moment, claiming the right to so divert them under and by virtue of the irrigation laws of the state of Nebraska, which right has not yet been adjudicated by the state board of irrigation. And the court further finds that the said plaintiff and the said defendant, the Harris & Cooper Irrigation Company, are not entitled to the relief prayed in the amended supplemental petition and cross-petition respectively, at this time; that the defendant, Leroy Hall, is entitled only to an injunction against the plaintiff prohibiting it from diverting the water of said stream by means of its dam, headgates, ditches and appliances aforesaid until its right to the waters of said stream for the purposes of irrigation shall be adjudicated by the state board of irrigation, or until the further order of this court, and is entitled to have the temporary injunction heretofore granted herein vacated, dissolved and set aside, and is entitled to recover his costs herein expended as against the said plaintiff and against the said Harris & Cooper Irrigation Company.' The court thereupon dis-

missed the petition 'without prejudice to any future adjudication which may be made by the state board of irrigation or any court having jurisdiction of the right of the plaintiff to the waters of said stream for irrigation and power purposes.' The same decree was made in regard to the cross-petition of Harris & Cooper Irrigation Company, and in the Crawford Company-Hall case 'it is further ordered, adjudged and decreed by the court here that the said plaintiff be, and it is hereby, prohibited and enjoined from further diverting the waters of said stream from the bed and channel thereof by means of its dam, headgate, ditches and appliances aforesaid, until its right thereto shall have been adjudicated by the state board of irrigation, or other proper tribunal, until the further order of this court in that behalf granted; provided, that said injunction shall not restrain the plaintiff from arresting and storing flood waters, or any excess above the usual flow. And the court further finds that it has not jurisdiction of the several causes of action set forth in the several cross-petitions of the defendants herein stated. And the court further finds that the state board of irrigation has exclusive jurisdiction over the several causes of action set forth in plaintiff's petition, and the several cross-petitions. And the court having determined that the court has not original jurisdiction to hear, determine and adjudicate the rights of plaintiff and defendants claimed under the statutes of Nebraska governing the manner of acquiring water rights for irrigation, power, domestic and other purposes, the court refuses in this action and litigation to finally determine and adjudicate any question of law, fact or right.'"

From this decree said Crawford Company appeals to this court. There are many reasons why the decree must be sustained. We may not agree with the court below in all the reasons given by it for rendering its decision against appellant and the cross-petitioners on the various causes set forth in the cross-petitions, but if said court was right in so deciding, the ground on which it

so held is immaterial. Without attempting to enter at length upon a discussion of all the questions presented, the court will content itself with an examination of the principal arguments of appellant to sustain its contention that the decree of the court below is wrong, and which we conceive to be decisive of the case.

It is conceded by appellant that any right it may have in the premises arises out of the irrigation act of 1895 (Compiled Statutes, 1897, ch. 93*a*), and that without that act neither the appellant nor the numerous cross-petitioners have any right to the waters by them sought to be appropriated, unless the act of 1877 may have abrogated the common law rights of riparian owners, a question to which we will advert later. If this irrigation act of 1895 is valid and constitutional, the trial court properly refused to try and determine the right of priority between these litigants for the reason that the board of irrigation provided by that act is thereby given exclusive original jurisdiction to try those questions, and the same had not been by it heard or in any wise determined. Appellant admits the truth of this proposition, but seeks to avoid it by contending that that portion of the act which erects a board of irrigation, giving it exclusive judicial powers, is in derogation of section 1, article 6, of the constitution, in that the legislature by said act sought to erect a new judicial tribunal in place of one of the regularly constituted courts of the state. Without deciding that that portion of the act is unconstitutional, we will assume its invalidity for the purposes of this case, for a cursory examination of the act will convince any one that the board of irrigation was one of the inducements for its passage, and it is so interwoven with the whole act as to make it impossible to declare this portion thereof invalid without also effecting the destruction of the remainder of the act. *State v. Lancaster County*, 6 Nebr., 474; *Trumble v. Trumble*, 37 Nebr., 340; *Low v. Rees Printing Co.*, 41 Nebr., 127; *State v. Stewart*, 52 Nebr., 243. If, therefore, we assume that a part of the act is void, we

must hold that the remainder of it is also invalid, leaving appellant in no better position than it would have been had it commenced its suit without this act as a basis for its rights. Hence we must conclude that, whether the act is or is not in derogation of any constitutional provision, the suit could not have been maintained, in so far as it sought to adjudicate the rights of the parties to the waters of this stream, unless the common law right of riparian owners to an uninterrupted flow of the water of a stream through or past their realty does not obtain in this state. It is conceded that if the common law principle applicable to riparian proprietors exists, then Hall had the right, at least by prescription, to the full flow of the water of this stream into his mill pond. But it is contended that this common law doctrine is not in force here; first, because it is not applicable to conditions that obtain in this jurisdiction; and second, because it was abrogated by the law of 1877. To the first argument we answer that this court has a number of times approved and recognized the common law rule relative to the rights of riparian owners (*Clark v. Cambridge*, 45 Nebr., 798; *Gill v. Lydick*, 40 Nebr., 508; *Eidemiller Ice Co. v. Guthrie*, 42 Nebr., 238), and has no doubt that that is the proper rule. Nor can we understand how the act of 1877 (Session Laws, 1877, p. 168) in any degree either repealed or modified the common law rule relating to riparian rights. Such rights are not referred to in the act, either directly or by implication, the act being merely an authorization of the owners of canals constituted for public purposes to condemn for right of way and to mortgage their property. In no manner does it seem to touch upon the rights of riparian owners, nor had it the effect claimed by appellant of establishing the separate ownership of land and water in the state of Nebraska. Immediately after its passage, the rights of riparian owners stood exactly where they did immediately prior thereto, and the common law rule which obtained then, now exists. This act of 1877 not having

abrogated the common law rule, appellant is unable to make good any claim of right under the irrigation acts of either 1889, 1893 or 1895, for the reason that said Hall had acquired a vested right to the flow of the water in said stream by prescription, he having erected his dam across said stream more than ten years prior to the commencement of this suit, and having maintained and used it as a mill dam continuously.

On the oral argument it was suggested that we establish a rule for the western portion of this state relative to riparian rights different from that declared in former decisions of this court; in other words, that we hold that while the common law rule might obtain in the eastern portion of the state, where the annual rainfall is sufficient to mature crops, yet in the western portion, where irrigation is a necessity, it does not exist, not being applicable to local conditions. A single suggestion will expose the futility of such an attempt to adjust the law to varying climatic conditions of the same jurisdiction. It is well known that, beginning with the eastern line of the state, the annual amount of rainfall steadily diminishes until the western line of the state is reached. But can any one tell at what particular point in the state the common law rule applicable to riparian owners would cease and the rule said to be better applicable to the less favored portions of the state would begin? Such a rule would merely tend to breed "confusion worse confounded," and would be an assumption of legislative powers by this court, inhibited by the constitution.

Without adverting at length to another question argued by counsel, we might say that we are of the opinion that the lower court did not err either in refusing an injunction to appellant as against Hall, or in granting one in his favor as against it. There is no evidence of record sufficient to justify the lower court in drawing the conclusion that Hall was threatening to or would attempt to destroy appellant's property. There was, however, evidence on which to base the injunction against appel-

lant, the evidence having established the fact that Hall was a riparian proprietor and that appellant was diverting the water from his mill pond and dam. He was entitled to this relief upon his cross-petition, and the lower court was justified in granting it.

Without discussing the case further, we are of the opinion that the decree of the lower court was right, and it is therefore

AFFIRMED.

WILLIAM A. PAXTON ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1900. No. 10,977.

1. **Pleadings as Evidence.** Pleadings may be introduced as evidence in actions other than those wherein they were filed, as admissions against interest. *Paxton v. State*, 59 Nebr., 460.

2. **Conflicting Evidence:** DIRECTING VERDICT. Conflicting evidence is for the jury to weigh, and when there is a conflict in evidence upon a material issue, it is error to direct a verdict for either party.

ERROR to the district court for Douglas county. Tried below before FAWCETT, J. Rehearing of case reported in 59 Nebr., 460. *Former judgment of reversal sustained.*

John C. Cowin, Frank T. Ransom, Robert Ryan, Frank Irvine and *E. E. Brown*, for plaintiffs in error.

Constantine J. Smyth, Attorney General, Willis D. Oldham, Deputy, Ed. P. Smith, James Manahan and *E. M. Bartlett, contra.*

NORVAL, C. J.

At a former term an opinion prepared by Judge SULLIVAN was filed announcing the reversal of the judgment of the district court. 59 Nebr., 460. On application of the attorney general a rehearing was granted, and the cause has been again submitted for our consideration. The reversal was predicated on the sole ground that the

trial court committed an error in directing a verdict for the state for the full amount of its claim. It is with this ruling alone that we shall now deal. It will be remembered that the action was on the official bond of Bartley for his second term as state treasurer. The attorney general, for and on behalf of the state, instituted another action in the district court of Lancaster county to recover on the bond of Bartley given for his first official term. The state, in the cause now before us, contends that the moneys in controversy herein were embezzled by Bartley during his second or last term, and introduced evidence in support thereof, including the books in the state treasurer's office which purport to state the amount of public moneys with which Bartley was chargeable at the close of his first term. The state relied, in part at least, upon the balance so shown on that date, together with the amount of receipts and subsequent disbursements of the office, to establish that the defalcation occurred during the term for which the bond in suit was given. On the other hand, the defendants, as tending to prove that a part of the money in suit was embezzled by Bartley under his first term, and for which the second set of sureties are not liable, introduced in evidence a transcript of the record of the district court of Lancaster county disclosing the institution and pendency of the action of the state against Bartley and his first term bondsmen for an alleged shortage of over $300,000. That action was instituted by the attorney general under the directions of the governor, and the petition was verified by the attorney general. This was an admission by the state that, as to the amount of public moneys claimed in the petition filed in Lancaser county district court, Bartley had embezzled during his first term, and that a right of action existed in that regard in favor of the state against his first term bondsmen. With the proofs before the court, the admission of the transcript of the record of the district court of Lancaster county was evidence tending to show that a part of the money sought to be re-

covered in the case at bar was not embezzled during Bartley's second term; hence the district court erred in directing the jury to return a verdict for the state for the full amount claimed in the petition in this cause. There is no escaping this conclusion. The judgment of reversal is adhered to.

REVERSED.

HOLCOMB, J., took no part in the above opinion.

STATE OF NEBRASKA, EX REL. JOHN O. YEISER, V. BEECHER HIGBY, CITY CLERK.

FILED NOVEMBER 21, 1900. No. 11,210.

Error Proceeding: FINAL ORDER. Error proceeding can only be prosecuted after the rendition of a final order or judgment in the cause.

ERROR to the district court for Douglas county. Tried below before SLABAUGH, J. *Dismissed.*

John O. Yeiser, relator, for himself.

W. J. Connell, contra.

NORVAL, C. J.

John O. Yeiser instituted in the district court of Douglas county a proceeding in mandamus to compel the respondent, Beecher Higby, city clerk of the city of Omaha, to submit to the electors of said city a proposed ordinance of said city, under the provisions of chapter 32, Session Laws, 1897, popularly known as the initiative and referendum act. In the application for the writ it was alleged, among other things, that on the 30th day of August, 1898, a petition signed by over fifteen per cent of the duly qualified voters of the city of Omaha, containing a demand that an ordinance adopting the provisions of said chapter 32 be passed by the mayor and

city council or submitted to a vote of the electors of the city of Omaha, was filed with respondent; that said petition contains 3,104 signatures of the voters of the city of Omaha, as shown by the affidavit attached to said petition made by ten of said petitioners, stating under oath that they themselves were duly qualified voters residing as stated after their signatures, and that they believed all the signatures to such petition to be genuine. A purported copy of said petition is set out, following which it is alleged that said respondent submitted to the mayor and city council a certified copy of said proposed ordinance;that the said council refused to pass the same; that respondent refuses to submit said proposed ordinance to the voters of said city, etc., and will not do so unless compelled by the order of said court; and praying for a writ of mandamus to issue, etc. Upon this application an order to show cause was duly issued, and thereafter said respondent made and filed a lengthy return and answer, which we do not deem necessary to set out in this connection. This answer and return relator moved to strike from the files, as being frivolous and made for delay, which motion was overruled by Judge Slabaugh. Relator then filed a demurrer to said answer and return, which the judge declined to consider, the same having been called up in vacation, but did refuse to grant the writ as prayed, and ordered the costs of the proceeding taxed to relator. The relator brings the case here for review, alleging that there was error in overruling the motion to strike the answer and return from the files, in refusing to consider the demurrer to said return and in refusing to grant the writ.

The proceeding in error must be dismissed, because no final order or judgment has been rendered in the cause in the lower court. The court refused to grant the writ, but the proceeding has not been dismissed out of the district court. So far as this record discloses, this cause is still pending in the district court, and the peremptory writ prayed for may yet be granted or allowed. Error

proceeding can not be prosecuted before a final order or judgment has been entered in a cause. Strawn, Supreme Court Practice, 86-91, and cases there cited. The petition in error is, therefore,

DISMISSED.

FIRST NATIONAL BANK OF PLATTSMOUTH, APPELLEE, V. FRANCIS N. GIBSON ET AL., APPELLANT.

FILED NOVEMBER 21, 1900. No. 11,586.

1. **Pleading:** DENIAL: NEGATIVE PREGNANT. A denial that plaintiff "is a corporation duly organized as a national bank under the act of congress of June 3, 1864, or any other act" does not put in issue the plaintiff's corporate existence.

2. **Judgment Creditor:** EXECUTION: RETURN NULLA BONA: REMOVAL OF OBSTRUCTIONS: SUIT IN EQUITY. A judgment creditor, after an execution has been issued and returned *nulla bona*, may maintain a suit in equity to make his judgment effective as a lien upon land, by removing obstructions calculated to make an execution sale unproductive.

3. **Satisfaction of Judgment:** ASSIGNMENT AFTER PAYMENT. A judgment is extinguished when it is paid by one who is primarily liable for its satisfaction. It can not, when so paid, be kept alive by assignment to a third person.

4. **Void Judgment:** SALE OF REAL ESTATE UNDER: KNOWLEDGE OF PURCHASER. A sale of real estate under a void judgment does not divest the owner's title, nor confer any rights upon a purchaser who buys with knowledge of the facts which render the judgment void.

5. **Purchaser of Real Estate:** TITLE OF GRANTOR: APPARENT OWNERSHIP. A purchaser of real estate acquires only the title which his grantor had at the time of the sale, unless he bought and paid for the property on the faith of an apparent ownership upon which he was, under the law, justified in relying.

6. ——: ——: —— REAL OWNER: PURCHASER BONA FIDE. One who has bought property from a person who was the apparent, but not the real owner thereof, must, in a contest with the real owner or those claiming through or under him, allege and prove that he was a *bona fide* purchaser.

7. **Decree:** MODIFICATION: REVERSAL: PERSON NOT PREJUDICIALLY AFFECTED. A party who is not prejudically affected by a judgment or decree can not secure its modification or reversal.

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

Byron Clark, C. A. Rawls, J. H. Haldeman and *S. J. Tuttle,* for appellant.

A. N. Sullivan, contra.

SULLIVAN, J.

This action was brought by the First National Bank of Plattsmouth against John M. Carter, Benjamin A. Gibson and Francis N. Gibson to enforce a judgment lien against certain real estate in Cass county. It is conceded that Carter was, in 1887, the owner of the property in question which was at that time subject to the lien of two judgments, one in favor of Beardsley & Clark, recovered in 1883, the other in favor of the bank, recovered in 1886. It is also conceded that there was a sale of the property under the first judgment; that Benjamin A. Gibson was the purchaser at such sale, and that he afterwards conveyed to his brother, Francis N. Gibson, the title obtained by the sheriff's deed. The petition charges that the judgment in favor of Beardsley & Clark had been fully paid by Carter before the judicial sale, and that such sale and the subsequent conveyance to the appellant were collusively made for the purpose of divesting the plaintiff's lien and preventing the enforcement of the same. These allegations were denied, but the court found all the issues in favor of the bank and rendered a decree providing for the satisfaction of the bank's judgment by a sale of the land which appellant claims to own by virtue of the deed from his brother, Benjamin.

One of the reasons assigned for a reversal of the judgment is that the bank has not shown that it possesses legal capacity to sue. The petition states that "plaintiff is a corporation duly organized as a national bank under the act of congress of June 3, 1864, and the acts amend-

ing the same." The defendants in their answer "specifically deny that the plaintiff is a corporation duly organized as a national bank under the act of congress of June 3, 1864, or any other act." This denial is faulty; it implies that the bank was incorporated, but denies that its incorporation was legal. Discussing a similar question in *State v. Board of County Commissioners*, 53 Nebr., 767, 771, we said: "This denial is a mere negative pregnant. It does traverse the corporate existence of the relator, but only the regularity of the proceedings by which it was incorporated."

It is contended that this action can not be maintained because it does not appear that the bank has exhausted its legal remedies. An execution was issued and returned unsatisfied. Nothing more could be done without the aid of equity. The judgment was a lien on the land, and the plaintiff had the undoubted right to make his lien effective by removing obstructions which were well calculated to make an execution sale unproductive. *Keene v. Sallenbach*, 15 Nebr., 200; *Kennard v. Hollenbeck*, 17 Nebr., 362; *First Nat. Bank v. Hollerin*, 31 Nebr., 558; 3 Pomeroy, Equity Jurisprudence, sec. 1415.

Appellant claims to be an innocent purchaser and entitled to protection as such. We think the court rightly found on the evidence that he was not an innocent purchaser. It might, however, have reached that conclusion from an inspection of the pleadings. The judgment in favor of Beardsley & Clark having been paid by Carter before the sale to Benjamin A. Gibson, such sale was absolutely void and vested no title in the purchaser. It is a well settled proposition, subject to some exceptions not necessary to be here noted, that a judgment is extinguished when it is paid by one primarily liable for its satisfaction. It can not, when so paid, be kept alive even by assignment to a third person, as was done in this case. *Henry & Coatsworth Co. v. Halter*, 58 Nebr., 685. The sale under the Beardsley & Clark judgment being entirely null, it did not divest Carter's title; he still continued to

be the owner of the land. The appellant acquired nothing by his purchase, not even possession or the right thereto. Had he bought and paid for the property on the faith of his brother's apparent ownership, he would have obtained a good title; but this he did not do. At least he has neither alleged nor proved any facts from which it might be inferred that he acquired by the purchase a better title than his grantor had. Under the doctrine of *Arlington State Bank v. Paulsen*, 57 Nebr., 717, and *Upton v. Betts*, 59 Nebr., 724, appellant has failed to show that he has any right to, or interest in, the property, or that he is in any way prejudicially affected by the judgment which he asks us to reverse. If the judgment recovered in 1886, and which is the basis of this suit, became dormant before the trial, the decree revived it and made it a lien upon Carter's land. To that land neither of the Gibsons ever had any valid claim or title, and consequently Francis has lost nothing by the decision of which he complains.

We have not found it necessary to dispose of the contention that the defendants gained an advantage by reason of the bank's failure to issue execution on its judgment during the pendency of the suit to enforce it. Notwithstanding the authorities cited by appellant's counsel, the writer is not quite ready to subscribe to the doctrine that a court of equity should reward the defendants for the perseverance with which they pressed upon its attention a substanceless and futile defense. It would seem to be in accordance with the general procedure to decide the case on the questions evolved by the pleadings; and it would seem to be contrary to all legal analogies to permit a party to profit by an unwarranted and litigious resistance of his adversary's suit. *Dempsey v. Bush*, 18 Ohio St., 376; *Lawrence v. Belger*, 31 Ohio St., 175; *City of Cincinnati v. Hafer*, 49 Ohio St., 60. The judgment is

AFFIRMED.

MICHAEL FARRELL, APPELLEE, V. AUSTIN BOUCK ET AL., APPELLANTS.

FILED NOVEMBER 21, 1900. No. 9,306.

1. **Mistake of Fact:** NEGLECT OF LEGAL DUTY. A mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake.

2. **Culpable Inertness:** LOSS OF VALUABLE RIGHT: RELIEF IN EQUITY. One who fails, through culpable inertness, to make inquiry when it is his duty to inquire, and by reason of such failure loses a valuable right, is not entitled to relief in equity on the ground of mistake.

3. **Petition for Relief:** ALLEGATIONS: RELEASE OF MORTGAGE: SPECIAL FINDINGS. Where a petition for relief on the ground of mistake of fact charges that false representations on the part of defendant, caused plaintiff to release a mortgage and thereby to lose a valuable right, a decree in favor of plaintiff can not stand if the court makes special findings intended to embrace all material issues, but fails to find that the fact so charged was true.

APPEAL from the district court of Dixon county. Heard below before EVANS, J. *Reversed.*

Jay & Welty, for appellants.

McCarthy & Pearson, contra.

SULLIVAN, J.

This is an appeal from a decree of the district court of Dixon county reinstating and enforcing, in favor of the plaintiff, Michael Farrell, a real estate mortgage which had been, through a mistake of fact, canceled and released of record. Farrell and the defendant, C. D. Ryan, were co-sureties upon a note given by Austin Bouck to the firm of Halstead & Kearney. The mortgage in question, which was executed by Bouck, was held by Ryan as an indemnity against loss resulting from his suretyship. After the note to Halstead & Kearney became due Farrell paid it and took from Ryan an assignment of the mortgage.

Bouck afterwards discharged his obligation to Farrell by conveying to the latter the mortgaged premises; and thereupon Farrell, in the usual way, released the mortgage, believing that the property therein described was not otherwise incumbered. In this he was mistaken. Ryan had a judgment lien upon the land, and this lien, which was junior to the mortgage, became a first lien when the mortgage was satisfied. Farrell alleged in his petition and testified at the trial that when the assignment aforesaid was executed, Ryan represented and declared to him that he had no claim or demand of any kind against Bouck, except such as might result from his suretyship upon the Halstead & Kearney note. The allegation and evidence upon this point were controverted, and the issue thus raised was not settled by the special findings, which were evidently intended to embrace all the material facts in dispute. The petition charges that the plaintiff was induced to release the mortgage by the false representations of Ryan; but the district court did not find that Ryan made any representations; it found only that Farrell had no knowledge of the judgment lien; and that, we think, is not sufficient to support the decree. A mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake. The rule upon this subject is thus stated in 2 Pomeroy, Equity Jurisprudence, section 852: "The general doctrine is firmly settled as one of the elementary principles of the equitable jurisdiction, that a court of equity will grant its affirmative or defensive relief, as may be required by the circumstances, from the consequences of any mistake of fact which is a material element of the transaction, and which is not the result of the mistaken party's own violation of some legal duty, provided that no adequate remedy can be had at law." In Story's Equity Jurisprudence the learned author, after remarking that the fact with respect to which the mistake has been made must be a material fact, goes on to say: "It is not however sufficient in all cases to give the party relief

that the fact is material, but it must be such as he could not by reasonable diligence get knowledge of when he was put upon inquiry. For if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence." 1 Story, Equity Jurisprudence, sec. 146. It thus appears to be a settled principle that one who has failed to make inquiry when it was his duty to inquire, is not entitled to relief in equity on the ground of mistake. Those who suffer in consequence of their own culpable inertness are without remedy. The law aids the vigilant, not the indolent and listless. *Conner v. Welch*, 51 Wis., 431; *Mather v. Jenswold*, 72 Ia., 550. The plaintiff having charged in his petition that the false representations of Ryan caused him to release the mortgage, he could not rightfully succeed in the action without a finding that the fact so charged was true. The cause of action pleaded was not, on the trial, established by the proof. The judgment is, therefore, reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

W. F. PORTER ET AL. V. TAYLOR FLICK ET AL.

FILED NOVEMBER 21, 1900. No. 11,662.

1. **Judge at Chambers:** CIVIL ACTION: FINAL JUDGMENT: REVIEW. The determination of a civil matter by a judge at chambers is not final; it may be reviewed by an appellate court in the proper proceeding.

2. **Court:** DEFINITION. The word "court," as used in section 582 of the Code of Civil Procedure, means not only the tribunal over which a judge presides, but also the judge himself when exercising, at chambers, judicial power conferred by statute.

3. **Australian Ballot Law:** JUDICIAL AUTHORITY: REVIEW. The authority given by the Australian ballot law (Compiled Statutes, 1899, ch. 26, sec. 137) to the county court and to the judges of

the district and supreme courts is, in its nature, judicial; and the orders made by such court or judge may be reviewed by error proceeding.

4. **Judicial Cognizance:** POLITICAL HISTORY. Courts will take judicial cognizance of the political history of the state.

5. **Legislative Purpose.** The legislative purpose in forbidding the adoption and use of an old party name by a new political organization (Compiled Statutes, 1899, ch. 26, sec. 131) was to avoid confusion in voting and to prevent fraud at elections; to enable the elector to express, with certainty, his real choice of candidates, and to eliminate, as far as possible, from the ballot, whatever might tend to deceive him into casting a vote contrary to his intention and for persons to whom he is opposed.

6. **Australian Ballot Law:** NEW PARTY: OLD NAME. Section 131 of the Australian ballot law (Compiled Statutes, 1899, ch. 26) forbids a new political organization from using an old party name, although such name is the one by which it is generally and popularly known, and not the name which the officers of its convention have certified to the secretary of state for use upon the official ballot.

7. **People's Independent Party:** POPULIST: SYNONYMS: NEW PARTY. The People's Independent party having been generally and popularly known in this state as the "Populist Party," that name can not be adopted and used by a new political organization.

ERROR to the district court for Lancaster county. Tried below before HOLMES, J. *Reversed.*

T. J. Doyle, A. S. Tibbets and *M. F. Harrington,* for plaintiffs in error.

Blair & Richardson, contra.

SULLIVAN, J.

This proceeding in error brings here for review an order made at chambers by Hon. E. P. Holmes, one of the judges of the district court for the third judicial district, reversing a decision of the secretary of state touching the right of a new political organization to use the party name which it had adopted. Defendants in error contend that this court has no appellate jurisdiction in

this class of cases, and that this proceeding must, for that reason, be dismissed. The argument is (1) that the legislature has made no provision for reviewing decisions made at chambers by judges of the district court; and (2) that the intention of the law is that orders like the one here in question shall not be subject to revision. If the decision of Judge Holmes was a judicial decision, there can be no doubt about the authority of this court to review it. The constitution provides (sec. 23, art. 6.): "The several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." And section 24 of the bill of rights declares: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." These provisions considered together make it plain that the determination of a civil matter by a judge at chambers is not final. The Code of Civil Procedure (sec. 582) provides: "A judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court, for errors appearing on the record." The word "court," as here used, has always been construed to mean, not only the tribunal over which a judge presides, but the judge himself when exercising, at chambers, judicial power conferred by statute. *Smith v. State*, 21 Nebr., 552; *Clark v. State*, 24 Nebr., 263; *In re Van Sciever*, 42 Nebr., 772; *Horton v. State*, 60 Nebr., 701.

We will now consider the character of the power conferred upon the judiciary by section 137 of the Australian ballot law. (Compiled Statutes, 1899, ch. 26.) So far as material to this inquiry the section reads: "All certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed to be valid, unless objection thereto shall be duly made in writing within three days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination. Objections to

use of party name may also be made and passed upon in the same manner as objections to certificates. The officer with whom the original certificate was filed shall in the first instance pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by a county court, or by a judge of the district court, or by a justice of the supreme court at chambers, on or before the Wednesday preceding the election. Such order may be made summarily upon application of any party interested, and upon such notice as the court or judge may require. The decision of the secretary of state, or the order of the judge, or supreme court justice revising such decision, shall be binding on all other county, municipal, or other officers with whom certificates of nomination are filed." That the authority given by this statute to the county court and to the judges of the district and supreme courts is in its nature judicial, we are entirely satisfied. It is to be presumed that the legislature intended to enact a constitutional law, and it is evident that this law would not be constitutional if the power conferred by it upon the judiciary is a non-judicial power. "The powers of the government of this state," says the constitution, "are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Constitution, art. 2. There being no express direction or permission which would make the power in question an exception to the general rule, the conclusion is inevitable that the legislature intended to give the judicial officers mentioned in the statute, an authority which they might lawfully exercise and none other. In other states the courts have, under similar statutes, exercised a revisory jurisdiction over the decisions of ministerial officers charged with the duty of preparing the official ballot. *People v. District Court*, 23 Colo., 150; *Leighton v. Bates*, 50 Pac. Rep. [Colo.],

856; *Schuler v. Hogan*, 168 Ill., 369; *Fernbacher v. Roosevelt*, 90 Hun [N. Y.], 441.

Having concluded that the case is properly before us, we proceed now to determine the single question of substantive law presented by the record. Section 131 of chapter 26, Compiled Statues, 1899, declares: "Electors may form new parties and hold their state, district, county, precinct or municipal conventions and nominate candidates for office. They shall not adopt any of the old party names nor any part thereof, and when such electors to the number of two hundred participate in a state convention, or fifty in a congressional, district or county convention, or twenty-five in any precinct, city, village or ward convention, they may make party nominations for either state or congressional, county, district, precinct, municipal or ward offices, but the certificate of nomination shall contain the name of the new party that said electors may have adopted, and shall state in addition in the certificate of nomination required to be filed by section one hundred and twenty-nine of this act, as the case may require, that said new party had at least two hundred persons participating in said state, fifty in said congressional, district, county or municipal convention, and at least twenty-five in said precinct, ward, or village convention, and when otherwise in conformity to law may be filed with the respective officers as provided by section one hundred and twenty-nine of this act." The name adopted by the new political organization at its convention held in Grand Island on July 20, 1900, and certified as required by law, was "Populist." To the use of this name objection was seasonably made on behalf of candidates nominated by the People's Independent party; and the secretary of state, after having accorded the parties in interest a full hearing, sustained the protest and decided that the new party should be designated upon the official ballot as "Mid-Road Populist." This decision was, in an appropriate proceeding, set aside by Judge HOLMES, who held that the new party was entitled

to use, for the purposes of the election, the name which it had adopted. We think that while the decision of the secretary of state may not have been entirely right, that of Judge Holmes was altogether wrong. The legislative purpose in forbidding the adoption and use of an old party name by a new political organization, was to avoid confusion in voting and to prevent fraud at elections; to enable the elector to express, with certainty, his real choice of candidates, and to eliminate, as far as possible, from the ballot whatever might tend to deceive or delude him into casting a vote contrary to his intention and for persons to whom he is opposed. That this is the design and intention of the law seems to be conceded, but counsel for defendants in error claim that the legislative interdict goes only to the old party name which is certified by the convention of an existing party to the proper officer for the purpose of being placed upon the official ballot. We can not accept this view of the matter; indeed we think it is not entitled to serious consideration. Where there is room for judicial interpretation it should be always assumed that the legislature intended to employ means adequate to the attainment of its purpose; and the courts should, in cases of doubt, adopt that exposition of the law which will give effect to the legislative will rather than a construction which may frustrate or obstruct it. This court will take judicial cognizance of the political history of the state. We know, judicially, that the People's Independent party, from the date of its organization, has been generally and popularly known, here and elsewhere, as the "Populist" party. In the Standard Dictionary a populist is said to be "a member of the People's party." The People's party is in the same work described as "a political organization formed in the United States February 22, 1892; * * * called also Populist party." It thus appears that when the Australian ballot law was enacted, the legislature must have known that one of the existing political parties in this state was known by two names, and as well known by

one as by the other. The members of the legislature must have known too, a fact of which no one else pretends to be ignorant, namely, that the adoption of the name "Populist" by a new party and the use of that name on the official ballot would deceive and mislead many citizens who affiliate with the People's Independent party and who believe in its doctrines and desire to vote for the nominees of its conventions. Having with full knowledge of existing conditions undertaken to protect the elective franchise by forbidding the use of an old party name by a new political organization, we can not believe that the legislature intended to limit its inhibition to the name certified to the secretary of state by the officers of the nominating convention, and thus provide an insufficient safeguard against the evil apprehended.

The order of Judge Holmes we believe to be unwarranted, and it is therefore

REVERSED.

NORVAL, C. J., offered no opinion.

J. MCGREGOR ADAMS, APPELLANT, V. RALPH R. OSGOOD, APPELLEE.

FILED NOVEMBER 21, 1900. No. 11,344.

1. **Void Tax Sale:** IRREGULARITIES: WANT OF AUTHORITY IN TREASURER. Between tax sales that are void for mere irregularities and those that are void for want of authority in the treasurer to sell, the laws of this state make no distinction.

2. ———: ASSIGNMENT OF PUBLIC RIGHT TO PURCHASER. A void tax sale is effective in every case as an assignment of the rights of the public to the purchaser.

3. **Holder of Certificate:** SUBROGATION. The holder of a tax-sale certificate is subrogated to the rights of the public in any taxes which he pays for the purpose of protecting his lien, whether such taxes were levied before or after he became the owner of such lien.

4. ———: LIEN: FORECLOSURE. The owner of a tax-sale certificate may enforce his lien by an action in the nature of a suit to foreclose a real estate mortgage.

5. **Tax Lien:** FORECLOSURE: ADMISSION OF PLAINTIFF. An admission by the plaintiff in an action to foreclose a tax lien, that taxes for certain years were charged against his property, and that he had, before the suit was instituted, tendered to the treasurer the amount of such taxes for the purpose of effecting a redemption, is, in the absence of countervailing proof, sufficient to establish the validity of the taxes to which the admission relates.

6. **Valid Tax:** ASSESSMENT: LEVY. An assessment and levy for general revenue are always evidence of a valid tax.

7. **Validity of Tax:** GENERAL REVENUE: PRESUMPTION. In an action involving the validity of a tax for general revenue it will be presumed, in the absence of proof to the contrary, that the taxing authorities discharged the duties imposed upon them, and that the board of equalization held annual sessions at the time required by law.

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

John L. Webster, for appellant.

H. W. Pennock, Charles Robbins, Lambertson & Hall and *C. C. Marley*, contra.

SULLIVAN, J.

This cause has been twice decided by this court and twice remanded to the district court for further proceedings. *Adams v. Osgood*, 42 Nebr., 450, 55 Nebr., 766. The plaintiff, J. McGregor Adams, charged in the petition that his title to certain Omaha real estate was clouded by two void tax sale certificates and other pretended tax liens held by the defendant, Ralph R. Osgood. Osgood answered, alleging that the certificates and liens referred to in the petition were valid, and praying for a foreclosure of the same. The plaintiff having dismissed his cause of action after the first judgment of reversal, there was a trial only of the issues formed by the answer and reply. The district court found in favor of the defendant and rendered a decree of foreclosure, from which plaintiff appeals.

Counsel for Adams contends that the sales upon which the tax certificates are based were prematurely made, and therefore void. For the purposes of this case, let that be conceded. Under our decisions, the difference between a valid and a void tax sale, so far as the purchaser is concerned, is not very great. In either case he succeeds to the rights of the public; the lien of the tax, for the non-payment of which the land was sold, is transferred to him; and so also is the lien of any prior or subsequent tax afterwards paid by him to protect his rights under the tax sale certificate. Between sales that are void for mere irregularities and those that are void for want of authority in the treasurer to sell, the decisions in this state make no distinction whatever. The sale is in every case effective as an assignment of the rights of the public to the purchaser. *Merriam v. Hemple*, 17 Nebr., 345; *Roads v. Estabrook*, 35 Nebr., 297; *Adams v. Osgood*, 42 Nebr., 450; *Medland v. Connell*, 57 Nebr., 10; *Grant v. Bartholomew*, 57 Nebr., 673. RAGAN, C., discussing the question when the case was first here, said, p. 463: "Osgood, then, by virtue of the purchase he made of these lots in 1888, and by virtue of the taxes paid thereon both prior and subsequent to that date to protect the lien he acquired by his purchase, became subrogated to the rights which the public had against these lots by virtue of these tax liens." It thus appears to be settled by authority, and as the law of the case, that the defendant is the owner of the tax liens formerly existing in favor of the public against lots 3 and 4 in block 52 in the city of Omaha. Having been subrogated to the rights of the public he is entitled to enforce his liens by an action in the nature of a suit to foreclose a mortgage. Compiled Statutes, 1899, ch. 77, art. 5, sec. 1. These remarks dispose of the first, second and fourth points discussed by counsel for appellant.

His third contention is that the record does not show that there was an assessment or levy for the year 1888. We think it does. The petition, which was given in evi-

dence, contains an admission that taxes, amounting with interest to $2,573, were charged against the plaintiff's property for the year 1880 and subsequent years, including 1888; and that the plaintiff, for the purpose of effecting a redemption from the certificates of sales and other liens had, before the commencement of the action, tendered said sum to the treasurer of Douglas county. This admission, which is in no way qualified or limited, is sufficient, in the absence of countervailing proof, to establish the validity of the taxes to which it refers.

A further contention on behalf of appellant is that a portion of the taxes included in the decree are void because the board of equalization was not in session in the years for which such taxes were levied. There is no proof that the board did not hold annual sessions as required by the statute, and the presumption is that it did. An assessment and levy for general revenue are always evidence of a valid tax. It is presumed that the taxing authorities in making such an assessment and levy proceeded according to law; that they discharged with fidelity the duties imposed upon them by the revenue act. *Miller v. Hurford*, 13 Nebr., 13; *Towle v. Holt*, 14 Nebr., 221; *Leavitt v. Bell*, 55 Nebr., 57; *Chamberlain Banking House v. Woolsey*, 60 Nebr., 516; *Durham v. People*, 67 Ill., 414; *Shelbyville Water Co. v. People*, 140 Ill., 545; 2 Desty, Taxation, 615.

Some other arguments against the validity of defendant's liens are explicitly answered by sections 141 and 142, article 1, chapter 77, Compiled Statutes, 1899.

The judgment is right and is

AFFIRMED.

ANNA GOOS V. FRED KRUG BREWING COMPANY.

FILED NOVEMBER 21, 1900. NOS. 11,401 AND 11,499.

1. **Motion for New Trial:** JUDGE WHO DID NOT TRY CASE. The district court has authority to grant or deny a motion for a new trial as the justice of the case may require, although the judge who presides when the motion is presented is not the one who presided at the trial.

2. **Evidence:** FINDING. Evidence examined, and found to support the findings of the trial court.

ERROR to the district court for Cass county. Tried below before RAMSEY, J. Motion heard by JESSEN, J. *Affirmed.*

Mathew Gering and *A. N. Sullivan,* for plaintiff in error.

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

SULLIVAN, J.

When this case was formerly before us (*Goos v. Goos,* 57 Nebr., 294) we reversed a decree in favor of the plaintiff, Anna Goos, and remanded the cause to the district court for further proceedings. Another trial resulted in a decision dismissing the petition and enforcing the brewing company's mortgage as a second lien upon the land. Counsel have, in their briefs, discussed two points, which will be now considered.

The official term of Judge Ramsey, before whom the cause was tried, having expired before the plaintiff moved for a new trial, the motion was presented to Judge Jessen, who refused to allow it. It is contended that the ruling was necessarily erroneous, but we think otherwise. The district court had authority to act judicially on the motion—to sustain or deny it, as the justice of the case might require. The precise question has been twice adjudicated, and we think correctly, by this court. *State v. Gaslin,* 32 Nebr., 291; *Lauder v. State,* 50 Nebr., 140.

The findings of fact were not unwarranted. The preponderance of the evidence upon the vital issues was in favor of the defendants; of that there can be no doubt, and hence the court, under the law as laid down in the former decision, was manifestly right in the conclusion at which it arrived.

The judgment is

AFFIRMED.

SWIFT & COMPANY V. FRANK HOLOUBEK.

FILED NOVEMBER 21, 1900. No. 11,178.

1. **Negligence:** EVIDENCE: VERDICT. In an action for negligence by reason of alleged defective machinery, whereby a plaintiff, who was assisting in the operation of such machinery, receives injuries resulting in the loss of three fingers and a part of the left hand, *held*, that the evidence of negligence was sufficient to support the verdict of the jury.

2. **Question of Fact.** *Held, also*, The evidence being contradictory as to whether the machinery, and especially the part alleged to be defective, was in all respects similar and the same as like classes of machinery in common and ordinary use, that the question of negligence was not one of law but of fact, properly within the province of the jury to determine.

3. **Verdict:** PASSION AND PREJUDICE. As to whether the verdict is so large as to make it apparent that it was rendered under the influence of passion and prejudice is not determined.

4. **Instructions.** The refusal to give instruction requested copied in the opinion, *held*, not to be erroneous.

5. ———. The giving of two instructions copied in the opinion *held* to be erroneous.

6. **Negligence:** PRESUMPTION. Negligence will not be presumed in the absence of facts and circumstances from which its existence may reasonably be inferred; the presumption, if any may be indulged in, is that all parties acted with ordinary care, and this presumption continues until overthrown by evidence. *Spears v. Chicago, B. & Q. R. Co.*, 43 Nebr., 720.

7. ———: DAMAGES: RECOVERY. Where, in an action by an employee against an employer, one of the causes contributing to the injury for which recovery is sought in damages, being the alleged negligent action of the employer in permitting the

floor where plaintiff stood to become wet and slippery, a finding in favor of the plaintiff as to such act of negligence can only be had when it affirmatively appears by proof that the employer has failed in the exercise of reasonable care in providing the employee a reasonably safe place in the prosecution of the work required.

8. Instructions: EVIDENCE: PLEADINGS. Instructions to a jury are required to be applicable to the evidence and grounded upon the pleadings in a case.

9. ———. Instructions which assume the possible existence of a material fact, to support which there is no evidence, as where a question is submitted as to the alleged negligence of a defendant by reason of the wet and slippery condition of the floor where the plaintiff stood while operating a machine by which an injury was received, and authorizing a recovery if the jury found the defendant negligent in respect to the condition of the floor, and there being no evidence tending to prove that such condition was an act of negligence; *held*, the giving of such instruction to be erroneous.

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

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

J. L. Kaley, contra.

HOLCOMB, J.

In an action for negligence, defendant in error, plaintiff below, recovered a verdict and judgment for the sum of $11,500, for the reversal of which this proceeding in error was instituted. The case has once prior been before this court and reversed for errors in instructions given to the jury, the opinion being found in *Swift v. Holoubek*, 55 Nebr., 228.

The defendant, plaintiff in error, is a corporation engaged in the dressed meat business, and has in operation in South Omaha an establishment commonly known as a packing house. The plaintiff, at the time of the transactions pleaded in the petition, a boy between fourteen and fifteen years of age, was in the employ of the defendant. At the time of the injury complained of, and

for only a short time previous thereto, he was with others engaged in operating a machine for cleaning hog casings or entrails. He had never worked with the machinery before, and after being instructed by those with whom he was working, he assisted in the operation of the machinery, and while thus at work, he seems to have slipped in such a manner as to throw him toward the machine, causing him to thrust his hand under a shield and into some rapidly revolving knives or scrapers, causing the injury which is made the basis of this action.

It is alleged, in substance, that the plaintiff was injured by having three fingers and a part of the left hand cut off and destroyed by revolving knives or scrapers in a hog casing cleaning machine, in the operation of which he was assisting in the cleaning of hog casings; that the machine was defective, dangerous, and unfit for use, more especially in that the space between the shield covering the revolving knives or scrapers and the drum of said machine was greater than it should have been if properly constructed and attached to the machinery, thereby allowing plaintiff's hand to be drawn into and under said shield and come in contact with said revolving knives, causing the injury as aforesaid; that if the shield had been properly constructed and attached to the machinery, the space between it and the drum of the machine would not have exceeded an eighth to a quarter of an inch, when in truth and in fact the space was an inch or over.

It is also alleged that the defendant was negligent in permitting the floor about the machine where plaintiff stood while assisting in its operation to become wet, greasy, and slippery, and negligently and carelessly failed to provide and use, or cause to be used, salt or other suitable substance for sprinkling over the floor where plaintiff stood, by reason of which plaintiff slipped and fell forward, thus contributing to the injury as aforesaid.

The answer denied that the machinery was defective

or improperly constructed, or that defendant was guilty of negligence in that respect. As to the allegation of negligence in regard to the condition of the floor, it admitted that the floor was wet and slippery at the time of the accident, but alleged that such was the common and ordinary condition of the floor at all times while the machine was in operation, and that such condition was a necessary consequence to the operation of the machine, and that it could not be operated without the floor becoming wet and slippery; that the plaintiff knew when he commenced the work of the condition of the floor, and knew that it was the usual and ordinary condition while the machine was in operation.

It is urged that the evidence fails to establish negligence on the part of the defendant, or a reasonable inference of negligence, and for that reason the verdict and judgment can not be sustained, and that error was committed by the trial court in not instructing the jury peremptorily, as requested by the defendant, to return a verdict in its favor. To this we can not assent. An examination of the evidence convinces us that it was sufficient, not only to justify, but to require, the submission of the question to the jury as to the alleged negligence of the defendant with regard to the machinery alleged to be defective and improperly constructed, by reason of which the plaintiff suffered the injury. Without an attempt at reference to the evidence in detail on this point, we deem it sufficient to say, that with respect to the manner of the construction, arrangement, and attachment of the shield covering the revolving knives or scrapers in the machine used for cleaning the casings, the whole record is pregnant with evidence in support of the issues raised by the pleadings with respect to such matter. The theory of plaintiff's case rested upon the proposition, that the shield was improperly and negligently constructed, and was attached to the machinery in such a manner as to make the space between the knives and the revolving drum an inch or over, and sufficient to permit the hand to

pass into the rapidly revolving knives; when the proper construction would have allowed but an eighth to a quarter of an inch space, and thus prevented the possibility of the happening of an injury similar to that suffered by the plaintiff. Evidence was offered in support of his contention in this regard. On the contrary, the defendant maintained that the shield was properly constructed and attached, and that it was only about one eighth to one fourth of an inch from the drum, thus, in effect, conceding that a proper construction would leave a space only of the distance last mentioned.

The evidence shows that in the operation of the machine, the casings were placed on a slowly revolving drum and passed under the rapidly revolving knives or scrapers for the purpose of scraping or cleaning them, and that in the performance of the work, it was the duty of one of the operators, in this instance the plaintiff, to take hold of the casings near to the shield covering the revolving knives, conduct them between two revolving rollers which pressed them in the manner of a clothes wringer, after which they dropped into a receptacle beneath. The motion of the drum was towards the plaintiff, and, as to where he stood, away from the revolving knives. In performing this work, it appears to have been usual for the operator to allow the left hand to rest on the drum near the revolving knives for partial support, and with the right hand manipulate the casings in the manner described. The shield was evidently for the purpose of protecting the operators of the machine from contact with the revolving knives, and, under plaintiff's theory, should be placed so near the drum as not to permit the hand to slip thereunder and against the knives or scrapers. A great deal of the evidence was directed to, and centred in the one proposition as to the proper and natural construction of the shield, and whether the one in controversy was thus constructed. The verdict of the jury can not be said to be unsupported by the evidence.

It is also urged that, as a matter of law under the undisputed evidence, the verdict can not be sustained because no negligence is shown. This contention is based on the assumption that the machinery, and especially the shield, was in all respects the same, and similar to the same class of machines, in common and ordinary use, and therefore in the use thereof, negligence can not be imputed to the defendant. We observe a sharp conflict in the evidence as to whether the shield, which it is claimed was defective and improperly attached, was the one forming a part of the machine as originally manufactured and constructed. Certainly there is evidence to show that it was not usual or customary to construct machines in the manner it is claimed the one in controversy was constructed. There is evidence to support the conclusion that a change in the manner of the original construction and attachment of the alleged defective machinery had occurred, if not the substitution of an entirely different article than the one manufactured with the machine. The issue we regard as purely one of fact, and upon which there is a conflict of the evidence, rendering the question one properly in the province of the jury for its determination.

It is also contended that the verdict of the jury is excessive, as a result of passion and prejudice, and for that reason should not be permitted to stand. We may say with respect to this matter, that the verdict appears rather large when considered in connection with the nature and extent of the injury. It appears somewhat larger than verdicts generally returned and upheld when an injury has been received of an extent and degree equal to, or even greater than that in the case at bar. Whether it is so excessive as to make it apparent that it was the result of passion and prejudice, we will not here determine. We only say that defendant's contention is worthy of serious consideration. In the examination of briefs of counsel, we have noticed a slight manifestation of feeling toward counsel, litigants, and witnesses on the opposite

side of the controversy, and if the same spirit prevailed in the heat of a stubbornly contested trial, we can conceive how the prejudices of a jury may possibly have been excited and their passions aroused to such a degree as to preclude the cool, calm and deliberate judgment which ought to be characteristic of all judicial proceedings.

The rulings of the court in the giving and refusal of several instructions are complained of, some of which only will be noticed. One instruction requested by the defendant and refused is as follows: "You are instructed as a matter of law, that an employee assumes the risks and dangers incident to his employment that are open, obvious and apparent, and respecting which he has the same knowledge and opportunity to observe possessed by the master, and in this case, you are instructed that respecting the condition of the floor and the presence of water thereon, at the place where plaintiff stood at the time the alleged injury was received, the danger of slipping, if you find there was such danger, was obvious and apparent and plaintiff assumed the risk incident to such condition; and if you find from the evidence in this case, that the injuries of which plaintiff complains were received by him by reason of slipping upon the floor, and further find that if plaintiff had not slipped he would not have been injured, then you are instructed that for such injuries defendant is not liable, in this case, and your verdict should be for the defendant." Error is sought to be predicated on the court's ruling regarding the instruction refused, as well as on instructions given referring to the same matter, which when taken together are especially urged as erroneous. Two instructions were given bearing upon the question of negligence with reference to the condition of the floor, which, omitting what refers to the alleged defective machinery, are as follows: "The burden of proof is upon the plaintiff in this case to establish by a preponderance of the evidence the material allegations in his petition which are denied in defendant's answer, that is, that the defendant * * * negligently

permitted the floor on which plaintiff stood, when operating the machine to be slippery as alleged, whereby plaintiff, without any negligence on his part, was injured, and the extent of the injury, and the damages caused thereby." And also instruction No. 11: "It is the duty of every master to conduct his business with reasonable care and prudence so as not to negligently or carelessly subject his servant to any danger not ordinarily incident to or connected with his employment, and it is the duty of the master to provide his servant with a reasonably safe working place * * *, and if the master fails in this regard, that is, fails to exercise such reasonable care and prudence in the conduct of his business, and fails to provide his servant with a reasonably safe working place, * * * and the servant is injured thereby, and for such reason, then the master is liable in damages for such injury, unless negligence or want of ordinary care of the plaintiff contributed to his injury." The fault of the instructions given, it is urged, lies in the fact that they submitted to the jury as an issue of fact the wet and slippery condition of the floor, which was admitted, and permitted an inference of negligence by reason thereof and without any evidence to support the same. Having admitted the wet and slippery condition of the floor, the defendant denied that it was negligently permitted to be so, and alleged that the same was its ordinary and natural condition and made necessary in the operation of the cleaning machine. In effect, the defendant's position was that the condition of the floor was open, obvious and notorious, rendered necessary in the conduct of the business, and was one of the risks incident to the employment and assumed by the servant. It will be observed that whatever the issue of fact as to negligence with respect to the condition of the floor, it was whether it was the usual, natural and ordinary one, and reasonably necessary to the operation of the machinery in the conduct of that branch of defendant's business.

In the petition it was averred, in addition to the al-

leged negligence regarding the slippery condition of the floor, that the defendant had carelessly and negligently failed to provide salt or other suitable substance to prevent a person from slipping. No evidence was introduced tending to prove that it was usual or common to use such material in the conduct and operation of a business or work similar to that in which plaintiff was engaged when injured. At the request of defendant, an instruction was given withdrawing from the jury the question of negligence in regard to the failure of defendant to use salt or other suitable substance to prevent a person from slipping while operating the machine. The issue, however, as to the alleged negligence of the defendant in regard to the condition of the floor, was submitted to the jury in the instructions heretofore quoted, and from them, whether properly or improperly, they were permitted to infer negligence on the part of defendant because the floor where plaintiff stood was wet and slippery. If it was error to submit to the jury, as an issue of fact, the question of defendant's alleged negligence in regard to the wet and slippery condition of the floor upon which plaintiff stood while operating the machine, it is quite clear that the error was not cured by the giving of a correct instruction as to the alleged defective machinery, or the instruction withdrawing from the jury the question of defendant's alleged negligence by reason of its failure to place salt or other suitable substance on the floor to prevent slipping. *Richardson v. Halstead*, 44 Nebr., 606; *Carson v. Stevens*, 40 Nebr., 112; *First Nat. Bank of Denver v. Lowrey*, 36 Nebr., 290. The jury, from the instructions given, were yet at liberty to find negligence in defendant by reason of the wet and slippery condition of the floor.

We do not think it was erroneous to refuse the instruction requested on this particular phase of the controversy. By it was excluded the idea of recovery by reason of the alleged defective machinery, which, if plaintiff's contention were true, was the direct and immediate cause

of the injury, even though the initial and moving cause may have been the slipping of plaintiff while standing where he was. The fact of plaintiff's slipping, although no negligence was established on the part of the defendant with respect to the condition of the floor, would not preclude a recovery, if it be found that the machinery was improperly and imperfectly constructed and attached, by reason of which plaintiff's hand was permitted to pass under the shield and upon the revolving knives and thereby receive the injury, and that such defective and faulty machinery caused the injury or contributed thereto. The error lies, we think, rather in the instructions given than in the one refused. There is no evidence from which an inference of negligence may arise because of the slippery condition of the floor. All the evidence bearing upon the point is uncontradictory, and shows beyond controversy that such was the usual, common, ordinary and necessary condition in the operation of the machine in cleaning hog casings for which it was used. In doing the work necessary to accomplish the desired object, much water was used, which was thrown under pressure on the casings, as from a sprinkler, and necessarily fell upon the floor, where it was permitted to collect in a gutter and pass off as waste. It is difficult to conceive of a different condition in the prosecution of such work in a large packing establishment where much of the business is carried on by machinery, and the material handled in large quanities, as must necessarily be the case in establishments of the magnitude of defendant's and others situated in South Omaha. We know of no rule by which the jury may infer negligence from the mere fact of the slippery condition of the floor, as in this case, without other evidence to support such inference. It is probably true, that circumstances may be such as to require the defendant, in the discharge of its duty as employer, to provide a reasonably safe place for its workmen in the prosecution of their labors, for the failure of which actionable negligence would be chargeable to it.

But in this case there is no evidence to support such a conclusion. The plaintiff, realizing the requirements of the law in this regard, sought to establish negligence by pleading that defendant failed to provide salt or other suitable substance to prevent slipping, but failing to furnish any testimony in support thereof, was compelled to abandon that issue in the case. Counsel for plaintiff contends that defendant in its answer admitted the allegations of the plaintiff that the floor was wet, greasy and slippery, and that it was negligently permitted to be so by the defendant, and argues that it was the duty of defendant to provide a platform or other device to prevent slipping, and therefore is unable to see why the jury might not so find. The argument does not commend itself for two reasons: first, it is not admitted that the slippery condition of the floor was an act of negligence,—on the contrary this is denied; and second, with the same degree of merit, it could be urged that duty required defendant to scatter salt or other substance to prevent slipping as that it should be required to provide a platform or other device for the same purpose, and it is conceded by all that under the evidence, not only was it proper, but it became necessary, to withdraw from the jury's consideration any question of negligence regarding the failure to use salt or other suitable substance. The same reason which prohibited the submission of one question existed as to the other. If duty required the use of a platform or other device to prevent slipping, then, in the absence thereof, it required the use of salt or other suitable substance for the same purpose. The reason for the obligation, if existing, applies alike to all the different methods by which the object may be accomplished. There was not only an utter lack of evidence tending to prove that it was usual or customary in such cases to throw salt or other substance on the floor to prevent slipping, but it is equally clear that there is nothing in the evidence from which the inference may be drawn that it is common, customary or usual in the prosecution of

work of the character under consideration in like establishments, that platforms or other devices are used as a precaution against slipping, or that, as a reasonable precaution for the safety of the employees, it could be regarded as the duty of the master to make some such provisions. Negligence will not be presumed in the absence of facts or circumstances from which its existence may reasonably be inferred. In the absence of evidence, the presumption, if any may be indulged in, is that all parties acted with ordinary care, and this presumption continues until overthrown by the evidence. *Spears v. Chicago, B. & Q. R. R. Co.*, 43 Nebr., 720. One of the causes contributing to the injury for which a recovery is sought in damages, being the alleged negligent action of the defendant in permitting the floor where plaintiff stood to become wet and slippery, a finding in favor of plaintiff as to such allegation can only be had when it affirmatively appears by proof that the employer has failed in the exercise of reasonable care in providing the employee with a reasonably safe place for the prosecution of the work required; and if the alleged negligence does not so affirmatively appear, there can be no recovery as to such issue. *Fenderson v. Atlantic City R. Co.*, 56 N. J. Law, 708. We do not wish to be understood as intimating that the condition of the floor was not a proper matter of evidence in establishing the facts and circumstances surrounding the transaction in which the injury was received to be considered with other facts and circumstances, for the purpose of determining defendant's alleged negligence in other respects, which caused or contributed to the injury received. What we mean to say is that we find nothing in the evidence or the pleadings warranting the submission to the jury the question of its existence as evidence of negligence on defendant's part, with reference to its duty to provide a reasonably safe place for plaintiff to stand in the prosecution of the work in which he was engaged. The rule is that instructions to a jury are required to be applicable to the evi-

dence and grounded upon the pleadings in a case. *Runge v. Brown*, 23 Nebr., 817; *Dorsey v. McGee*, 30 Nebr., 657. The instructions referred to assumed the possible existence of negligence on the part of the defendant by reason of the wet and slippery condition of the floor where the plaintiff stood, and authorized a recovery, if the jury found the defendant negligent in that regard. There was no evidence upon which the existence of such fact might be based. These instructions had the effect of authorizing the jury to find negligence on the part of the defendant with respect to the condition of the floor and return a verdict in plaintiff's favor, although at the same time they found that no right of action existed in favor of the plaintiff because of the alleged defective and improper construction of the machinery and the appliances connected therewith. This, we think, was error to the prejudice of the defendant. *City of Crete v. Childs*, 11 Nebr., 252; *Farmers Loan and Trust Co. v. Montgomery*, 30 Nebr., 33; *Consaul v. Sheldon*, 35 Nebr., 247.

Entertaining the views as above expressed, we regard the assignment of errors last discussed as being well taken, and although reluctant to do so, we must again reverse and remand the cause for further proceedings.

REVERSED AND REMANDED.

ST. JAMES ORPHAN ASYLUM ET AL. V. MARY B. SHELBY.

FILED NOVEMBER 21, 1900. No. 9,243.

1. **Record:** CASE PROPERLY BROUGHT. Record examined, and the case *held* to have been properly brought to this court for consideration upon the merits involved in the controversy.

2. **Will Construed.** Provisions of the will in controversy examined, and *held* to disclose no interest in the devisee therein named, save that of trustee for the purpose of applying the property devised to charitable uses.

3. **Common Law:** FEDERAL CONSTITUTION: STATE CONSTITUTION: STATUTE. So much of the common law as is applicable, and not inconsistent with the federal constitution or the laws and constitution of this state, is by statute declared to be a part of the law here. Compiled Statutes, 1899, ch. 15.

4. **Equity Jurisprudence:** JUDICIAL POWER: ORIGIN: ORGANIC LAW: STATUTES: COMMON LAW. Under our system of equity jurisprudence, the powers exercised are purely judicial, derived solely from the organic law, including the common law, and the statutes.

5. **Administration of Charitable Trusts:** STATUTE OF CHARITABLE USES. The provisions for the administration of charitable trusts under the statute of 43 Elizabeth *held* not to be in force in this state.

6. ———: CY PRES: PARENS PATRIÆ: INAPPLICABLE IN THIS STATE. The doctrine of administering trusts for charitable uses *cy pres*, or under the prerogatives of the king as *parens patriæ* by his sign-manual, is inapplicable and has no part or place in the administration of the courts, either at law or in equity in this state.

7. **Testamentary Trusts:** COMMON LAW OF ENGLAND: STATUTE OF CHARITABLE USES. Under the common law of England, *held*, that testamentary trusts for charitable uses were administered by the courts of chancery, exercising their inherent judicial powers only, anterior to and independent of the statute of 43 Elizabeth: such trusts, where the object of the charity or the beneficiaries of the will were general, indefinite and uncertain, being executed through trustees empowered by the testator to designate the object or objects or select the beneficiaries of the charity bestowed.

8. **Doctrine of Charitable Uses:** ADMINISTRATION IN ENGLAND: IN THIS STATE. From the foregoing, *held*, that the doctrine of charitable uses, being administered as a part of the common law jurisdiction of the courts of chancery of England exercising judicial powers only, has been transplanted in this state and become a part of the jurisprudence of the courts possessing common law equity powers; and that in the administration and enforcement of such trusts the courts can exercise only judicial powers, and not those of the extraordinary character mentioned.

9. **Donations by Will for Charitable Purposes Favored by Courts.** Courts will view with favor donations by will for charitable purposes, and will endeavor to carry them into effect where the same can be done consistently with the rules of law.

10. **Construction of Terms of Will.** Terms of the will under consideration construed to give to the trustee power to apply the

property and the proceeds of the same and the sale thereof to some particular and definite charity, according to the judgment of the trustee, once and for all, after which the trustee, and his duties and powers in the premises, cease and terminate, the trust having been fully discharged.

11. **Power Conferred by Will Upon Trustee:** INTERPOSITION BY COURTS. Where ample power is conferred upon a trustee to relieve a bequest of all objections arising from its indefiniteness, and no obstacle exists to the exercise of that power, courts will not interpose to prevent its exercise, when the trust is assailed for uncertainty. *Miller v. Teachout*, 24 Ohio St., 525.

12. **Devise:** TRUSTEE CERTAIN AND ASCERTAINABLE. In a devise, where a certain and ascertainable trustee or trustees are appointed, with full power to select the beneficiaries or designate the objects of the charity, and devise a plan for the application of the funds bestowed, the court will, through the trustee, execute the charity. *Grimes' Executors v. Harmon*, 35 Ind., 199.

13. **Trustee:** DISCRETIONARY POWER: WILL OF TESTATOR. In such a case, the exercise of the discretion or power vested in the trustee will be deemed to be an expression of the will of the testator.

14. **Bequest for Charity:** DIFFERENCE: DEGREE: PRINCIPLE: INDEFINITENESS. There is only a difference in degree and not in principle between a bequest for charitable purposes to the poor of a state, or to charitable institutions of two states, or to other general and indefinite charities, and one to some charity entirely unrestricted and undefined.

15. **Power Conferred on Trustee.** If power may be conferred upon a trustee to designate a charitable object for the testator's bounty, *held*, that unlimited scope may be given regarding the objects of charity, the only limitation being that the object must be a charitable one according to the intention of the testator.

16. **Construction of Will:** INTENTION OF TESTATOR. The provisions of a will, like all other contracts, must be construed with a view of carrying out the intention of a testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, it will not be declared invalid.

17. **Object of Testamentary Trust.** Where the object of a testamentary trust is clearly charitable, and a trustee is named who is empowered to select for the testator, and as an expression of his will, a charity upon which the property is to be bestowed, and the trustee has accepted or is ready to accept the trust and is willing to carry out its provisions, such bequest, though

entirely general and uncertain in its objects, will not be declared invalid because of the general nature of the object or objects of the charity.

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

J. C. Cowin and *C. J. Smyth,* for plaintiffs in error.

George W. Doane, W. G. Doane and *James B. Kelkenney, contra.*

HOLCOMB, J.

In the will of Joseph Creighton, deceased, among other provisions, appears the following: "Item. I hereby give and bequeath unto the Rt. Reverend James O'Conner, Bishop of Omaha, if he shall survive me, the following lands situate in the county of Douglas, in said state, that is to say," (description of land follows) "if the said Bishop O'Conner do not survive me, then my will is, that the said land shall go to his successor as Bishop of Omaha, my wish and direction is that the said Bishop O'Conner, if he shall survive me, or his said successor as Bishop of Omaha, apply the said lands and the proceeds arising from the same and the sale thereof to some charity according to his judgment but I prefer that the same be applied to the establishment or maintenance of an orphanage."

By the terms of the will, the testator sought to dispose of all his property by three separate and distinct provisions. By the first, certain real estate specifically described was devised to his grand children, they being the children of the contestant, who is his only daughter and sole heir at law; by the second, in the manner herein quoted; and by the third, he bequeathed all the residue and remainder of his property, both real and personal, to his said daughter, Mary Bridget Shelby, in trust, for her children, or such of them as shall be living at her death, such property being charged with the sum of $15 a week to be paid by his said daughter for the maintenance and

support of Mary Furlong, the testator's wife's sister, so long as she may live. The said daughter was nominated as executrix of the will. When it was filed for probate, the daughter withdrew as executrix, and contested the admission to probate and allowance of the will upon different grounds, but mainly because of the alleged incapacity of the testator to make a valid will, the exercise of undue influence, and for the reason the provisions quoted are void for uncertainty and indefiniteness. Upon a hearing of the objections interposed, the will was disallowed and the probating thereof denied. An appeal was taken to the district court, where a hearing resulted in a disagreement of the jury trying the issues of fact. The other provisions of the will having been amicably arranged by the interested parties, a motion was presented to dismiss the appeal, for the reason that the provisions heretofore quoted rendered the will, as to the property therein mentioned, null and void for indefiniteness and uncertainty, passing nothing thereby to the trustee named. The motion was sustained and the appeal dismissed. From the judgment of dismissal the case is brought here for review.

As thus presented, the sole question involved is as to the validity of the provisions of the will with respect to the disposition or attempted disposition of a portion of the property of the testator for charitable purposes. While some other questions are briefly argued relative to the course of proceeding taken by appellants and plaintiffs in error, we find no reason why the trustee should not be heard in this court. His case, we are disposed to the view, is properly before us for consideration upon the merits of the controversy with respect to that part of the instrument by which the testator sought to apply a part of his property to objects of charity, and this without necessarily determining the status, in this proceeding, of the St. James Orphan Asylum, which it is claimed has been made the beneficiary under the terms of the will.

The first and last of the three provisions heretofore referred to being unobjectionable, and having been eliminated from the controversy so far as the present proceedings are concerned, the litigation has resolved itself into the one proposition as to the force and effect of the second provision of the will, whereby the testator sought to apply the property described to a charitable object. If this provision fails, the property passes to the contestant as the sole heir at law of the testator.

We are indebted to counsel on both sides for their able and learned discussion of the many questions involved, and the intelligent manner in which the subject is presented, as well as the exhaustive research of authorities evidenced by the many citations in the several briefs now before us.

While the plaintiff in error argues from different hypotheses as to the validity of the controverted provisions of the will, we are strongly of the opinion that all must be discarded as unwarranted by the positive language used and therefore untenable, save the fourth and last one, which we conceive to be the only position which has real and substantial merit to rest upon. The fourth position is, that if a trust is created by the terms of the will, it is for charitable uses, and the fact that the beneficiary or beneficiaries are indefinite and uncertain does not therefore render it void and of no force and effect. On this proposition the contestant takes direct issue, and therein lies, in our judgment, a correct solution of the matter in litigation.

The question is one which, in the beginning, we are constrained to say, is surrounded with difficulties, and regarding which there is much diversity of opinion and an irreconcilable conflict in the authorities adverting to or passing upon the subject. These divergent views, as it occurs to us, are occasioned by a difference of opinion as to the correct doctrine of charitable trusts by devise under the common law, and controlled also, to some extent, by statutory provisions governing the subject. By

statute, so much of the common law as is applicable, and not inconsistent with the federal constitution or the laws and constitution of this state, is declared to be the law here. Hence it becomes of some importance to ascertain what, if any, difference exists between the doctrine of charitable trusts and that of trusts of any other character under the common law. It is admitted that devises for charity, where the beneficiaries were general, indefinite and uncertain, were enforced by the English courts of chancery; but it is insisted that the power thus exercised was not by virtue of the common law jurisdiction of such courts, but by specially conferred authority by the statute of 43 Elizabeth, the power and prerogatives of the king as *parens patriæ*, by his sign-manual, and the doctrine of *cy pres* which obtained in that country, whereby, if a testamentary gift to charity could not be applied as directed by the testator, it would be applied as nearly as possible, or as closely to the presumed general intention of the donor as expressed in the will. It needs no argument or elaboration to reach the conclusion that, under our system of equity jurisprudence, the powers exercised are purely judicial, derived solely from the organic law and the statutes including the common law, and that the statute of 43 Elizabeth mentioned, the doctrine of administering trusts *cy pres*, or under the prerogative of the king as *parens patriæ* by sign-manual, have no part or place in the administration of the courts, either at law or in equity, in this state.

While the earlier opinions of the courts of this country, following *Baptist Association v. Hart's Executors*, 4 Wheat. [U. S.], 1, held to the doctrine that charitable trusts in England were administered under the provisions of the statute of 43 Elizabeth, and the extraordinary powers above referred to, in the later and more thoroughly considered case of *Vidal v. Girard's Executors*, 43 U. S., 126, a different conclusion was arrived at, and in that opinion it was announced that charitable trusts were administered by the courts of chancery of England exercising

their inherent judicial powers only, anterior to and independent of the statute of 43 Elizabeth, upon which their jurisdiction to administer such trusts was in former opinions held to rest. In the Girard will case, in which the beneficiaries of the will were of a general, uncertain and indefinite class, says Mr. Justice Story, who wrote the opinion: "In the next place it is said that the beneficiaries who are to receive the benefit of the charity are too uncertain and indefinite to allow the bequest to have any legal effect, and hence the donation is void and the property results to the heirs." After discussing a number of cases decided by the chancery courts of England, and expressing the opinion that the jurisdiction under which the court acted belonged to it in the exercise of its judicial powers independent of the statute of 43 Elizabeth, the author further says: "In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as I can gather from the imperfect statement in the printed records, they were also cases where there were no trustees appointed, or the trustees were not competent to take." See, also, *Estate of Hinckley*, 58 Cal., 457, and *Howe v. Wilson*, 91 Mo., 45.

The views expressed by Judge Story, both as to the common law jurisdiction of courts of chancery, and the validity of a devise for charity, although general and indefinite, appear to be better supported by authority and sounder in principle, and to have been adopted by a majority of the courts of last resort of the different states of the union. From a consideration of the foregoing, we are disposed to the view that the doctrine of charitable trusts was a part of the common law jurisdiction of the courts of chancery of England exercising judicial powers only, and as such has been transplanted into the courts of this state possessing common law equity powers, and that in the administration and enforcement of charitable trusts of the character under consideration the exercise of the powers of the court must be solely judicial and none other.

The provision of the will under consideration is a model of clearness and conciseness of expression, and freedom from ambiguity or uncertainty in the meaning of the language used to denote the testator's will and intention. It is clearly and definitely expressed, that it is the will of the testator that the property described should descend to the Bishop of Omaha, the proceeds of the same and the sale thereof to be applied to some charity, according to the judgment of the trustee, with an expression of preference that the devise be given to an orphan asylum. To avoid any contingency, it is provided that if the trustee named shall not survive the testator, then the property shall go to his successor as Bishop of Omaha, in trust, for the same purpose. It is but a natural and probable inference, that in the trustee designated, as well as his successor, whoever he might be personally, the testator reposed implicit reliance and unreserved confidence in his integrity and personal character, as one who, by reason of his chosen work in life and piety, was peculiarly fitted and well qualified to worthily bestow the endowment upon some deserving charity, to be by him selected in the execution of the charitable and benevolent intentions of the testator. It is entirely certain who the trustee is, and that the bequest was made for a charitable purpose. While a preference is expressed, the objects of the charity from which the selection is to be made are of the most general character. Is the devise to fail for that reason alone? Is it competent for a testator to devise property to a trustee with power in him to select or designate the object or objects upon which the charity is to be bestowed? In determining the question of the validity of the bequest, we should be mindful of the rule that courts view favorably donations by will for charitable purposes, and will endeavor to carry them into effect where the same can be done consistently with the rules of law. *Duggan v. Slocum*, 83 Fed. Rep., 244; *State v. Smith*, 16 Lea [Tenn.], 664; *Estate of Hinckley, supra.*

It is perhaps well to note here that, in the bequest under consideration, it is not attempted to establish a perpetual trust fund, the income or increase of which is to be devoted to objects of charity general in their nature, from which a selection or designation is to be made by the trustees, the same to be subject to their will and control, with power to change according to their discretion and as they may deem desirable. Whether or not this may be done, it is unnecessary here to determine. By the terms of the will in controversy it is proposed, through the power of the trustee in him vested, to apply the property and the proceeds of the same and the sale thereof to some particular and definite charity, according to the judgment of the trustee, once and for all, after which the trustee, and his duties and powers in the premises, cease and terminate, the trust having been fully discharged. In this case the trustee is willing to, and has, accepted the trust and has sought to carry out the will of the testator by conveying the property to an orphan asylum, in conformity with the preference expressed by the testator.

In *Miller v. Teachout*, 24 Ohio St., 525, a testator had devised the residue of his estate to an executor to be invested for the use of his wife during her lifetime, and at her death, the property should be appropriated by the executor to the advancement of the Christian religion, in such manner as, in his judgment, would best promote the object named. The executor accepted the trust. "*Held*, That the testator had conferred ample power upon the executor to relieve the bequest of all objections arising from its indefinite character, and that so long as no obstacle exists to the exercise of the power at the proper time, the courts of this state will not, in advance of that time, interpose, on the application of the heir, to prevent its exercise." Says Judge Day in the opinion: "Although the power of the courts of this state to devise a scheme for the application of a vague charity may well be questioned, it does not follow that the testator can-

not create an agency to do it for him; and it may be regarded as settled, that where a testator, creating a trust to a charitable use, defines the intention of the trust, and invests the trustee with discretionary power over the application of his bounty to the objects, or for the purposes intended, the bequest will not be held invalid so long as there is no obstacle to the exercise of the power confided to the trustee, for the exercise of the power may relieve the bequest of all objections arising out of its vague and indefinite character"; and after citing a number of authorities in support of the proposition, he continues: "Nor does it make any difference, in this respect, whether the trust be of a mere administrative character in the hands of the executor, or whether it be confided to another. In either case, the will of the testator may be ascertained and made certain by those to whom he has entrusted discretion and power for that purpose, and their acts may be justly regarded as the definite expression of his own purpose." Further on, after discussing the power of the executor to make the application of the bounty of the testator to the general charitable object mentioned, he says: "So long, then, as the power thus conferred exists, ready to be exercised, and may be exercised in accordance with the will, the bequest can not be regarded so defective as to be incapable of execution."

In *Grime's Executors v. Harmon*, 35 Ind., 199, cited by contestant in support of the contention that the provisions under consideration are void for indefiniteness and uncertainty, it is declared in one paragraph of the syllabus that, in a case where a charity does not fix itself upon any particular object, but is general and indefinite, and "certain and ascertainable trustees are appointed with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity." Says the author of the opinion, Judge Buskirk, after reviewing the many authorities on the question: We claim that they establish

these principles: "If the charity does not fix itself upon any particular object, but is general and indefinite, such as the promotion of the moral and intellectual condition of a race, or the relief of the poor, and no plan or scheme is prescribed, and no discretion is lodged by the testator in certain and ascertainable individuals, it does not admit of judicial administration. In such a case in England the administration of the charity is cast upon the king, to be executed *cy pres*, while in this country the property devised lapses to the next of kin. If, however, in such a case, certain and ascertainable trustees are appointed, with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity."

In *Fontain v. Ravenel*, 58 U. S., 369, the residue of an estate, left in trust for the use of the wife of the testator during her lifetime, was to be disposed of for such charitable institutions in Pennsylvania and South Carolina as the executors might deem most beneficial to mankind. The persons named as executors died during the lifetime of the wife, and before any appointment of the charity was made or attempted. It was there held that the charity could not be carried out, because the executors were vested with mere powers of appointment, and this not having been exercised, the trust must fail. The logic of the opinion, as well as its direct expression, is that an appointment by the executors at the proper time, under the powers vested, had they lived, would have rendered the trust valid and enforceable in the courts of equity.

In *Russell v. Allen*, 107 U. S., 163, a more recent case on the subject, Mr. Justice Gray gives expression to the following views: "They may, and indeed must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one of the characteristics of a legal charity. If the founder

describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery."

In *Dye v. Beaver Creek Church*, 26 S. E. Rep. [S. Car.], 717, decided in 1897, the court, after referring to the many conflicting authorities on the subject, deduces, among others, the following principle: "If a trustee is appointed by the testator, and the will shows that the object of the devise, though expressed in general terms, is for a charitable use, the trust will be declared valid. In such a case the duty devolves upon the trustee of devising a scheme for carrying the trust into effect." In the same opinion it is said: "The reason a trustee is allowed to enforce a trust, the object of which is only expressed in general terms, is that in exercising his discretion he carries out the intention of the testator."

In re Murphy's Estate, 39 Atl. Rep. [Pa.], 70, decided in 1898, it is held: "A bequest of the residue of an estate 'to be divided among such benevolent, charitable and religious institutions and associations as shall be selected by my executors,' is not void for uncertainty."

Authorities holding generally to the views hereinbefore indicated may be multiplied, but it would serve no useful purpose, and we content ourselves with referring only to the following in harmony with those already quoted from: *Duggan v. Slocum*, 83 Fed. Rep., 244; *Hoeffer v. Clogan*, 49 N. E. Rep. [Ill.], 527; *Staines v. Burton*, 53 Pac. Rep. [Utah], 1015; *People v. Cogswell*, 45 Pac. Rep. [Cal.], 270; *Phillips v. Harrow*, 61 N. W. Rep. [Ia.], 434; *Fox v. Gibbs*, 29 Atl. Rep. [Me.], 940; *Powell v. Hatch*, 14 S. W. Rep. [Mo.], 49; *Minot v. Baker*, 17 N. E. Rep. [Mass.], 839; *Claypool v. Norcross*, 9 Atl. Rep. [N. J.], 112; *Dodge v. Williams*, 50 N. W. Rep. [Wis.], 1103; *Darcy v. Kelley*, 26 N. E. Rep. [Mass.], 1110; *Bedford v. Bedford's Adm'r*, 35 S. W. Rep. [Ky.], 926; *Guilfoil v. Arthur*, 41 N. E. Rep. [Ill.], 1009.

Holding to the doctrine contrary to the authorities

heretofore cited may be mentioned *Tilden v. Green*, 130 N. Y., 29, as a leading authority. In that case it is said, "The law is settled in this state that a certain designated beneficiary is essential to the creation of a valid trust"; following *Levy v. Levy*, 33 N. Y., 107, wherein it is said: "If there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement, is void," no distinction being made between trusts generally and a trust for charitable purposes. Says Brown, J., the author of the opinion in the *Tilden Case:* "The objection is not obviated by the existence of a power in the trustees to select a beneficiary unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can asertain who were the objects of the power." The opinion in this case was, in a manner, dependent upon and governed by the statutes of that state, but to what extent, we have deemed it unprofitable to examine. It is reasonably clear, that the earlier decisions of the courts of that state rested upon the assumption that the doctrine of charitable uses was no part of the common law administered by the chancery courts of England, but received its support from, and grew out of, the statute of 43 Elizabeth, and that this statute was not applicable or in force in the state of New York. The opinions of the courts of Virginia, Maryland and perhaps some other states, are in the main in harmony with those of New York.

An examination of the authorities cited by counsel for contestant holding bequests invalid for uncertainty and indefiniteness, shows that the decisions in many of them rest upon facts peculiar to the case which was under consideration; such as a failure to nominate trustees; to provide a means for the selection of beneficiaries; or to empower trustees or executors to make selection; or the devise was to charity generally, without designating the manner in which the charity may be executed;

while some of the cases refer to trusts general in their character as distinguished from a charitable trust.

Another class of cases may be briefly referred to, which in principle may assist in arriving at a correct conclusion in the case at bar. The rule as to executory devises, depending for their complete execution upon the happening of some future event or selection, has invariably received judicial sanction, and such devises have been held valid. Thus, a bequest may be made to a corporation to be organized after the death of the testator, as was the case in the *Tilden Will Case, supra;* for a site for the erection of a hospital for foundlings, to be built by a corporation to be established by congress,—*Ould v. Washington Hospital,* 95 U. S., 303; for the incorporation of a society for the purpose of maintaining and supporting aged, decrepit and worn-out sailors,—*Inglis v. Sailors' Snug Harbour,* 3 Pet. [U. S.], 99; "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri,"—*Russell v. Allen,* 2 Sup. Ct. Rep., 327. In all these cases, and many others which might be cited, the bequest was held to be valid and treated as an executory devise, depending upon the happening of some future event, which, when occurring, would vest the donation as contemplated by the testator.

In the present case it is urged that, while in many of the states charitable gifts general in their nature have been held valid, there was in all such cases a limitation as to the locality of classes from which the beneficiaries were to be chosen. To us, conceding the proposition which we think does not hold good in many cases, this seems to be only a difference in degree, and not in principle. If a bequest to "the poor of California," or "the children of the colored race," or "the charitable institutions of Pennsylvania and South Carolina," or "to the Beaver Creek Church for poor children for their tuition," or for "benevolent and charitable purposes to be used in Cumberland county, Maine," is valid, and capable of being administered in courts of equity, we are unable to

understand why a bequest to a charity unnamed, to be selected by the trustee, is not within the principle enunciated in the many cases referred to. In *Powell v. Hatch, supra*, a bequest "to such charitable purposes as my said trustee may deem best" was held valid. Says Barclay, J. in speaking of the case then at bar and another case decided prior thereto: "The only difference of any consequence between the facts presented in the two cases is, that in the earlier one the discretion was to be exercised among 'the charitable institutions of St. Louis,' while in the present, no limitation with respect to locality appears. We do not regard this difference in the facts as affecting, in anywise, the application of the principles established in the former case." If restrictions, either as to locality, or numbers included in a class of beneficiaries, are necessary to the validity of a charitable bequest, we know of no rule by which the line may be drawn. If power may be conferred upon a trustee to designate a charitable object for the testator's bounty, we doubt not that unlimited scope may be given, the only limitation being that the object must be a charitable one according to the intention of the testator.

This contract, like all others, must be construed with a view of carrying out the intention of the testator, and unless there is something in it contrary to the laws of the state, or in contravention of public policy, no reason exists for declaring it invalid. The object of the trust is clearly charitable, and is specified as such in so many words. A trustee is named, and is empowered by the testator to select for him, and as an expression of his will, a charity upon which the property in controversy is to be bestowed. The trustee has accepted the trust. He is willing to carry out its provisions, and has attempted to do so. He stands ready to make certain the very matter of uncertainty upon which contestant relies for a judgment. The will is for an object which has always been looked upon with favor by the courts. It is one of the most worthy of

all bequests, save perhaps near kindred, having, by reason of their kinship, peculiar claims to the consideration of a testator in the distribution of his property. The bequest is sanctioned by law and contravenes no public policy. Its invalidity can be declared only by the adoption of a doctrine at variance with the great weight of authority, to wit, that the beneficiaries shall be so certain that they may come into court claiming the benefits of the trust, and demand its execution. We do not think this doctrine should be adopted in this state, and hence hold to the view that where a bequest for a charitable purpose, though entirely general and uncertain in its character, is made to a trustee who is empowered to select the object of the charity, and who is willing to or has accepted the trust, the will will not be declared invalid because of the general nature of the object or objects of the charity. The decree of the district court must be reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JAMES DUFFY V. STATE, EX REL. ISAAC W. EDSON.

FILED NOVEMBER 21, 1900. No. 11,301.

1. **Quo Warranto:** CONSENT OF COUNTY ATTORNEY. Quo warranto proceedings begun by the relator in his own behalf as claimant to the office, in the prosecution of which the county attorney joined as one of the attorneys in the case, *held* to be sufficient to show that the action is brought with the consent of the county attorney, as required by section 1, chapter 71, Compiled Statutes, 1899. *Kane v. People*, 4 Nebr., 509, followed.

2. **Petition:** SINGLE CAUSE OF ACTION. Petition examined, and *held* to state but one cause of action.

3. **Trial Without a Jury:** ERROR: SUFFICIENT EVIDENCE. In an action tried to a court without a jury, prejudicial error can not be predicated on the rulings in the admission of evidence. A reviewing court will only ascertain whether there is sufficient proper and competent evidence to support the judgment rendered.

4. **Case Distinguished.** Case at bar distinguished from *State v. Lansing*, 46 Nebr., 514, 527.

5. **Individual Right:** PROSECUTION: FAILURE OF OFFICIAL. Where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain such right by the neglect or misconduct of a public officer, the law will protect him.

6. **Presumption That Officer Will Do His Duty:** OFFICIAL BOND: APPROVAL: LIMITATION. A county officer elect may properly rely upon the presumption that a board of county commissioners will do its duty and convene in timely session to act upon official bonds presented to it for approval, within the time limited by statute.

7. ——: ——: ——: ——: NON-ACTION: NUNC PRO TUNC. If a person elected to an office presents for approval an official bond in all respects as required by law, within the time fixed by statute, and because of the failure of the approving body to meet, or by reason of non-action thereon, or for any other neglect or omission of duty on their part, an official bond is not approved until after the time limited, and is then approved and filed, the same will be deemed a compliance with the provisions of the statute, and the doctrine of relation is applicable, each subsequent act relating back to the dominant one, to wit, delivery for approval, and will be deemed as having been done of the time within which, in contemplation of law, it should have been approved.

8. **Judicial Officer:** OFFICIAL OATH: CONSTITUTION. A judicial officer, in qualifying for an office to which he has been elected, is required to take and subscribe to the oath prescribed in section 1, article 14, of the constitution.

9. **Failure to Take Oath:** VACANCY. Where an officer elected to a judicial office failed to take the constitutional oath of office within the time contemplated by statute, because of a mistake on his part as to the proper official oath to be by him taken, but soon thereafter took and subscribed to the proper oath and filed it in the proper office before the office had been declared vacant, or any other right or title had intervened, *held*, that such failure did not of itself forfeit the office, and was not a refusal to take the constitutional oath within the meaning of the word as there used.

10. **Official Bond:** APPROVAL: FILING: MISTAKE: DISCOVERY OF ERROR: LIMITATION. Where, as in this case, the officer elect presented with his official bond, which was approved and filed, the official oath prescribed by section 1, chapter 10, Compiled Statutes, 1899, instead of the oath required by section 1, article 14, of the constitution, under the mistaken belief that the oath taken was the one required by law, and soon afterward, but beyond the time limited by law, upon discovery of the error, subscribed to and filed with the proper officer the oath required by the constitu-

tion, *held*, that such error was an innocent mistake and oversight, and might be thus corrected, and that his right and title to the office was not forfeited because of such mistake.

ERROR to the district court for Webster county. Tried below before ADAMS, J. *Affirmed.*

Chaney & Mercer, R. T. Potter and *B. McNeny,* for plaintiff in error.

A. D. Ranney and *Overman & Blackledge, contra.*

HOLCOMB, J.

By quo warranto proceedings, the relator, Isaac W. Edson, defendant in error, seeks to obtain possession of the office of county judge of Webster county, which, it is alleged, is wrongfully withheld by the respondent, James Duffy, plaintiff in error. Briefly, the facts, as disclosed by the record, may be summarized as follows: The relator was elected to the office named at the general election held in 1899. The respondent was the then incumbent of the office, having been previously elected for the term expiring on the first Thursday after the first Tuesday in January, 1900. After his election, and on December 30, 1899, the relator made and presented for approval his official bond, with the statutory oath of office provided for by section 1, chapter 10, Compiled Statutes, 1899, indorsed thereon. The bond as thus prepared was presented to and filed with the county clerk, who is also the clerk of the board of county commissioners who are charged with the duty of approving bonds of county officers, the board at the time not being in session. Action on the bond with respect to approval was not had by the board of county commissioners until its first sitting after the bond had been filed, which was at a regular meeting held January 9, 1900. The bond on that day was accepted, approved and recorded as presented. On the same day, and after the approval of relator's bond, the board of county commissioners passed a resolution, in

substance reciting that the right of relator to hold the office to which he was elected having been questioned by some, because of the non-approval of his bond until the time mentioned, they thereby, without attempting to determine whether a vacancy existed, appointed him to the same office. Another bond, with the same oath indorsed thereon, was immediately executed, reciting therein the resolution of appointment, which was likewise approved by the board and recorded in the office of the county clerk on the same day. On January 22, an oath of office, in form as prescribed by section 1, article 14, of the constitution, was taken and subscribed to by the relator, and on the same day filed in the office of the county clerk. Various demands by the relator were made upon the respondent for the possession of the office, all of which were refused. It also appears that the respondent, upon the theory that the failure of the relator to secure the approval of his bond on or before the time mentioned in section 15 of said chapter worked a forfeiture of his right to the office, made and tendered for approval on January 9 a "hold-over" bond as provided in section 17 of the same chapter, on which was indorsed the statutory oath similar to the one taken by relator. The county commissioners rejected and refused to approve this bond until compelled to do so by an order of the district court upon application for a writ of mandamus issued at the instance of respondent. On January 16 the board, in pursuance of the writ, also approved the "hold-over" bond tendered by respondent. The present suit was instituted on the 26th of January, resulting in a judgment of ouster against respondent, from which judgment he prosecutes error proceedings to this court.

While some objections of a technical nature are urged against the proceedings by counsel for respondent, we are of the opinion that the case should be disposed of upon its merits, and that the technical objections presented are untenable.

Regarding the authority of relator to prosecute the action, the record discloses that the proceedings were begun by relator in his own behalf as claimant to the office, and that the county attorney joined in the prosecution as one of the attorneys in the case. This is proof sufficient that the action is brought with the consent of the county attorney, and is all that is required by section 1, chapter 71, Compiled Statutes, 1899. *Kane v. People*, 4 Nebr., 509.

To the objection that two separate and distinct causes of action are set forth in the petition, it may be said that relator has only attempted to follow section 707 of the Code, which provides that an information in quo warranto "shall consist of a plain statement of the facts which constitute the grounds of the proceedings, addressed to the court which shall stand for an original petition." While the petition probably contains surplusage, a fair construction of the whole of it leads to the conclusion that relator relied upon his election to the office and qualification thereunder.

As to the action of the board in attempting to strengthen his title by making the appointment without attempting to determine the existence of a vacancy, it may, we think, be said that no vacancy at that time to be filled by appointment by the county commissioners existed, and that their action in that regard was a nullity, and without force or effect. *Richards v. McMillin*, 36 Nebr., 352.

While it is urged that there was error in the admission of evidence, this objection may be disposed of with the statement that the case was tried to the court without a jury, and the only question which we are to determine is whether the judgment is supported by sufficient competent evidence and the pleadings in the case. This rule is so well settled that no citations in support of the same seem to be required.

The two controlling propositions in the case are: First, will the failure of relator to secure the approval of his

bond within the period provided by statute under the facts in this case defeat his title to the office; and, second, what is the legal effect or consequence of his subscribing to, and presenting with his bond, the oath as prescribed by section 1, chapter 10, Compiled Statutes, 1899, instead of the oath required by section 1, article 14, of the constitution, which latter oath was not taken and filed until January 22, as hereinbefore mentioned. The two questions will be considered in the order named.

Section 15 of the chapter under consideration provides in substance that if any person elected to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by that act, his office shall thereupon *ipso facto* become vacant. This section, with others relating to it, after a full discussion of their scope and effect, was construed in the case of *State v. Lansing,* 46 Nebr., 514, 527, and it was there held that a compliance with these provisions was a condition precedent; that such provisions were self-executing, and unless the official bond, where one is required, is filed within the time provided by law, the person elected or appointed loses all right to the office. Says IRVINE, C., who wrote the opinion, after reviewing the authorities: "We therefore think that whether the result be reached by a review of the authorities or by an inspection of the statute itself, our legislature has declared in unmistakable terms that where an official bond is required it must be filed within the time provided by law, and that its filing within time is a condition precedent to the induction into office of the person elected; that Lansing did not present his bond within time; that he failed thereby to perform a condition precedent, and that he thereby lost all right to claim the office unless his right was saved by a constitutional question, which next arises for consideration." While the conclusion announced in the opinion referred to was not concurred in by all the members of the court, the construction given the sections therein referred to must now

be regarded as the settled law of this state. It is, however, urged that the rule announced in that case is not applicable to the case at bar. This position seems to us correct. There is a distinction of vital importance between the two cases. In the *Lansing Case*, no attempt was made by the person elected to qualify as by law provided; no bond was attempted to be executed, and none presented for approval or filed with the approving body for its consideration on the part of the officer elected. There was an utter failure on his part to take any steps or make any attempt to qualify himself for the office to which he had been elected. It was under these circumstances, and the facts in connection therewith, that the court reached the conclusion announced in the opinion referred to. In the case at bar it is to be observed that the relator, after his election, made and signed an official bond as provided by law, and indorsed thereon an official oath conforming to the statutory provisions, and presented the same to the county clerk, who is also the clerk of the board of county commissioners, on December 30, which was several days prior to the expiration of the time allowed by law for the approval of his bond. He, in fact, did all that was in his power and which he was required to do and within the time limited by statute. His bond should have been approved and filed for record, to comply with the strict letter of the statute, on January 4, following. The board of county commissioners, however, did not in fact convene until January 9, which was subsequent to the statutory period within which official bonds were required to be approved. At its first sitting the board approved the bond, which act, if performed on or before January 4, would, so far as the execution of the bond was concerned, have rendered relator's right to the office beyond peradventure of doubt. Its approval is ample evidence that the bond tendered was a good and sufficient one, and that no objection to its form or other requirement in its execution existed. The question therefore arises, will the failure of the approv-

ing officers to consider and approve the bond presented within the time fixed by statute, but afterwards acting favorably upon it, defeat a claimant's right and title to an office to which he has been elected? We answer in the negative. Says MAXWELL, C. J., in *Parker v. Kuhn*, 19 Nebr., 394, 396: "It is a well established rule that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the neglect or misconduct of a public officer the law will protect him"; citing *Smiley v. Sampson*, 1 Nebr., 83; *Lytle v. Arkansas*, 9 How. [U. S.], 333; *Dobson v. Dobson*, 7 Nebr., 296; *Louderback v. Boyd*, 1 Ash. [Pa.], 380; *Noble v. Houk*, 16 S. & R. [Pa.], 421; *Republican V. R. Co. v. McPherson*, 12 Nebr., 480; *Curran v. Wilcox*, 10 Nebr., 449. The relator, it seems to us, might very properly rely upon the presumption that the board of county commissioners would do its duty, and convene in timely session to act upon a bond presented to it for approval within the time limited by statute. Its failure to do so can scarcely be said to be a neglect upon the part of the relator. If the failure of the board to act within the time prescribed by statute deprives the relator of the office, then it lies within the power of a person or approving body, charged with the duty of approving bonds, to defeat the expressed choice of the people, and in many instances secure the appointment of persons of their own selection to fill such office. This is a doctrine appearing to us wholly untenable. Such a construction of the statute would be unnatural, strained, and one never, in our judgment, intended by the legislature. The views above expressed are in consonance with former expressions of this court upon the same subject. In *State v. Frantz*, 55 Nebr., 167, 171, SULLIVAN, J., on behalf of the court, says: "We think that the failure of Barton to have his bond executed and approved within the statutory period was not the result of his neglect, and that section 15 aforesaid has no application to cases of this character. Such failure, according to the averments of the informa-

tion, was entirely due to the neglect or willful omission of the precinct election boards to discharge the duties imposed upon them by law."

It is contended by respondent that mandamus should have been resorted to to compel action by the approving board within the time limited by statute. While mandamus in a proper case would undoubtedly lie, the proceeding was unnecessary in this instance, because the board was willing to approve the bond as soon as convened in session, and capable of taking such action. Voluntary action was taken as soon as action could have been secured by compulsion. If mandamus was unnecessary because of the willingness of the board to act, but the action was taken subsequent to the time when it should have been, the same principle, we apprehend, would apply as in a case where the board, being in session at the proper time for the consideration of such matters, took no action, or action adverse to the party, arbitrarily and without sufficient reason therefor. In *State v. Lynn*, 31 Nebr., 770, 773, it is held that, where a good bond with the proper oath is filed in time, and adverse action is taken thereon, without sufficient reason, the proper remedy is by mandamus; but this, however, would not prevent a sufficient bond which had been duly filed and which the board was compelled to approve, from being in force from the time it should have been approved. By a parity of reasoning it would seem that, in this case, although the bond was not approved within the required time, being good and sufficient, and tendered in good season, the failure of the board to act within the proper time would not forfeit relator's right to the office.

The conclusion proper to be reached from the foregoing is that if a person elected to an office presents for approval an official bond, in all respects as required by law, within the time fixed by statute, and because of the failure of the approving body to meet, or by reason of nonaction thereon, or for any other neglect or omission of duty on their part, an official bond is not approved until

after the time limited, and is then approved and filed, as in this case, the same will be deemed a compliance with the provisions of the statute, and the doctrine of relation is applicable, each subsequent act relating back to the dominant one, to wit, delivery for approval, and will be treated as having been done as of the time within which, in contemplation of law, it should have been approved. This rule, while not fully determined, was adverted to in the case of *Holt County v. Scott*, 53 Nebr., 176. The 11th paragraph of the syllabus in that case is as follows: "*Quære:* Are approval, taking and subscribing the oath of office indorsed on the bond, and its filing for record constituent elements of its delivery, the filing being the dominant one; and if it is within the limit of time prescribed by statute, and the approval of a later date, and beyond that of the limit, does the approval relate back to the filing?" Says HARRISON, J., in writing the opinion of the court on the same subject, p. 199: "There is another argument which might be urged as establishing the validity and potency of the bond in suit, viz., that, when filed in time, as was this one, a later approval relates back to the time of filing, and will be considered as done of that date. This is on the ground that where there are several acts which may be said to be concurrent, required to be done to make or complete a matter or thing, then the dominant act in this case,—the delivery,—shall be preferred, and to it the other acts have relation. Supporting this doctrine are *State v. Tool*, 4 Ohio St., 553; *Drew v. Morrill*, 62 N. H., 23. This point was not discussed by counsel and as to whether it should prevail or not, we will merely indulge in a query; but if there ever were cases in which the doctrine of relation should be invoked and apply, it is probably in actions of the nature of this." In the case of *State v. Tool, supra,* decided by the supreme court of Ohio, speaking of the failure of approving officers to approve a bond within the time prescribed by statute, and with regard to a statute similar to our own, it is said, p. 559: "The bond was executed and delivered

to the commissioners, for their acceptance, within the time prescribed by law, but was neither accepted nor rejected on that day; but on the next day, and during the regular June session of the commissioners, was accepted and approved by them. * * * In such case the doctrine of relation would apply, and the acceptance, by the commissioners, of the bond on the next day, would relate back to the time of the delivery of the bond to the commissioners for their acceptance. * * * But, in this cause, the oath was not made or subscribed by the treasurer, nor indorsed on the bond, until the next day after the time prescribed by law; and therefore, it is claimed, the office became vacant. * * * Still, we think the indorsement of the oath more properly follows the acceptance, and if made immediately after the acceptance, that the oath, indorsement and the acceptance will have relation to the time of the first act of the treasurer, viz., the delivery of the bond to the commissioners for their acceptance, and that this original act shall, in the language of Viner, be preferred; and to this first act the others shall have relation, and, by this fiction, the whole shall be considered as done on or before the first Monday of June." On the same subject says the supreme court of California, in *People v. Scannell*, 7 Cal., 432, 440, a case in many respects like the one at bar: "But even in cases where the party seeks to enter upon the duties of an office, and he is required to give a bond as a precedent condition, and he does execute and present a good bond with sufficient sureties, and the officer, or board, whose duty it is to approve or reject the same, neglects or refuses to act it is not sufficient cause to defeat his rights." See, also, *Ross v. Williamson*, 44 Ga., 501. It is apparent from the foregoing that a failure of the approving board to meet and act at the time contemplated by law can not be invoked to the prejudice of one who, in all other respects, has done that which is necessary to qualify him for the office to which elected, and, that in this case the right of the relator to the office claimed by him is not

defeated by the non-action of the board of county commissioners respecting the approval of his official bond until January 9, when it was approved.

As to the second proposition, to wit, the filing of the statutory oath with the official bond, instead of the required constitutional oath, it may be well in the beginning to observe that the facts upon which legal conclusions are based are always to be kept in mind. They are quite generally, if not always, as important in arriving at a decision as the enunciation of a correct legal proposition, and in this case the facts upon which legal conclusions are founded we regard as of weighty importance. Having reached the conclusion that the failure of relator to secure the approval of his bond within the time mentioned by statute, because of the non-action of the approving board, does not militate against him in his claim to the office, so far as that question is concerned we are to regard him as being in the same position as he would be had his bond been approved within the time limited by statute. It is also to be remembered that the incumbent has no claim to the office other than the right to hold until his successor, whether elected or appointed, has qualified. It is quite obvious that if relator's failure to subscribe to and file the constitutional oath within the time mentioned in the statute forfeits his right to the office, then the incumbent, who also failed to take the same oath in his attempt to qualify as a "hold-over" officer, has lost any and all claim to the office which he may have by virtue of his attempted qualification. He is in the attitude of one holding the office without claim thereto, and has the right only to hold until his successor has been selected and has qualified for the position. Mention is made of this, not for the purpose of suggesting that relator's title to the office may be established by showing a weaker title in his adversary, but to show the exact status or condition the office is in, and that no adverse title or claim thereto has intervened. The office is as though a vacancy existed except as to relator's right

and title thereto. That a county judge is required to take the constitutional oath in order to qualify himself for the office to which he has been elected, we think is a proposition made so clear by the statute that it is not open to argument or controversy. The question then is, whether a neglect to take such oath and file it in the proper office within the same time the bond is required to be filed forfeits the right of such person to the office. To hold that such is required, is to give to the statute the same construction regarding the taking of official oaths as is given to it regarding the execution of bonds. It is expressly provided that a failure to give the bond within the time limited by the statute *ipso facto* vacates the office, and it was upon this express and mandatory provision that the conclusion was reached as announced in the case of *State v. Lansing, supra.* The statute contains no such provisions as to an official oath. There is a very material difference between an official bond and an official oath. The bond serves one purpose and the oath an entirely different one. The bond gives pecuniary protection for wrongs done in office, while the oath appeals only to the mind, judgment and conscience of the one taking it for a faithful discharge of the duties of the office. None will be heard to contend that it is mandatory or required that the oath shall be indorsed on the bond, as provided by the statute, or presented with the bond. It would be just as effective, and serve its pupose as completely, if it were on an entirely separate instrument and presented at a separate time. Nowhere is it provided in the statute that a failure to subscribe to and file the oath within the time limited shall forfeit the office. So far as our observation has extended, and clearly by the great weight of authority, the general rule is held to be that, where the provisions as to filing of an official oath are not expressly made mandatory by statute, then the statute will be construed as directory, and the oath may be taken at any time before induction into office. Mecham, Public Officers, sec. 251; *City of Chicago*

v. Gage, 35 Am. Rep. [Ill.], 182; *Ross v. Williamson*, 44 Ga., 501; *People v. Watts*, 73 Hun [N. Y.], 404; *State v. Colvig*, 15 Ore., 57; *People v. McKinney*, 52 N. Y., 374; *State v. Johnson*, 100 Ind., 489; *State v. Ruff*, 16 L. R. A. [Wash.], 140.

There are, we think, no states holding to the contrary doctrine, except where, by statute, it is expressly provided that, if the officer elected fails to take the oath within the time prescribed, he shall thereby forfeit the office. Under such statutes a construction thereof as being mandatory is certainly correct. It is a familar doctrine that forfeitures are not favored, and certainly we are not warranted in construing the statutory and constitutional provisions bearing on the subject under consideration as working a forfeiture of relator's title to the office unless the language used clearly intends that a forfeiture shall follow a failure such as the facts show to exist in the case at bar. In the present case, the oath required being the one prescribed by the constitution, we must turn to that instrument and ascertain its provisions. It is there provided that a refusal to take the oath therein prescribed shall forfeit the office. Nothing is said as to neglect or failure, nor are words used of similar import. The language is, "Any such officer * * * who shall refuse to take the oath herein prescribed, shall forfeit his office * * *." Webster gives the definition of "refuse" as "To deny, as a request, demand, invitation, or command; to decline to do or grant"; and "refusal" as "The act of refusing; denial of anything demanded, solicited, or offered for acceptance." It can hardly be said that relator has refused to take this oath. He has, in fact, taken it and filed it in the proper office as one of the steps in qualifying himself for the office which he is trying to secure, and this, before he appealed to the judiciary for an adjudication of his right and title thereto. Not only is there no refusal to take the official oath, but the failure on his part relates only to the time when taken, which was subsequent to the time when his official

bond was required to be filed. That he in good faith sought to qualify himself for the office to which he had been elected, by subscribing to and presenting with his bond an official oath, which he doubtless believed conformed to the law, is fairly presumable from the record. His failure to subscribe to the oath provided by the constitution for judicial officers was evidently a mistake, an oversight, and grew out of what the writer believes to be a popular belief, prevailing quite generally, that the statutory oath taken by him was all that was required of any person elected to any county office. It is quite probable that many similiar official oaths, under this misconception of the law, have been taken by many of the county judges of the state, in the belief that it was a full compliance with the requirements of law in that regard. It would be a rigid construction indeed, to hold that, in such cases, an office has become vacant, and a party thereto has forfeited his title to the office by reason of failure to take the correct oath of office. It would seem the truer rule, based on sounder principles, would be that an office would become vacant only when it becomes apparant that the incumbent, in the language of the constitution, "refused" to take the oath therein provided for. It is probably true that, if the office in question, or under similar circumstances another office, had been declared vacant for want of an official oath, or if another had properly qualified, under appointment or otherwise, and had been inducted into such office, an elected or appointed officer having failed to qualify could not thereafter take the proper official oath and claim the office. This question, however, is not presented in the case, and it is unnecessary to consider the same, or pass any opinion thereon, and no opinion is expressed on the subject. In the case at bar no person claims the office, and no intervening rights exist.

Under the facts as disclosed by the record in the case at bar, we think there is another and more cogent reason for holding his right to the office not forfeited because

of his failure to take and subscribe to the constitutional oath until the time when he did, on January 22. He subscribed to and filed in the proper office, and within the time contemplated by statute, an official oath conforming to the provisions of the statute as to all county offices, except of a judicial character. As a judicial officer, he should have taken the constitutional oath. We are of the opinion that his failure in this respect ought not to be permitted to work to his prejudice to the extent of forfeiting his title to the office. It seems to us that the taking of the statutory oath is such a compliance with the law regarding the subject as to render it permissible for him, upon discovery of the mistake (for such it is), to file an amended and supplementary oath, fully complying with the constitutional provisions. His failure in the first instance, as has been noted, was doubtless an innocent mistake upon his part. As soon as it was discovered that the constitutional and not the statutory oath was required of him, he took and subscribed to, and filed with the clerk, the proper official oath. He evinced no disposition either to neglect or refuse to take the oath required of him. The constitutional oath differs from the statutory one, more especially in that the former requires that the person subscribing to the oath shall swear that he, at the election at which he was chosen, had not improperly influenced the vote of any elector, and that he would not accept anything of value from a corporation or person, or promise of office for any official act or influence. Otherwise the two forms of oath are substantially the same.

It may, we think, be fairly said that the declaration that the affiant "will not accept anything of value or promise of office for official acts" is substantially covered by the averment in the statutory oath that he "will faithfully and impartially perform the duties of the office"; for how could he faithfully perform the duties of the office if he be unduly influenced in the manner prohibited by the constitutional oath? The two forms of oaths may

therefore be said to be substantially the same, except the statement in the constitutional oath that the officer elected has not improperly influenced the vote of any elector at the election at which he was chosen to such office. This is in the nature of a test oath. A person who violates its provisions, or who refuses to take the required oath, or who makes a false oath, forfeits his office. It has reference to that which has taken place in the past, and is a means of evidencing a person's fitness to hold any of the offices therein mentioned. Its provisions are retroactive, rather than prospective, as is ordinarily the case. There was in this case no hesitancy or refusal to subscribe to this oath when ascertained that the law required it. While the first oath, taken in a technical sense, was not a substantial compliance with the form prescribed by the constitution, yet it was, in our judgment, such a compliance as to admit of a correction of the error upon its discovery, by subscribing to, and filing in the proper office, an oath in form fully complying with law. Such correction, it appears to us, would cure the mistake, and, in the absence of intervening rights, secure to the relator his right and title to the office to which he was elected.

It is not to be doubted that a failure to subscribe to the official oath which is required by law would be sufficient to justify the rejection or non-approval of an official bond; but in the case we now have to deal with, the bond and oath were acceptable to those charged with the approval of the bond, as well as to those representing the state, and no objection thereto from either source was raised; but, on the contrary, these parties have chosen to waive the irregularity, and treat the relator as being rightfully entitled to the office.

It has been frequently said that the giving of official oaths and bonds is for the benefit of the public, and that the time of their filing may be waived, and the officer inducted into office, and dealt with as the person entitled thereto. This rule was definitely announced in *Paxton v.*

State, 59 Nebr., 460, and seems to be grounded on sound principle. In this case it is not to be forgotten that the only objection to relator's right to the office is interposed by the incumbent, who, as we have seen, is without any claim thereto in his own right. In *In re Executive Communication*, 14 Fla., 282, in speaking upon the subject, and regarding a constitutional provision broader than ours, in that it provides that a failure *or* neglect to take the oath therein prescribed shall forfeit all right to the office, one of the judges of the supreme court of that state pertinently says: "If an appointee, intending to take the oath required, makes an innocent mistake in the terms of the oath taken and filed, and a commission framed in accordance with law issues thereon, I am not prepared to say that this would be a neglect or refusal to qualify within the meaning of the act." If this conclusion is fairly deducible from the language of the act referred to, and we think it is, it is much more warrantable under the language of our constitution to reach the deduction that the failure to take the oath under the circumstances in this case is not a refusal within the meaning of the language therein used. The relator, we think, has not refused to take the constitutional oath, in the sense of the word as there used, and has not therefore forfeited his right to the office; nor can it be said that he has done or failed to do some act whereby it is expressly provided by statute that by reason thereof the office has become vacant.

Having met all the requirements of the statute and the constitution before proceedings were begun to obtain possession of the office, and there being no adverse claimant or other person entitled to the office, we are of the opinion that the judgment of the district court was right, in conformity with law, and should be affirmed, which is accordingly done.

AFFIRMED.

NORVAL, C. J., dissenting.

I find myself unable to agree to the conclusion of the

majority. James Duffy was duly elected county judge of Webster county for the term expiring in January, 1900. He qualified and discharged the duties of his office. At the general election held in November, 1899, Isaac W. Edson was elected to said office to succeed said Duffy. Within the time required by law, Edson presented for approval his official bond with the oath of office thereon indorsed as prescribed by section 1, chapter 10, Compiled Statutes. The bond was not approved or acted upon prior to the date fixed by law for the beginning of the official term, owing to the fact that the county board was not in session until after that time. The bond of Edson was approved on January 9, 1900. On the same day the county board entered on its records a resolution reciting that the right of Edson to hold the office having been questioned because his bond had been approved out of time, they thereby appointed Edson to the office of county judge. Edson immediately executed and filed a new bond reciting the resolution of appointment, upon which was indorsed the same oath of office. This bond was likewise approved on the same day. Thirteen days thereafter, Edson took, subscribed, and filed in the office of the county clerk, the official oath required by section 1, article 14, of the constitution. On January 6, 1900, Duffy executed and filed a hold-over bond, having indorsed thereon the official oath similar to the one first taken by Edson. This hold-over bond, in obedience to a peremptory writ of mandamus, was approved by the county board. Later, Duffy subscribed the constitutional oath of office, and filed the same with the county clerk of Webster county. Duffy having refused to surrender the office to Edson, the latter instituted quo warranto proceedings against the former to oust him from the office of county judge and install relator therein. From a judgment in the district court in favor of Edson the respondent has prosecuted a petition in error.

Numerous questions have been argued in the briefs and at the bar by counsel for the respective parties, and

passed upon by my associates, but the only one which I deem necessary to consider at this time is whether the failure or refusal of relator to take and subscribe the oath designated by the constitution within the time required by law forfeited his right to the office.

Chapter 10, Compiled Statutes, relates to official bonds and oaths, section 1 of which declares that "All state, district, county, precinct, township, municipal, and especially appointed officers, except those mentioned in section 1, article 14, of the constitution, shall before entering upon their respective duties, take and subscribe the following oath, which shall be endorsed upon their respective bonds: 'I do solemnly swear that I will support the constitution of the United States, the constitution of the state of Nebraska, and faithfully and impartially perform the duties of the office of ——, according to law, and to the best of my ability. So help me God.'" It was the foregoing oath, and none other, that was taken by relator before the date fixed by law for the commencement of his term of office. The taking of this oath would suffice were it not for the exception contained in said section 1, chapter 10, and the requirements of the constitution. Section 1, article 14, of the fundamental law reads thus: "Executive and judicial officers and members of the legislature, before they enter upon their official duties, shall take and subscribe the following oath or affirmation, 'I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the state of Nebraska, and will faithfully discharge the duties of —— according to the best of my ability, and that at the election at which I was chosen to fill said office, I have not improperly influenced in any way the vote of any elector, and have not accepted, nor will I accept or receive, directly or indirectly, any money or other valuable thing from any corporation, company, or person, or any promise of office, for any official act or influence. * * *' Any such officer or member of the legislature who shall refuse to take the oath herein prescribed, shall forfeit his office. * * *."

It is obvious that this section is applicable to the office in question, and on this point we are all agreed. The constitutional provision is mandatory, and of this there is no room to doubt. The taking of the constitutional oath by a county judge elect is a condition precedent to his entering upon the duties of such office. And the statute prescribes the time within which the oath shall be filed in the proper office, as section 5, chapter 10, declares that "Official bonds, with the oath endorsed thereon, shall be filed in the proper office within the times as follows: Of all officers elected at any general election on or before the first Thursday after the first Tuesday in January next, succeeding the election," etc. By this section it became the imperative duty of relator to have taken the constitutional oath and lodged the same in the office of the county clerk of Webster county on or before the first Thursday after the first Tuesday in January, 1900. He wholly failed or refused to do either. The omission of the relator to subscribe to the constitutional oath and file the same in proper time is not a mere irregularity, but was a clear and palpable violation of the fundamental law, which is no more an irregularity than the failure of the legislature to observe the requirements of the constitution in passing laws; and this court has frequently held that statutes enacted in violation of the plain requirements of the constitution are void. By a parity of reasoning, the neglect or refusal of a county judge elect to take and file the oath prescribed by the fundamental law within the time limited therefor forfeits his right to be inducted into office. If he could rightfully subscribe to the oath and file the same one day after the period fixed by statute, then he might do so in a month or year. This is not a suit on an official bond where the constitutional oath was not taken in time and the omission so to do is urged as a defense, but is a proceeding to determine the rights of two persons to hold a public office, and the relator, like a plaintiff in ejectment, must recover on the strength of his own title and can not rely upon the weak-

ness of that of his adversary. The neglect or failure of Edson to take the constitutional oath within the statutory time amounted to a refusal so to do. In the opinion of the majority it is said that the failure of Edson to subscribe the oath prescribed by the constitution was evidently a mistake—an oversight. There is no warrant for this assertion to be found in the record. Edson in his pleadings does not allege that he inadvertently or by mistake took the wrong oath, nor did he attempt to excuse his neglect by testimony given on the trial. He offered no extenuating evidence whatever. His conduct amounted to a refusal to take the required oath. Even though he took the statutory oath under a misconception of the law, it is no valid excuse. He was bound to know the law.

Again, relator abandoned any claim he might have to the office under and by virtue of his election, by the county board declaring that a vacancy existed and appointing relator to fill the same and by his giving a new bond and attempting to qualify. If there existed a vacancy in the office of county judge, the county board was without power to fill the same, since the unexpired term exceeded one year, and could be filled alone by election. Constitution art. 6, sec. 21; *State v. Lansing*, 46 Nebr., 514. The conclusion is irresistible that relator has failed to establish his right to be inducted into the office in question.

INDEX.

Abatement and Revivor.

1. To sustain a plea of a prior suit pending there must be the same parties or such as represent the same interests, the same rights must be asserted and the same relief prayed for, and the relief must be founded on the same facts and essential basis. *Richardson v. Opelt*..... 180

Dissolution.

2. Under section 63, chapter 16, Compiled Statutes, a suit does not abate by the dissolution of a corporation plaintiff or defendant organized under the laws of this state. *Schmitt & Bro. Co. v. Mahoney*..... 20

Pendency of Another Action.

3. As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the same or another court of concurrent jurisdiction, the plea of another suit pending is valid. *Richardson v. Opelt*..... 180

Waiver.

4. Issuance of summons or conditional order of revivor held waived where defendant filed objection to the substitution. *Schaberg v. McDonald*..... 493

Abutting Owner. See MUNICIPAL CORPORATION, 11.

Account Stated. See USURY.

1. An account stated is merely an agreement between persons who have had previous transactions, fixing the amount due as the result of an accounting. *Jorgensen v. Kingsley* 44
2. In an action on an account stated, the defense of usury is available without alleging that the balance claimed to be due was agreed to in consequence of fraud or mistake. *Idem.*

Action. See CREDITOR'S BILL.

1. ——— to enforce tax title. See TAXATION.
2. Names of parties. See IDEM SONANS. NAMES.
3. A cause of action for false imprisonment may be joined in the same petition with a cause of action for malicious prosecution when both arose out of one and the same transaction. *Scott v. Flowers*..... 675

Action—*concluded.*

4. A plaintiff can not divide his demand and prosecute by different actions. But this rule does not require him to consolidate independent actions in a single suit. *Richardson v. Opelt*..... 181

Adultery. See STATUTE, 30.

Under section 208 of the Criminal Code a single act of sexual intercourse by a married man with an unmarried woman constitutes the crime of adultery. *State v. Byrum*..... 384

Adverse Possession. See LIMITATION OF ACTION.

1. Possession for a period long enough to ripen into a title must be inconsistent with constructive possession of the legal proprietor. *Hoffine v. Ewings*..... 729
2. The word "hostile" when applied to the possession by an occupant holding adversely is not to be construed as showing ill-will but only that the occupant holds against all other claimants. *Idem.*
3. To maintain a title by reason of adverse possession of real estate, it is necessary to prove that the claimant for a period of ten years next before the commencement of the action was in actual, continuous and notorious possession, claiming against all persons. *Idem.*

Color of Title.

4. Color of title is not essential to adverse possession. *Murray v. Romine*..... 94

Pleading. Evidence. Review.

5. Proof of adverse possession is admissible in ejectment under a general denial. *Idem.*
6. A verdict based on evidence sufficient to establish adverse possession will not be disturbed, though the evidence may not be inconsistent with a holding under a claim other than that of title. *Idem.*
7. Use of word "hostile" in an instruction, while not to be commended, *held* not prejudicial error. *Hoffine v. Ewings*.. 729

Tacking.

8. Possession of one occupant may be tacked to that of another, if one acquired possession from the other, and the possessory estates are connected and continuous. *Murray v. Romine*..... 94
9. Possession can not be tacked to make out title by prescription where the adverse occupant did not come in under another, and the deed under which the last occupant claims title does not include the land in dispute or show any privity between him and his grantor in regard thereto. *Pohlman v. Evangelical Lutheran Trinity Church*..... 364

Verbal Transfer.

10. The right of one person holding possession adversely may be transferred to another verbally. *Murray v. Romine*..... 94

Alimony. See DIVORCE AND ALIMONY.

Amendment. See CONSTITUTIONAL LAW. INDICTMENT AND INFORMATION. STATUTE, 1-3.

Amicus Curiae. See PARTY, 5.

Appeal and Error. See BURGLARY. COURTS. CRIMINAL LAW, 2, 5. EJECTMENT. EXECUTION, 10. FORCIBLE ENTRY AND DETAINER. INSTRUCTIONS, 10. MANDAMUS, 5, 11. NEW TRIAL. RAPE.

1. The authority given by the Australian ballot law to the county court and to the judges of the district and supreme courts is, in its nature, judicial, and may be reviewed by error proceeding. *Porter v. Flick*..... 773
2. A party who misleads the court can not complain of an error committed. *Missouri P. R. Co. v. Fox*..... 531
3. Error proceeding can only be prosecuted after the rendition of a final order or judgment in the cause. *State v. Higby* 765
4. A reversal can not be had merely because the trial court gave a wrong reason for its decision. *Crawford Co. v. Hathaway* 754
5. An order confirming a sale of real estate by the receiver of an insolvent bank is appealable and may be superseded. *State v. Fawcett*..... 393
6. The supreme court has jurisdiction to review, by proceeding in error, a judgment rendered by the district court without jurisdiction of the subject-matter. *Armstrong v. Mayer* 423
7. Any party prejudiced by a judgment rendered against him may have the same reviewed by taking the proper steps. *Horton v. State*..... 701
8. The failure of a trial court to make a complete and final disposition of a cause can not be reviewed until it has been asked to so proceed in the case. *McClave v. McClave*.. 464
9. An order of a probate court entered under the provisions of subdivision 3 of section 602 of the Code, vacating an order allowing a claim against an estate made at a prior term, is appealable directly to the district court. *Estate of McKenna v. McCormick*..... 595
10. By section 42, chapter 20, Compiled Statutes, 1899, in all probate matters an appeal is allowable from any final order, judgment or decree of the county court to the district court by any one against whom the order, judgment or decree is made, or who is affected thereby. *Idem.*

Entry of Record. Transcript.

11. Questions not presented by the record before the court for review will not be determined. *Dufrene v. Johnson*..... 18

Appeal and Error—*continued.*

12. The transcript of the record of the trial court imputes absolute verity, and can not be contradicted by extrinsic or original evidence in the appellate court. *Fulton v. Ryan*.. 9
13. A judgment will not be reversed for error of law occurring at the trial, unless it is alleged in the petition in error, and shown by the record, that the court erred in overruling the motion for a new trial. *James v. Higginbotham* 203
14. In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and that such issue was correctly determined. *Sutton v. Sutton*..... 400
15. Whether or not a proceeding to vacate a judgment or order comes within the provisions of subdivision 3 of section 602 of the Code is to be determined from the grounds upon which the application is based as disclosed by the record. *Estate of McKenna v. McCormick*..... 595

Assignments of Error.

16. Instructions should be assigned specifically in the petition in error. *Hawkins v. State*..... 380
17. An assignment in a petition in error should specifically indicate the ruling of which complaint is made. *Idem.*
18. The assignment in a petition in error of "errors of law occurring during the trial, duly excepted to," is insufficient to present for review the rulings of the trial court admitting or excluding testimony. *Idem.*
19. An assignment of error directed against a group of instructions, will be considered no further than to ascertain that one of the instructions was properly given. *Frenzer v. Richards*..... 131
20. Where error in the giving of instructions is not so assigned that it can be reviewed, a verdict in accord with such instructions must be permitted to stand. *Idem.*
21. Assignments of error in a joint petition in error not good as to all who join in the petition must be overruled as to all. *Poska v. Stearns*..... 708

Briefs.

22. Briefs containing matter disrespectful to the court will be stricken from the files. *State v. Kennedy*..... 300
23. Where in a cause submitted under rule 2 upon a printed abstract of the record, neither party files briefs, the judgment will be affirmed. *Brower v. Fass*..... 6

Discretion of Lower Court.

24. The general rule as to the competency of a witness to testify as an expert rests in the sound discretion of the court, whose rulings will not be reversed unless clearly wrong. *Missouri P. R. Co. v. Fox*..... 531

Appeal and Error—*continued.*

25. An order of court directing a receiver of a bank to sell its assets, will not be disturbed where no abuse of discretion is shown. *State v. Nebraska Savings Exchange Bank*..... 190

Effect of Transfer of Cause.

26. When an appeal is docketed in the district court the judgment appealed from is vacated and annulled, and the litigants are, with respect to their legal rights, where they were at the commencement of the suit. *Jenkins v. State* 205

Estoppel. Irregularities.

27. An appeal from a judgment claimed to have been irregularily obtained, estops the party appealing from afterwards relying on the alleged irregularities antecedent to the judgment appealed from. *Dredla v. Baache*..... 655

Evidence. Verdicts. Findings.

28. A verdict resting on conjecture can not be permitted to stand. *Leisenberg v. State*..... 628
29. A finding unsupported by evidence will be set aside. *Bradford v. Anderson*..... 368
30. Where different trials have been had resulting in verdicts for plaintiff, and new trials have been denied by the trial court, the verdict and judgment in the last trial will not be set aside unless the evidence is clearly insufficient. *Missouri P. R. Co. v. Fox*..... 531
31. Where a case has been tried different times, resulting in a verdict in favor of one and then the other of the parties to the litigation, the verdict in the last trial should not be disturbed unless there is a clear lack of sufficient evidence to support it. *Brownell v. Fuller*..... 558
32. A finding, verdict or judgment based on conflicting evidence will not be disturbed unless clearly wrong.

Receiver in Foreclosure of Mortgage.

Waldron v. First Nat. Bank of Greenwood..... 245

Action on Insurance Policy.

Travelers Ins. Co. v. Snowden..... 263

Injunction Against Trespasser.

Pohlman v. Evangelical Lutheran Trinity Church..... 364

In Suit for Personal Injury.

Nebraska Telephone Co. v. Jones..... 396

Homestead Right.

Flynn v. Kiley..... 491

In Suit for Commissions.

Peterson v. Martin..... 577

In Disbarment Proceeding.

Morton v. Watson..... 672

Appeal and Error—*continued.*

Harmless Error.

33. Where the trial is to the court without a jury, it is not reversible error to admit incompetent evidence. *Omaha Nat. Bank v. Kiper* 33

34. The admission of immaterial evidence which could not have influenced the minds of the jury is not reversible error. *Bennett v. McDonald* 47

35. The withdrawal of evidence from the consideration of the jury by an instruction cures any error in the admission. *Scott v. Flowers* 675

36. A judgment will not be set aside for an error in admitting immaterial evidence where it appears that such evidence had no harmful or mischievous tendency. *Nebraska Telephone Co. v. Jones* 396

37. The admission of incompetent evidence in a cause tried to the court without a jury is not ground for reversal, where judgment is based on sufficient evidence. *Bolin v. Fines* 443

38. It is not necessarily prejudicial error to receive evidence to prove admitted facts. *Wittenberg v. Mollyneaux* 583

39. The reception of evidence which responds to no issue in the case, but which is incapable of mischief, is not reversible error. *Idem.*

40. Where evidence is admitted over objections and thereafter stricken out, error can not be predicated thereon. *Missouri P. R. Co. v. Fox* 531

41. Where evidence ruled out is afterward established by other witnesses, the error is harmless. *Idem.*

42. Where it appears that improper evidence admitted could not have influenced the jury, its reception is error without prejudice. *Idem.*

43. Where evidence ruled out on cross-examination is afterward received from the same witness on direct examination, there is no error. *Idem.*

44. A judgment will not be reversed because of an error or defect in the proceedings not affecting the substantial rights of the complaining party. *Lancashire Ins. Co. v. Bush* 116

45. A reversal can not be based upon the permitting of a witness to answer an improper question where the answer was not unfavorable to the complaining party. *Peterson v. Martin* 577

46. In an action tried to court without a jury, prejudicial error can not be predicated on rulings in admission of evidence if it is sufficient to support the judgment. *Duffy v. State* 812

Appeal and Error—*continued.*

Judge at Chambers.

47. The determination of a civil matter by a judge at chambers is not final. *Porter v. Flick* 773

Law of the Case. Subsequent Appeal.

48. Rulings on the first appeal settle definitely all questions adjudicated, but mere expressions of opinion respecting matters not actually involved have no binding force. *Wittenberg v. Mollyneaux* 583

49. It is not permissible for an appellate court, on a subsequent appeal of a cause, to reconsider and correct an erroneous decision made by it in the same case on a former appeal. *Idem.*

50. A question once decided by this court in the trial of a case will be held to be the law of the case during its future course of procedure. *State v. Commissioners of Cass County* .. 566

51. The rule as to the law of the case on second appeal applies only to questions of law, and not of fact, when the testimony is materially different. *Idem* 566

52. The determination of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, ordinarily, will not be re-examined in a subsequent appellate proceeding. *Barker v. Wheeler* 470
Motley v. Motley 593

53. The rule that a legal principle, when once determined in the supreme court, becomes the law of the case and will not ordinarily be re-examined in a subsequent appeal, is not applicable to decisions rendered on questions of fact. *Missouri P. R. Co. v. Fox* 531

Motion for New Trial.

54. To review alleged errors in refusing instructions they must be called to the attention of the trial court by a motion for a new trial. *Schmitt & Bro. Co. v. Mahoney* 20

Objections and Rulings Thereon.

55. An objection to the admission of testimony can not be argued for the first time in the appellate court. *Fulton v. Ryan* 9

56. An objection to the confirmation of a sale not made in the trial court and raised for the first time in this court will not be considered. *Pearson v. Badger Lumber Co* 167

57. On an appeal from an order confirming a sale, the court will consider only objections specifically made in the district court. *Ashpole v. Hallgren* 196

58. Where a case has passed to trial on the issues formed and the first objection made to the pleading is a demurrer *ore tenus*, the petition will be liberally construed and sustained if possible. *Fire Ass'n of Philadelphia v. Ruby* 216

Appeal and Error—*continued.*

Parties.

59. Only parties to a judgment, or their privies, can successfully prosecute a petition in error. *Peterson v. Martin*.... 577
60. A party who is not prejudicially affected by a judgment or decree can not secure its modification or reversal. *First Nat. Bank v. Gibson*.... 767
61. The provisions of the Code relative to abatement and revivor of actions are applicable to causes brought to this court. *Schmitt & Bro. Co. v. Mahoney*.... 20

Pleadings.

62. A question not presented by the pleadings and evidence on the trial of a case will not be considered on appeal in this court. *Hyde v. Hyde*.... 502
63. Evidence tending to show that forfeiture was waived will not be considered where the question of waiver is not raised by the pleadings. *Jewett v. Black*.... 173

Presumptions.

64. In the absence of a bill of exceptions sufficient evidence is presumed. *Fisk v. Thorp*.... 713
65. Error in the proceedings of the district court will not be presumed but must be affirmatively shown. *Ashpole v. Hallgren*.... 196
66. It will be presumed, in the absence of a showing to the contrary, that the discretionary powers of the district court have been wisely exercised. *Waldron v. First Nat. Bank of Greenwood*.... 245
67. Where there is a defect in the record an instruction given will be presumed to have been warranted by material evidence not appearing of record. *Brownell v. Fuller*.... 558
68. It is presumed that the jury followed the instructions of the court. *Missouri P. R. Co. v. Fox*.... 531
69. Where a case is reversed and a second trial had, in the absence of a record to the contrary, it will be presumed that the trial court found a difference between the evidence in the first and second trials, and determined that the decision in the first appeal that the evidence was insufficient did not apply to the evidence on the second trial. *Idem.*

Restitution After Appeal.

70. When a judgment is vacated by appeal, after having been carried into execution, the appellant is entitled to have restitution. *Jenkins v. State*.... 205
Hier v. Anheuser-Busch Brewing Ass'n.... 320

Reversal. Proceedings Below. Remittitur.

71. When the reversal of a judgment is grounded on error in the trial occurring anterior to the verdict, the verdict is nullified, and the cause, when remanded, stands for trial *de novo*. *State v. Omaha Nat. Bank*.... 232
Missouri, Kansas & Texas Trust Co. v. Clark.... 406

Appeal and Error—*concluded.*

72. After reversal for error occurring subsequent to the trial, where the finding or verdict is not disturbed, it is not error, on the cause being remanded, to refuse to permit amended pleadings to be filed. *Missouri, Kansas & Texas Trust Co. v. Clark* 406
73. When, in an error proceeding, the judgment of the trial court has been reversed, that court should retrace its steps to the point where the first material error occurred; from that point the trial should progress anew. *Idem.*
74. A case which is reversed and remanded with directions to proceed according to law is reversed generally. *Pinkham v. Pinkham* 600
75. Where, on appeal, an instrument is construed to be testamentary in character and the case is remanded, it is not *res adjudicata*, where defendant seeks to amend his answer alleging mistake in the deed. *Idem.*
76. Where in an equitable action a decree is reversed and cause remanded generally, the court, in the exercise of its discretion, may permit amendment of pleadings if not inconsistent with opinion on appeal. *Idem.*
77. Remittitur allowed, the amount thereof being clearly ascertainable. *Trester v. Pike* 510
78. Judgment rendered for too large a sum and plaintiff allowed to remit the excess as a condition of affirmance of the judgment. *Barker v. Wheeler* 470

Review of Final Judgment. Motion for New Trial.

79. A final judgment based upon a pleading defective in substance may be reviewed without a motion for a new trial having been filed and ruled upon. *Horton v. State* 701

Stay. Supersedeas.

80. An appeal to this court does not operate as a stay proceeding unless the appellant should execute a supersedeas bond within twenty days from the entry of such decree, conditioned as required by section 677 of the Code. *Dovey v. McCullough* 376
81. An order directing a receiver of an insolvent firm to sell assets other than real estate may not be superseded as a matter of right. *State v. Scott* 98

Tender of Proof.

82. A party, to avail himself of an error of the court in refusing to permit a witness to answer a question on direct examination, must make a tender of proof. *Nebraska Telephone Co. v. Jones* 396
Wittenberg v. Mollyneaux 583

Writ of Error on Behalf of State.

83. Refusal to allow county attorney to file an amended information in a criminal cause can not be reviewed where the amended information is not in the record. *State v. Dennison* 192

Appearance. See MUNICIPAL CORPORATION.

1. An unauthorized appearance, where no process has been served on the defendant, is void as to such defendant. *Chicago, B. & Q. R. Co. v. Hitchcock County*..... 722
2. Ordinarily a defendant may waive the issuance and service of summons in an action and enter a voluntary appearance. *Idem.*
3. An appearance made invoking the court to set aside a judgment, in no way militates against its authority to determine the application to vacate the judgment because of an irregularity in obtaining it. *Fisk v. Thorp*..... 713
4. By appearing in a case and moving to set aside a judgment as having been irregularly obtained, jurisdiction is given to the court over the parties appearing as to all proceedings had in the case. *Idem.*
5. When an administrator appears in a case involving the allowance of a claim against the estate, and asks leave to have the order of allowance vacated and leave to defend, and appeals from the judgment of allowance, such action will be a general appearance in the case and the court thereby obtains jurisdiction. *Dredla v. Baache*..... 655

Appointment. See COURTS. RECEIVER, 3.

Appraisement. See EXECUTION, 1-11.

Appropriation. See STATE AND STATE OFFICERS, 3. STATUTE, 25.

Arrest. See FALSE IMPRISONMENT.

Arrest of Judgment. See CRIMINAL LAW, 7

Assessment. See MUNICIPAL CORPORATION, 6-10. TAXATION.

Assets. See MARSHALING ASSETS AND SECURITIES.

Assignment.

1. An order for the payment of money which is not immediately effective does not operate as an equitable assignment. *Nebraska Moline Plow Co. v. Fuehring*..... 316
2. A check drawn upon a particular fund is an appropriation of so much of the fund as may be necessary to pay the check. *Idem.*
3. A check directed against a fund to be afterwards created by depositing money in a bank does not vest in the payee of the check any right to, or control over, such money, until it has been so deposited. *Idem.*

Assignment for Benefit of Creditors. See VOLUNTARY ASSIGNMENT.

Assignment of Errors. See APPEAL AND ERROR.

Assumption Clause. See ESTOPPEL.

Attachment. See GARNISHMENT.

Attorney and Client. See MUNICIPAL CORPORATION. PRINCIPAL AND AGENT.

Lien.

1. An attorney can not enforce, by action, his general or retaining lien upon a note, bond or other obligation to pay money. *Cones v. Brooks* 698
2. An attorney's general or retaining lien depends upon possession, and is effective without notice to anyone. *Idem.*
3. An attorney has a general or retaining lien upon all papers, books, documents or money of his client coming into his hands in the course of his professional employment. *Idem.*
4. Petition in suit to enforce an attorney's lien examined, and found to state facts sufficient to support the action. *Idem.*
5. An attorney has a charging or specific lien upon money in the hands of the adverse party to an action or proceeding. Such lien is not perfected until notice has been given to the party in possession of the fund. *Idem.*
6. The notice of a charging or specific lien of an attorney need not be in writing or placed among the files in the case. Any notice that the claim is made and that it will be asserted is sufficient. *Idem.*

Disbarment.

7. In disbarment proceedings costs can not be taxed against the informer where he acted in good faith. *Morton v. Watson* 672
8. Where disbarment proceedings are founded, in part, upon facts made the basis of a prior indictment or information against the same attorney the court may, where no abuse of discretion is shown, postpone the consideration of the specification in the proceeding to disbar involved in the criminal case until the latter is terminated. *Idem.*

Attorney Fee. See ATTORNEY AND CLIENT. INJUNCTION, 8-13. TAXATION.

Baker's Decedent Law. See DOWER. STATUTE, 10.

Ballot. See ELECTION.

Banks and Banking. See ASSIGNMENT. CORPORATION, 3.

1. A bank which undertakes to collect a draft is bound to keep within the authority conferred upon it, and exercise proper diligence to obtain payment. *Omaha Nat. Bank v. Kiper* 33
2. A receiver can collect an assessment ordered by the comptroller of the currency against stockholders of an insolvent national bank, and satisfaction of judgment obtained obliterates the obligation regardless of the disposition made of the proceeds by the receiver. *Schaberg v. McDonald* 493
3. It is no defense to a stockholder in an insolvent national

Banks and Banking—*concluded.*

bank, sued by a receiver for an assessment, to say that the receiver has unlawfully disposed of such claim, and that creditors will not receive as much of the proceeds as they are entitled to have. *Idem.*

Banks as Depositaries of Public Funds. See COUNTY, 5-7.

Bill of Exceptions. See APPEAL AND ERROR.

Where no order is made fixing a time for preparing a bill of exceptions including the evidence adduced on the hearing of a motion to set aside a default and vacate a decree, such bill must be served within fifteen days from the final adjournment of the term at which the motion was determined. *State v. Ramsey* 191

Bills and Notes. See ASSIGNMENT.

1. Where the consideration for a promissory note is an agreement not to bid at a chattel mortgage sale, the note is unenforceable. *McClelland v. Citizens Bank* 90
2. In actions upon promissory notes or other written instruments, whenever any of the parties thereto are designated by initials or some contraction of the Christian name, it is sufficient to so designate such parties, instead of stating the Christian name in full. Code, section 23. *Richardson v. Opelt* 180

Bona Fide Purchaser. See VENDOR AND VENDEE.

Bond. See APPEAL AND ERROR, 80. INJUNCTION. OFFICE AND OFFICERS. WATER AND WATER COURSES, 6-8.

Brief. See APPEAL AND ERROR.

Building and Loan Association.

A borrower from a building and loan association, whose mortgage stipulates that in case of foreclosure he shall receive credit for the withdrawal value of his shares of stock on a basis fixed by the by-laws, is entitled on foreclosure to have the withdrawal value of his stock fixed and credited according to his contract. *Equitable Building & Loan Ass'n v. Bidwell* 169
Idem v. Baird 173

Burden of Proof. See CRIMINAL LAW, 1. EVIDENCE, 2.

Burglary.

1. Evidence *held* insufficient to show with the requisite degree of moral certainty that crime charged was committed in the night. *Leisenberg v. State* 628
2. It is not essential, in an indictment or information charging burglary, to state the particular hour of the night at which the crime was committed. *Idem.*
3. Where a building is occupied by a person having general charge thereof the ownership should be alleged in him in an information for burglary, though some of the rooms are let to lodgers. *Hahn v. State* 487

Burglary—*concluded.*

4. In an information for burglary, it is proper to allege ownership in the person having the visible occupancy and control of the premises burglarized. *Idem.*
5. Where a building occupied by a person having general charge thereof, has a basement some of the rooms which are let to lodgers, and a hallway leading to the different rooms, is in possession of and used in common by the person in charge and those occupying the rented rooms, if a burglary is committed by breaking in at the door of such hallway, *held* that ownership was properly charged in the person having such general control, though said basement was not connected internally with other portions of the building. *Idem.*
6. Where, in an action against a person for burglary with intent to steal, charging also the larceny of goods, the court in defining burglary in an instruction omits an essential element, and the jury return a verdict of not guilty as to the charge of burglary, the omission is error without prejudice. *Williams v. State*..... 526

Change of Venue. See CRIMINAL LAW, 2.

Charities.

1. Devise to trustee with power to select some charitable institution as beneficiary *held* not void for uncertainty. *St. James Orphan Asylum v. Shelby*..... 796
2. Courts will view with favor donations by will for charitable purposes and will carry them into effect when possible. *Idem.*

Chattel Mortgage. See PLEADING, 6.

1. Priority of lien over tax lien. See TAXATION.
2. A chattel mortgage on 340 acres of corn, which was part of a growing crop of 425 acres, *held* void for uncertainty of description, the mortgaged property being neither uniform in quality or capable of identification. *Wattles v. Cobb*.. 403

Check. See ASSIGNMENT.

City. See MUNICIPAL CORPORATION.

Claim. See COUNTIES, 1-4. EXECUTOR AND ADMINISTRATOR. STATE AND STATE OFFICERS.

Clerical Error. See TAXATION, 17.

Collateral Attack. See JUDGMENT, 5.

Collection. See BANKS AND BANKING.

Color of Title. See ADVERSE POSSESSION, 4.

Comity. See CORPORATION, 6.

Common Law.

So much of the common law as is applicable and not in conflict with the federal constitution or laws of this state, is a part of the law here. *Kerner v. McDonald*..... 663
St. James Orphan Asylum v. Shelby..... 796

Constitutional Law. See REFORMATORY. STATUTES. TAXATION, 23.

1. Amendment of Code in regard to repeal in forcible entry and detainer, unconstitutional. *Armstrong v. Mayer*..... 423
2. Unconstitutionality of industrial school act. *Baker v. State*.. 691
3. An amendatory act containing no repeal of act or section amended is unconstitutional. *Byrum v. State*..... 384
4. The provisions of section 11, article 3, of the constitution, relative to the mode of enacting laws, are mandatory. *State v. Burlington & M. R. R. Co*..... 741
5. The constitutional inhibition of special legislation, is not violated by a general law affecting only one locality. *State v. Frank* 327
6. An appropriation for an officer's salary can not be included in an act containing another subject. *State v. Cornell* 276
7. While a practical interpretation of the constitution by the legislature will not be disregarded in doubtful cases, yet it will not nullify the fundamental law where the language of the constitution is free from ambiguity. *Idem.*
8. The provisions of section 3 of the valued policy law (Compiled Statutes, 1899, ch. 43, sec. 45), permitting the taxation of a reasonable attorney's fee as costs against an insurance company, is constitutional. *Lancashire Ins. Co. v. Bush* 116
9. There is nothing in the constitution of the United States, or of this state, which forbids classification of subjects for the purpose of legislation. The power to classify is subject only to the limitation that the classification must not be arbitrary. *Idem.*

Contempt.

1. A party who, after vacation of judgment, willfully fails to comply with a lawful order for restitution may be proceeded against as for a criminal contempt. *Jenkins v. State*.. 205
2. One who is in contempt of court, by failing to comply with an order of restitution, may purge himself of such contempt by showing an inability to comply with the order, not voluntarily created. *Idem.*
3. A disavowal by contemnor of intention to commit a contempt of court, when made in good faith, though insufficient to purge the contempt, is, at least, receivable in extenuation of the offense. *Mackay v. State*..... 143

Contempt—*concluded.*

4. The common law power of the courts to punish for constructive contempts is, in this state, expressly conferred by legislative enactment. *State v. Bee Pub. Co.* 282
5. Every litigant is entitled, not only to a just decision of his cause, but to a decision rendered by a court which is, at the time, entirely free from physical and moral coercion. *Idem.*
6. The press and the public have the right to freely discuss, criticise and censure the decisions of the courts; but they have no right, while a cause is pending, to attempt, by threats or other form of intimidation, to control judicial action. *Idem.*
7. A newspaper corporation which deliberately seeks to influence judicial action by the publication of articles threatening the judges with public odium and reprobation in case they decide a pending cause in a particular way is guilty of constructive contempt. *Idem.*

Continuance.

Application for a continuance is addressed to the sound discretion of the court. *Welsh v. State* 101

Contract. See ACCOUNT STATED. BILLS AND NOTES. CORPORATION, 5. COVENANT. DAMAGES. DEEDS. EVIDENCE, 13. MASTER AND SERVANT, 3. MECHANIC'S LIEN. MONOPOLY. PRINCIPAL AND AGENT. REFORMATION OF INSTRUMENTS. USURY. WATER AND WATER COURSES, 3.

1. ——— implied. See MONEY PAID.
2. ——— for necessities. See HUSBAND AND WIFE, 5.
3. Courts will not enforce contracts which are shown to be illegal. *Jorgensen v. Kingsley* 44
4. A contract to be of any binding force must be assented to by all the parties to it. *Fulton v. Ryan* 9
5. A contract by which one agrees not to bid at a chattel mortgage sale is contrary to public policy. *McClelland v. Citizens Bank* 90
6. Contracts which contravene the established policy of this state can not be enforced by action in its courts. *Commonwealth Mutual Fire Ins. Co. v. Hayden* 636
7. Where both parties to an ambiguous contract agree as to its construction, it is generally a safe rule to adopt such construction. *State v. County Commissioners* 566
8. Contracts which impose unreasonable restraints upon the exercise of any business, trade or profession contravene sound public policy. *Wittenberg v. Mollyneaux* 583
9. Partial restraints upon the exercise of any business, trade or profession are not unreasonable when they are ancillary to an actual purchase of property, made in good faith, and are apparently necessary to afford fair protection to the purchaser. *Idem.*

Contract—*concluded.*

10. When an illegal contract has been executed and the parties thereto are *in pari delicto,* no action lies to recover back money paid under it, or for restitution of property delivered in pursuance of its terms. This rule applies to the parties themselves and to all others claiming through or under them. *Brower v. Fass*..... 590

Conversion. See TROVER.

Conveyance. See DEEDS.

Corporation. See ABATEMENT AND REVIVOR. BANKS AND BANKING. BUILDING AND LOAN ASSOCIATION. WATER AND WATER COURSES.

Corporate Existence. Evidence.

1. The record of the articles of incorporation of a corporate body in office of county clerk, or a certified copy thereof, is primary proof of the right of the association to transact business. *Equitable Building & Loan Ass'n v. Bidwell*..... 169
Idem v. Baird..... 173

2. Under section 126, chapter 16, Compiled Statutes, 1895, a corporation, previous to the commencement of any business, except its own organization, must file its articles of incorporation for record in the office of the county clerk in the county or counties in which the business is to be transacted. *Idem.*

3. A denial that plaintiff "is a corporation duly organized as a national bank under the act of congress of June 3, 1864, or any other act," does not put in issue the plaintiff's corporate existence. *First Nat. Bank v. Gibson*..... 767

Dissolution. Corporate Name.

4. A dissolved domestic corporation may, after such dissolution, prosecute any suit in its corporate name in the same manner and with like effect as if the corporation had not ceased to exist. *Schmitt & Bro. Co. v. Mahoney*..... 20

Estoppel. Contract.

5. One who has entered into a contract with a body assuming to act as a corporation, is not permitted, when sued on such contract, to question the capacity of such body to contract or to sue. *Equitable Building & Loan Ass'n v. Bidwell* 169
Idem v. Baird..... 173

Foreign Corporation. Comity.

6. By comity of the states, corporations of one state may sue in the courts of another state the same as can a domestic corporation, unless prohibited by legislative enactment. *Schmitt & Bro. Co. v. Mahoney*..... 20

Corporation—*concluded.*

Officers and Agents.

7. Evidence *held* to show corporation not liable for medical services furnished employees on direction of its manager. *Chase v. Swift & Co.* 696
8. The manager of a business corporation has no implied authority to furnish medical aid and assistance to a servant of the corporation who has been injured outside the line of his duties. *Idem.*
9. Where the officers of a *quasi*-public corporation are required immediately to perform a certain act for the benefit of the corporation, the duty will, ordinarily, be regarded as a continuing one. *Baltes v. Farmers Irrigation District* 310
10. A person dealing with the officers or agents of a public corporation is required to act with reference to the authority, limitations and restrictions imposed upon such officers by the legislation authorizing the organization and government of such corporation. *Lincoln & Dawson County Irrigation District v. McNeal* 613

Preferring Creditor.

11. An insolvent corporation may not prefer as creditor one of its officers and stockholders. *Reynolds v. Smith* 197

Right of Stockholder.

12. A corporation holds its property in trust for its shareholders who, like other beneficial owners, may insist that it shall be properly managed and preserved from waste. *State v. Holmes* 39
13. Where the officers of a corporation fail and refuse to protect and conserve the corporate property, the shareholders may intervene in pending suits for the purpose of protecting their own interests. *Idem.*

Costs.

——— in disbarment proceedings. See ATTORNEY AND CLIENT, 7.

County.

Claims Against County.

1. The power of the county board to act on claims is derived from section 23, article 1, chapter 18, Compiled Statutes, 1899. *State v. County Commissioners of Cass County* 566
2. A claim is filed when delivered to the county clerk to be acted upon by the board, though the clerk fails to indorse the filing thereon. *Idem.*
3. A claim under a contract with a county, wherein it is recited that the property was sold to the county commissioners, held to be a claim against the county, and failure to designate county by name will not affect its validity. *Idem.*

County—*concluded.*

4. Section 37, article 1, chapter 18, Compiled Statutes, 1899, regulates the grant of power and mode of procedure in the allowance of claims against the county, and failure to observe its provisions does not deprive commissioners of jurisdiction to act on the claims. *Idem.*

Depositories.

5. A county treasurer is the custodian of the funds of his office and it is for him, and not the county board, to deposit and withdraw all funds coming into his custody. *State v. Whipple*..... 650
6. A board of county commissioners is without authority to make one of two or more banks designated as depositories a preferred depository. *Idem.*
7. When a county board has acted upon the propositions of different banks applying to be made depositaries of county funds and has approved or rejected bonds presented for that purpose, its powers are at an end and it can not control the action of the treasurer or designate one bank as preferred depository. *Idem.*

Supreme Court Reports. Replevin.

8. A county as a municipal corporation has no such possessory right in the reports of the supreme court, consigned to the county judge, as will authorize it to maintain replevin proceedings against one who wrongfully retains possession of the same. *Clifford v. Hall County*..... 506

County Attorney.

1. Election for county attorney can be held only in even numbered years. *State v. Commissioners of Saline County*... 275
2. A vacancy in the office of county attorney should be filled by appointment, and the appointment holds until his successor is elected and qualified. *Idem.*

County Judge.

1. ———, official oath of. See OFFICERS.
2. ——— as *de facto* officer. See COURTS.
3. A county judge who receives money in his official capacity and converts the same to his own use, is guilty of official misconduct. *Barker v. Wheeler*..... 470

Supreme Court Reports.

4. Under the provisions of section 20, chapter 19, Compiled Statutes, the supreme court reports distributed to county judges belong to the office and not to the individual. *Clifford v. Hall County*..... 506
See, also, COUNTY, 8.

Courts. See CONTEMPT. COUNTY JUDGE. MANDAMUS.

1. District court as examining magistrate. See CRIMINAL LAW, 5.

Courts—*concluded.*

2. Trial by court without jury. See TRIAL.
3. The word "court," as used in section 582 of the Code, means not only the tribunal over which a judge presides, but the judge himself, when exercising, at chambers, judicial power conferred by statute. *Porter v. Flick*..... 773
4. Courts possess a portion of the sovereign power; they are authorized by the constitution to decide between litigants; and authority to decide implies, always, power to make their decisions effective. *State v. Kennedy*..... 300
5. Under our system of equity jurisprudence the powers exercised are purely judicial, derived from the common and statutory law. *St. James Orphan Asylum v. Shelby*..... 796

Jurisdiction.

6. Consent of parties can not confer jurisdiction of the subject-matter. *Armstrong v. Mayer*..... 423
7. District courts have no original jurisdiction of cases in forcible detainer. The jurisdiction of courts in such actions is by error proceeding only. *Idem.*
8. Where a right is given by statute and a specific remedy is provided designating the tribunal for the enforcement thereof, the jurisdiction of such tribunal is exclusive, unless the law otherwise provides. *Idem.*
9. The United States court having jurisdiction over a receiver and questions growing out of the administration of the assets of an insolvent bank, this court will not interfere with such jurisdiction. *Schaberg v. McDonald*..... 493
10. Where the record discloses the jurisdictional steps taken, and it is made to appear that no jurisdiction was acquired over the defendant, the rule that in courts of general jurisdiction proceedings taken are presumed to be regular, does not apply. *Chicago, B. & Q. R. Co. v. Hitchcock County* 722

Special County Judge.

11. Where a person has been appointed an acting county judge, qualifies for the position, assumes the duties of the office, and is actually engaged in their discharge for a period of three months or more, with the acquiescence of the public during said time, such officer will be held to be a *de facto* officer. *Dredla v. Baache*..... 655

Covenant.

If a party waive a covenant conditionally and the condition is broken, the waiver ceases to be effective for any purpose. *Wittenberg v. Mollyneaux*..... 583

Coverture. See HUSBAND AND WIFE.

Creditor. See CREDITOR'S BILL. FRAUDULENT CONVEYANCE, 5. MARSHALING ASSETS AND SECURITIES. SUBROGATION. VOLUNTARY ASSIGNMENT.

Creditor's Bill.

A judgment creditor, after an execution has been issued and returned *nulla bona*, may maintain a suit in equity to make his judgment effective as a lien on the land. *First Nat. Bank v. Gibson* 767

Criminal Law. See ADULTERY. BURGLARY. FALSE IMPRISONMENT. INDICTMENT AND INFORMATION. INSTRUCTIONS. JURY. LOTTERY. RAPE. REFORMATORY.

Burden of Proof.

1. The burden of proof in a criminal action does not shift to the accused. *Williams v. State* 526

Change of Venue. Continuance.

2. Application for change of venue is addressed to the sound discretion of the court, and its ruling thereon will not be disturbed where no abuse of discretion is shown. *Welsh v. State* 101

3. An application for a continuance is addressed to the sound discretion of the court. *Idem.*

Defective Information.

4. When an information in a criminal cause fails to state a crime, it is not proper to direct a verdict of not guilty, but the jury should be discharged. *State v. Dennison* 157

District Court as Examining Magistrate.

5. It is discretionary with the district court whether it will sit as an examining magistrate, and its ruling in that regard will not be disturbed where no abuse is shown. *Idem* 192

Failure to File Information. Arrest of Judgment.

6. Where no information or indictment is filed against the defendant in a criminal proceeding, during the term at which he was held to answer, he is entitled to be discharged. *Leisenberg v. State* 628

7. Where no information is filed against defendant at the term at which he is held to answer, if he enters a plea of "not guilty" to an information filed at a subsequent term, the court has power to try the issues raised, and if defendant is convicted it is not error to deny a motion in arrest of judgment. *Idem.*

Presumption of Innocence.

8. The presumption of innocence attends the accused through every step of the trial, until the jury finds his guilt established under the evidence beyond a reasonable doubt. *Williams v. State* 526

Crops. See CHATTEL MORTGAGES.

Cross-Examination. See WITNESSES.

Curative Act. See STATUTES, 10.

Cy Pres.

Doctrine not in force in this state. *St. James Orphan Asylum v. Shelby* 796

Damages. See EMINENT DOMAIN. MUNICIPAL CORPORATION.

A party may recover for gains prevented as well as for losses sustained, when the damages are direct, and the amount certain. *Wittenberg v. Mollyneaux* 583

Debtor. See CREDITOR.

Dedication.

In a suit for damages for the seizure and appropriation of private property for street or boulevard purposes, a judgment in such action will work a dedication of the property so appropriated to the corporation for the purposes for which it was taken. *City of Omaha v. Croft* 57

Deed. See COVENANT. ESTOPPEL. REFORMATION OF INSTRUMENTS. VOLUNTARY ASSIGNMENT.

1. A deed is never vitalized except by delivery and acceptance. *Hare v. Murphy* 135, 137
2. A provision in a deed that the grantee shall pay to a person named therein a certain sum at certain stated times, is an equitable lien on the land. *Pinkham v. Pinkham* 600
3. A covenant in a deed for the exchange of hotel property by which the grantee in one deed agrees that for a period named he will not use the property acquired by him for hotel purposes, is not void as being contrary to public policy. *Wittenberg v. Mollyneaux* 583
4. In a suit between others than the original parties, the description in a deed, if unambiguous, governs, and the intention of the parties to the conveyance can not take the place of calls. *Pohlman v. Evangelical Lutheran Trinity Church* 364
5. A definite description of lands in a deed designating the initial point, courses and distances, and followed by a statement of the number of acres conveyed, passes the quantity of land embraced in the specific boundaries, though greater or less than the number of acres stated. *Idem.*

Delivery. See DEED, 1.

Depositories. See COUNTY, 5-7.

Deputy Sheriff. See EXECUTION, 13, 14.

Descent and Distribution. See DOWER. EXECUTORS AND ADMINISTRATORS.

Advancements made by a father to a son may be deducted from the distributive share of the latter. *McClave v. McClave* 464

Disbarment. See ATTORNEY AND CLIENT.

Dissolution. See CORPORATION, 4. PARTNERSHIP.

Distress Warrant. See TAXATION, 3.

Divorce and Alimony.

1. Evidence examined, and found to support the decree of the trial court granting a divorce from the bonds of matrimony, on the ground of extreme cruelty practiced by the husband towards the wife. *Tietken v. Tietken*..... 138

Lien. Alimony.

2. A decree for alimony is a lien upon real estate the same as a judgment at law and is enforceable in like manner. *Dufrene v. Johnson*..... 18
3. Evidence examined and held to support a judgment rendered, awarding the wife permanent alimony in the sum of $1,000. *Tietken v. Tietken*..... 138
4. The amount allowed as permanent alimony should be just and equitable, due regard being had to the rights of each party, and should be made payable at such time or times as, considering the ability of the husband, the estate of the wife, and the situation of the parties, would seem just. *Smith v. Smith*..... 273

Dower.

1. A widow is entitled to dower in the lands owned by her intestate husband at the time of his death unless barred therefrom in the manner prescribed by the statute. *Motley v. Motley* 593
2. The fact that the husband died after Baker's Decedent Law (Session Laws, 1889, ch. 57) was adopted and before it was adjudged unconstitutional does not affect the widow's right to dower. *Idem.*

Drunkenness.

Contributory cause for divorce. *Tietken v. Tietken*..... 138

Ejectment. See ADVERSE POSSESSION.

1. Instructions in ——— examined, and *held* to be without prejudicial error. *Hoffine v. Ewings*..... 729
2. A defendant, in answer to a petition in ejectment, may show, by his pleading, that he is the equitable owner of the property and entitled to affirmative relief. *Sutton v. Sutton* 400
3. Where the answer to a petition in ejectment presents an equitable counter-claim which is traversed by a reply, the issues of fact thus arising are triable to the court without a jury. *Jewett v. Black*..... 173

Election. See COUNTY ATTORNEY.

1. Under section 131, ch. 26, Compiled Statutes, 1899, the people's independent party, having been generally and popu-

Election—*concluded.*

larly known as the "Populist party," that name can not be adopted by a new political organization. *Porter v. Flick*.. 773

2. Where it affirmatively appears that an election was fairly conducted; that it was held on the day and within the hours fixed by law; that due notice was given and that a majority of the voters entitled to vote voted in favor of the proposition submitted, the failure to keep the polls open for the entire time required by the statute will be deemed a harmless irregularity. *Baltes v. Farmers Irrigation District* 310

Eminent Domain. See MUNICIPAL CORPORATION.

Damages for lands appropriated for a highway accrue at the date of the condemnation proceedings, without regard to the time when the road is actually opened. *Harlan County v. Hogsett* 362

Equity. See MAXIMS.

1. One who fails through culpable inertness, to make inquiry when it was his duty to inquire and so loses a valuable right, is not entitled to relief in equity on the ground of mistake. *Farrell v. Bouck*..... 771

2. Where a petition for relief on the ground of mistake of fact charges that false representations on the part of defendant caused plaintiff to release a mortgage and thereby lose a valuable right, a decree in favor of plaintiff can not stand, if the court in its special findings, fails to find the fact so charged as true. *Idem.*

Estate by Entirety. See HUSBAND AND WIFE.

Estoppel.

1. The grantee in a deed containing an assumption clause, is not estopped from denying the validity of the contract of assumption as against a party who, relying on the recitals in the instrument as spread upon the public records, purchased the debt secured by a mortgage on the land. *Hare v. Murphy*..... 135

2. The right to invoke the rule of estoppel by avowal rests upon proof of the conduct of the parties before litigation is begun and is not rendered unavailable because other issues are raised by the pleadings. *State v. Commissioners of Cass County*..... 566

3. Where a party gives a reason for his decision and conduct touching a matter involved in controversy, he is estopped, after litigation has begun, from changing his ground and putting his conduct upon another and different consideration. *Idem.*

Evidence. See ADVERSE POSSESSION. APPEAL AND ERROR, 28-32. BURGLARY, 1. CORPORATION. DIVORCE AND ALIMONY. FALSE IMPRISONMENT. FRAUDULENT CONVEYANCE. HOMICIDE. LARCENY. NEGLIGENCE. PLEADING. RAPE. REPLEVIN. STATUTES. TRIAL. WITNESS.

Best Evidence.

1. The best evidence of which a case is in its nature susceptible is always admissible to prove the fact in issue. *Wittenberg v. Mollyneaux* 583

Burden of Proof.

2. The burden is upon the plaintiff to prove the material allegations of the petition not admitted by a preponderance of the evidence. *Chamberlain Banking House v. Woolsey* .. 516

Expert Testimony.

3. Yardmaster of a railroad held competent to testify as an expert in regard to construction of car. *Missouri P. R. Co. v. Fox* 531
4. Expert testimony may be received regarding a subject peculiarly within the knowledge and experience of those testifying. *Idem.*
5. Persons having experience in railroading and knowledge as to the construction of roadbeds can testify as to whether a certain road-bed was properly constructed. *Idem.*
6. In an action for injury to a brakeman certain testimony as to the duties of a brakeman and car inspector was held admissible. *Idem.*
7. Where the question involved does not fall within the range of common knowledge, opinions of witnesses skilled in the particular trade, art or science are admissible. *Idem.*

Foreign Laws.

8. In the absence of proof, the laws of a sister state will be presumed to be the same as those of this state. *Schmitt & Bro. Co. v. Mahoney* 20

Judicial Notice.

9. Courts will take judicial cognizance of the political history of the state. *Porter v. Flick* 773
10. Courts of this state will take judicial notice of the fact that the city of Omaha is situate in Douglas county. *Green v. Paul* 7
11. The district court will not take judicial notice of the contents of a brief filed by one of the litigants in this court when the cause was pending here on appeal or error. *Bennett v. McDonald* 47

Locus in Quo.

12. The jury may take into account the result of their observations at the *locus in quo* and make it, in connection with the other evidence, the basis of their verdict. *Chicago, R. I. & P. R. Co. v. Farwell* 322

Evidence—*concluded.*

Parol Evidence. Contract.

13. A contract will generally be construed solely by reference to its own language and terms; but where the language is ambiguous, other evidence may be considered, not for the purpose of contradiction, but to explain the ambiguity. *State v. County Commissioners*..... 566

Pleading. Evidence.

14. Pleadings may be introduced as evidence in actions other than those wherein they were filed, as admissions against interest. *Paxton v. State*..... 763

Preponderance of Evidence.

15. The mere fact that the testimony of the plaintiff is contradicted in every essential particular by that of the defendant does not necessarily determine that the former has failed to make out his case by a preponderance of the evidence. *Grand Island Mercantile Co. v. McMeans*..... 373

Presumptions.

16. Assessments being regularly entered on the assesssment books of the county, the presumption is that public officers do their duty and that errors, if any existed, were corrected in the manner provided by law. *Chamberlain Banking House v. Woolsey*..... 516

17. In an action involving the validity of a tax for general revenue it will be presumed that the taxing authorities discharged their duty, and that the board of equalization held annual sessions as required by law. *Adams v. Osgood*.. 779

Execution.

Appraisement. Objections. Vacation.

1. An officer is not required to make a second appraisement of real estate until he has twice offered the property for sale. *Carstens v. Eller*..... 460

2. Property can not be offered for sale, or sold, under an appraisement which has been set aside by the court. *Idem.*

3. All objections to the appraisal of property, to be available, must be made before the sale. *Dovey v. McCullough*..... 376

4. A copy of the appraisement is required to be filed with the clerk of the district court before the property is advertised for sale. *Idem.*

5. Evidence in foreclosure case examined, and *held* that the appraisement was not so low as to be presumptively fraudulent. *Woolworth v. Parker*..... 142

6. Evidence examined, and *held* that the appraisement made was not materially disproportionate to the actual market value of the property, and no sufficient cause exists to justify its vacation. *Idem.*

7. Where no attack has been made on an appraisement, an

Execution—*continued.*

order setting it aside is unauthorized. *Kampman v. Nicewaner* 208

8. There is no authority in law for a second appraisement unless the property remains unsold for want of bidders after being twice advertised and twice offered for sale under the first appraisement. *Idem.*

9. A judicial sale will not be vacated on the ground that the appraisement was too low unless the disparity between the appraised value and the actual value raises a presumption of fraud. *Green v. Paul* 7

10. Objections to the appraisement of property made for the purpose of a judicial sale, must be brought to the attention of the trial court and a ruling obtained thereon to entitle the same to be considered on review. *Idem.*

11. A plaintiff, by consenting to the sustaining of defendant's motion to vacate an appraisal of real estate, is not thereby estopped from denying that a subsequent appraisal is too low, whereby the property was valued at one-half the sum fixed by the former appraisers, where it is not shown that there had been no depreciation in the market value of the property after the making of the first appraisement. *Carstens v. Eller* 460

Confirmation.

12. An order confirming a judicial sale adjudicates only the proceedings under the order of sale, and does not relate to such grounds for equitable relief as were unknown when the order for confirmation was entered. *Kampman v. Nicewaner* 208

Deputy Sheriff.

13. A deputy sheriff may act for his principal in appraising property for sale under a decree of foreclosure. *Carstens v. Eller* 460

14. A deputy sheriff may perform for his principal, any act necessary to be done to carry into effect a decree for the sale of property. *Passumpsic Savings Bank v. Maulick* 469

Notice.

15. The owner of real estate about to be sold under a decree of foreclosure is not entitled to notice of time and place of making the appraisement. *Green v. Paul* 7

16. A notice of sale which states that the sale is to be made by virtue of an order issued out of the district court, in a certain case, entitling it, is a sufficient compliance with the statute. *Pearson v. Badger Lumber Co* 167

17. Under a decree of foreclosure which requires that city lots shall be sold separately, the published notice of sale need not specially state that the lots will be offered for sale separately, when such notice states that they will be sold in the manner provided by the decree. *Carstens v. Eller* .. 460

Execution—*concluded.*

Objection to Confirmation.

18. The owner of the equity of redemption of real estate can not be heard to object to the confirmation of the sale on the ground that prior liens against the property were not deducted by the appraisers. *Green v. Paul*..... 7

Ratification.

19. It is ordinarily the duty of a court, where a judicial sale is made in conformity with its decree, to ratify such sale. *Passumpsic Savings Bank v. Maulick*..... 469

Sale Under Void Judgment.

20. A sale of real estate under a void judgment neither diverts the owner's title nor confers any rights on a purchaser buying with knowledge of the invalidity. *First Nat. Bank v. Gibson* 767

Sheriff's Authority.

21. The sheriff's authority to sell mortgaged real estate is derived from the decree of foreclosure and not from the order of sale issued by the clerk of the court. *Passumpsic Savings Bank v. Maulick*..... 469

Vacation.

22. A court of equity may vacate an order confirming a judicial sale and discharge the purchaser who has become such through fraud, accident or mistake. *Kampman v. Niewaner*.. 208

Want of Seal.

23. A process, defective for want of the seal of the court out of which it issued, may be cured by amendment. *Passumpsic Savings Bank v. Maulick*..... 469

Executors and Administrators.

1. A motion to vacate judgment allowing a claim at a subsequent term can not be granted except on some of the statutory grounds. *McGrew v. State Bank of Humboldt*..... 716
2. Judgment allowing claim in November *held* judgment of the court, and not the act of recording such allowance in the April following. *Idem.*
3. An order allowing a claim against an estate in November *held* to be a valid judgment as of that date notwithstanding it was not spread at large upon the probate record until the April following. *Idem.*
4. An order of the probate judge allowing a claim against an estate *held* binding and of the force and effect of a judgment, until appealed from or reversed by other proceedings. *Idem.*

Limitation.

5. Failure to exhibit a claim within the time limited by the court forever bars such claim. *Schaberg v. McDonald*..... 493
6. Where a claim against a decedent's estate is properly pre-

Executors and Administrators—*concluded.*

sented for examination within the time limited by order of the court, it is not barred by the failure of the court to act thereon within such time. *Idem.*

7. The probate court or commissioners can allow a claim against an estate, duly presented within the time limited by order of the court, after the expiration of such limit. *Idem.*

8. A claim against the estate of a decedent must be presented to the court or commissioners within the time allowed by statute, as fixed by order of the court. *Idem.*

Notice.

9. A notice of the time and place of hearing claims against an estate, must be given in the manner provided by section 214, chapter 23, Compiled Statutes, 1899. *Dredla v. Baache* 655

10. The object of the notice required to be given by section 214, chapter 23, Compiled Statutes, 1899, is not alone for the benefit of creditors but also for the purpose of advising the administrator of the filing of claims. *Idem.*

11. A probate judge has authority to appoint convenient times and places for hearing claims against an estate, and such hearing may be had prior to the expiration of the time limited for the filing of such claims. *Idem.*

12. A notice of the time and place of hearing claims against an estate published four consecutive weeks in a legal newspaper in the county where the estate is being administered, is sufficient to authorize the allowance of claims at the time mentioned, and gives the court jurisdiction over the person of the administrator. *Idem.*

Review.

13. Order of probate court entered under Code of Civil Procedure, section 602, subdivision 3, vacating allowance of claims at prior term is appealable. *Estate of McKenna v. McCormick* 595

Exemption. See HOMESTEAD. TAXATION.

Expert Testimony. See EVIDENCE, 3-7.

False Imprisonment.

1. In an action for false imprisonment, plaintiff may prove newspaper publications containing an account of his arrest and imprisonment, without comment thereon. *Scott v. Flowers* 675

2. A complaint filed in the county court under section 5, article 1, chapter 75, charging no crime, but incorrigibility merely, states no cause for commitment to the industrial or reform school, and a person so arrested and committed has a cause of action against the person filing the same for false imprisonment. *Idem.*

Fees and Salaries. See *State v. Frank*, 327.

Filing.

The filing of a paper, as used in section 112, chapter 77, article 1, Compiled Statutes, 1899, means its delivery to the proper officer and the reception of it by him to be kept on file in his office. *Medland v. Linton*..... 249

Final Judgment. See APPEAL AND ERROR, 1, 3, 5, 8, 9, 10.

Fixture.

1. Definition of trade fixture. *Brownell v. Fuller*..... 558
2. Whether certain property is a trade fixture is a question of fact. *Idem.*
3. Whether it was the intention to make an article in dispute a trade fixture *held* a question for the jury, to be determined by the definition of a fixture as given in the opinion. *Idem.*
4. As between a landlord and tenant, or one claiming through the tenant, the fact that an addition to the leased premises or fixtures thereto was erected in an alley and abutted upon or adjoined to such premises, *held* not to affect the landlord's title. *Idem.*
5. In controversy as to ownership of fixtures it was not error to instruct the jury to disregard all of certain testimony bearing on the landlord's title, except that bearing on the question as to whether the property in question was a trade fixture. *Idem.*

Forcible Entry and Detainer. See COURT, 7.

1. Law giving right of appeal declared unconstitutional. *Armstrong v. Mayer*..... 423
2. The action of forcible detainer is purely statutory, and original jurisdiction thereof is conferred on justices of the peace. *Idem.*
3. The gravamen of the action of forcible entry and detainer is the unlawful and forcible entry upon and detention of real property. *Tarpenning v. King*..... 213
4. The action of forcible entry and detention may be maintained by one who has been deprived of possession by an unlawful and forcible entry by one having absolute title and present right of possession. *Idem.*

Foreclosure. See EXECUTION. MORTGAGE. PLEADING, 6. TAXATION, 4.

Foreign Corporation. See CORPORATION, 6. INSURANCE, 11.

Foreign Judgments. See JUDGMENT, 12-14.

Forfeiture.

Forfeitures will be enforced only when the strict letter of the contract requires it. *Connecticut Fire Ins. Co. v. Jeary*.. 338

Fraudulent Conveyance.

1. Evidence examined, and found sufficient to support the judgment. *Bennett v. McDonald* 47
2. In an action in which fraudulent conveyance of property is alleged it is proper to receive in evidence conversations of the vendor and vendee in negotiating and consummating contracts out of which arose the consideration for the alleged fraudulent transfer. *Idem.*
3. Alleged errors in the giving of instructions and in the introduction of evidence examined, and *held* insufficient to work a reversal. *Henney Buggy Co. v. Ashenfelter* 1
   Henney Buggy Co. v. Parlin, Orendorff & Martin Co 6
4. In the trial of an action in which a fraudulent transfer of property is alleged, any evidence which reasonably tends to illumine the transaction and explain the motives or conduct of the parties is admissible. *Bennett v. McDonald* .. 47
5. Conveyance by a failing debtor of practically all his property to a creditor in satisfaction of his debt, the difference being paid to such debtor in cash, with knowledge of preferred creditor that such conveyance would hinder, delay and defraud other creditors, is void. *Henney Buggy Co. v. Ashenfelter* 1
   Henney Buggy Co. v. Parlin, Orendorff & Martin Co 6

Garnishment.

1. A receiver can not be garnisheed or sued with respect to the property in his possession by virtue of his trust. *Veith v. Ress* 52
2. Where an order for payment of money is not immediately effective if the fund against which it is directed is seized by attachment or garnishee process, the rights of the attaching or garnisheeing creditor are superior to those of the person holding such order. *Nebraska Moline Plow Co. v. Fuehring* 316

Good Faith. See VENDOR AND VENDEE, 2.

Harmless Error. See APPEAL AND ERROR.

Highways. See EMINENT DOMAIN.

Whether driver of a vehicle was guilty of contributory negligence where there was an obstruction in the road, *held* a question for the jury. *Nebraska Telephone Co. v. Jones* 396

Homestead.

1. Evidence examined, and found to sustain finding of abandonment of homestead. *Flynn v. Riley* 491
2. Whether one has actually abandoned a homestead is a question of fact to be determined from all the evidence pertinent. *Idem.*
3. The right to claim the statutory homestead exemptions as head of a family is defined by Compiled Statutes, 1899, *Hyde v. Hyde* 502

Homestead—*concluded.*

4. Where a father has living with him a daughter over age of her majority and on her account is claiming homestead exemptions, there must be an actual and necessary dependency, by reason of the inability of the daughter to care for or support herself. *Idem.*
5. Evidence found to support the finding and judgment of the trial court holding the defendant is not the head of a family. *Idem.*
6. The question whether a man who has living with him a daughter over the age of her majority, is entitled to homestead rights, is one of fact. *Idem.*
7. A daughter over age is a member of the family so as to entitle the father to claim the benefit of the homestead exemption as the "head of a family" only when it appears that she is under his care and maintenance, and is unable to take care of, or support herself. *Idem.*

Homicide. See CRIMINAL LAW.

1. The venue of a homicide may be established by circumstantial evidence. *Hawkins v. State*..... 380
2. A prosecution for murder may be by information filed by the county attorney. *Idem.*
3. Evidence *held* sufficient to sustain finding that homicide was committed in the county alleged. *Idem.*

Husband and Wife. See ADULTERY. DIVORCE AND ALIMONY. DOWER. MECHANIC'S LIEN.

1. Relations discussed. *Kerner v. McDonald*.....663, 670, 671
2. A husband has no right to administer personal chastisement to the wife. *Idem.*
3. The common law rule of estate by entirety does not obtain in this jurisdiction. *Idem.*
4. Whether or not the husband is agent of the wife, is a question of fact to be determined as other like questions and will not be presumed from the marital relations alone. *Rust-Owen Lumber Co. v. Holt*..... 80
5. The separate estate of a married woman is not chargeable for necessaries for the family until after a judgment has been entered therefor against the husband and an execution returned unsatisfied. *Fulton v. Ryan* 9
6. Where coverture is pleaded to defeat a recovery on a promissory note plaintiff may set up in the reply any fact which would avoid such defense as that the note was given for necessaries furnished defendant's family, and that an execution had been issued against the property of the husband and returned unsatisfied or that the note was executed with special reference to and upon the faith and credit of the separate estate, trade or business of the wife. *Idem.*

Idem Sonans. See NAMES.

In Custodia Legis. See PARTNERSHIP, 1.

Indictment and Information. See BURGLARY. CRIMINAL LAW. HOMICIDE. LOTTERY. REFORMATORY.

1. Continuando, when good and when bad pleading. (See argument and opinion) *State v. Dennison*.....157, 192
2. Where a statute states the elements of a crime it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute. *Leisenberg v. State*..... 628

Amendment.

3. It is not error to refuse to allow the county attorney to file an amended information, where the complaint before the examining magistrate failed to state a crime. *State v. Dennison* 157

Joinder of Misdemeanors.

4. Several unlawful sales of intoxicating liquors may be joined in the same information, and the state will not be required to elect upon which count it will rely for a conviction. *McArthur v. State*..... 390
5. Several misdemeanors of the same kind may be set forth in as many counts of an information, and the prosecutor is not required to elect upon which count he will proceed. *Little v. State*..... 749

Industrial School. See REFORMATORY.

Injunction.

1. The office of a restraining order is only to hold matters *in statu quo*. It is not a part of the main action. *Trester v. Pike* 510
2. Injunction is the appropriate remedy to prevent a party from obstructing, or unlawfully interfering with, an irrigation ditch of which the owner is in actual possession. *Park v. Ackerman*..... 405
3. Evidence examined, and found sufficient to sustain the issuance of an injunction to prevent obstruction of an irrigation ditch. *Idem.*
4. The destruction of a fence and threatened repetition thereof by a trespasser, entitles the owner to relief by injunction, even though the latter may not be insolvent. *Pohlman v. Evangelical Lutheran Trinity Church*..... 364
5. An injunction will not lie to enjoin the breach of a contract where the party complaining has a plain and adequate remedy at law. *Wabaska Electric Co. v. City of Wymore*.. 199
6. If a mayor and council of a city threaten to exceed their authority and adopt an ordinance which will be prejudicial

Injunction—*concluded.*

to the rights of an individual, an injunction may, in a proper case, issue against them but not against the city. *Idem.*

7. A petition for an injunction should disclose with definiteness and particularity the threatened injury which the court is asked to restrain the defendant from committing. *Idem.*

Liability on Bond. Attorney Fee.

8. Instruction authorizing in a suit on an injunction bond a recovery as an element of damages for expenses incurred for attorney's fees on the trial of the main case, *held* erroneous. *Trester v. Pike*..... 510

9. It is only when trial of principal issues involved is necessary to dispose of the injunction that attorney's fees for the trial of such case are properly allowed. *Idem.*

10. The obligors on an obligation given to secure a temporary restraining order wrongfully issued in an action are not liable for attorney's fees incurred in the trial of the main issues. *Idem.*

11. A recovery of counsel fees for the trial of a case will not be allowed as an element of damages for an injunction wrongfully obtained, if the injunction proceeding be only auxiliary to the main case. *Idem.*

12. Damages for the wrongful obtaining and issuance of a temporary restraining order are confined to just and adequate compensation for the actual loss, which is the natural and proximate result of the restraint imposed. *Idem.*

13. Damages in the way of an attorney's fees for the wrongful issuance of a restraining order, are limited to the expenses incurred in securing its dissolution, as distinguished from expenses incurred in the trial of the principal issues involved. *Idem.*

14. Where, in an action on an undertaking given to secure the issuance of a restraining order, under the pleadings and proof the liability of two defendants is that of principal and surety it is error to render judgment against both defendants as principal; such judgment should be rendered in conformity with the provisions of section 511 of the Code. *Idem.*

Innkeeper.

The right to run a hotel is not a franchise. An innkeeper is not clothed with any authority from the state, and he owes no duty to the public except to render to all who come, and are fit to be received, fair accommodations at fair prices, while he sees fit to continue in business. *Wittenberg v. Mollyneaux*..... 583

Instructions. See APPEAL AND ERROR. HOMICIDE. NEGLIGENCE. TRIAL.

1. ——— assigned as error. See APPEAL AND ERROR.
2. Instructions are required to be applicable to the evidence and grounded on the pleadings. *Swift & Co. v. Holoubek*.... 784

Assuming Facts.

3. Instructions which assume the possible existence of a material fact to support which there is no evidence *held* erroneous. *Idem.*
4. An instruction submitting to the jury as an issue of fact a question material to the case, regarding which there is no evidence to support a finding, is erroneous. *Chamberlain Banking House v. Woolsey*..... 516
5. It is not error to assume in an instruction the existence of a collateral fact established by uncontroverted evidence, which tends to prove one of the constituent elements of a crime. *Welsh v. State*..... 101

Comparison.

6. Instructions examined, and *held* not to have made a comparison between the testimony of one witness and that of another, or to have reflected on the evidence adduced by the defendant. *Grand Island Mercantile Co. v. McMeans*..... 373

Construction.

7. Instructions are to be considered together and when so construed, if, as a whole, they fairly state the law, error can not be predicated upon the giving of the same. *Schmitt & Bro. Co. v. Mahoney*..... 20
   Hoffine v. Ewings 729

Contradiction.

8. Where a party requests instructions which are contradictory, he can not complain if the court makes a wrong selection. *Missouri P. R. Co. v. Fox*..... 531

Harmless Error.

9. A judgment will not be reversed for the giving of an erroneous instruction where it is manifest that the complaining party could not have been thereby prejudiced. *McArthur v. State*..... 390

Locus in Quo.

10. An instruction by which the court directs the jury to disregard evidence obtained by a view of the *locus in quo* is erroneous. *Chicago, R. I. & P. R. Co. v. Farwell*..... 322

Negligence.

11. Where an instruction on contributory negligence is given, which requires a greater degree of care and caution to be exercised than is necessary under the true rule, the giving thereof is not prejudicial to the party alleging contributory negligence. *Missouri P. R. Co. v. Fox*..... 531

Instructions—*concluded.*

Reasonable Doubt.

12. The definition of a reasonable doubt contained in the instructions did not permit the jury to enter the field of conjecture, but confined them to the consideration of the evidence adduced on the trial. *McArthur v. State*..... 390

13. It is not error for the court in a criminal case to charge the jury, *inter alia*, "You are not at liberty to disbelieve as jurors if from all the evidence you believe as men. Your oath imposes upon you no obligation to doubt where no doubt would exist if no oath had been administered." *Leisenberg v. State*..... 628

Repetition.

14. Instructions requested which are covered substantially by those already given may properly be refused. *Cardwell v. State* 480
Missouri P. R. Co. v. Fox..... 531

Request.

15. It is not error to refuse instructions which are not based on the evidence. *Bennett v. McDonald*..... 47

16. An instruction requested not applicable to the evidence is properly refused. *Cardwell v. State*..... 480

17. Where an instruction is not satisfactory to a party to the case, because of alleged uncertainty or vagueness, it is the duty of counsel to tender an instruction free from the uncertainty or vagueness alleged to exist in the one given. *Brownell v. Fuller*..... 558

Insurance.

1. Evidence in action on policy considered, and verdict held excessive. *British America Assurance Co. v. Kellner*..... 411

Action on Policy.

2. Evidence examined, and found to sustain a finding that the insurer intended to deliver an effective contract insuring the owner of the building described in the policy. *Cook v. Westchester Fire Ins. Co*..... 127

3. If a claim under a policy of insurance is presented within the sixty-day limit and payment is refused absolutely at any time, action may be commenced by the insured without waiting for the expiration of the limit. *Northern Assurance Co. v. Hanna*..... 29

Classification.

4. A classification of the occupation of an applicant for accident insurance by the general agent of the company on full information of the facts binds the insurer. *Travelers Ins. Co. v. Snowden*..... 263

Construction of Policy.

5. Courts will construe policies more strongly against the

Insurance—*continued.*

party by whom the contract has been drafted. *Connecticut Fire Ins. Co. v. Jeary* 338
Idem v. Waugh 353

6. Recitals which are not contractual elements of a policy of insurance are not conclusive on the parties thereto. *Commonwealth Mutual Fire Ins. Co. v. Hayden* 636

Estoppel.

7. Where controversy arises over liability on policy after loss, the company, after litigation, can not urge additional grounds for refusal to pay. *Continental Ins. Co. v. Waugh* ... 348

Extent of Loss. Recovery.

8. Under the valued policy law, in case of a partial loss, the actual damage is the measure of recovery. *Lancashire Ins. Co. v. Bush* 116
9. If, under a valued policy, the property insured is totally destroyed as a result of two or more fires, the measure of recovery for the final loss is the amount written in the contract less amounts paid in settlement of previous losses. *Idem.*
10. Under the valued policy law (Compiled Statutes, 1899, ch. 43, sec. 43) the statute fixes the worth of the property insured conclusively at the valuation written in the contract of insurance, and in case of total loss, that sum is the measure of recovery. *Idem.*

Foreign Company.

11. A foreign insurance company which has done business in this state without complying with the conditions prescribed by our statutes, can not rightfully claim of our courts, as an exercise of comity, the enforcement of contracts made with our citizens insuring property in this state. *Commonwealth Mutual Fire Ins. Co. v. Hayden* 636

Forfeiture. Inventory. Vacancy Clause.

12. Forfeitures will be enforced only where the strict letter of the contract requires it. *Connecticut Fire Ins. Co. v. Jeary* .. 338
Idem v. Waugh 353
13. Conditions of policy for taking inventory, keeping books of account, and locking them in a fire-proof safe, *held* to be construed conjointly, and that to work a forfeiture there must be a failure to perform all such conditions. *Idem.*
14. Warranty clause, providing for the taking of an inventory and its deposit in safe, *held* not to apply to inventory taken more than twelve months before issuance of policy. *Continental Ins. Co. v. Waugh* 348
15. Provision in policy as to books of account and taking inventory construed, and *held* that thirty days were given to perform such act, and, where fire occurred in less than

Insurance—*concluded.*

that time, no breach existed in warranty for keeping books, and their preservation in fire-proof safe. *Idem.*

16. Where a partial loss under a fire policy renders a building untenantable, there is no breach of the vacancy clause because the building is unoccupied during the time of insurer's option to repair the same. *Lancashire Ins. Co. v. Bush* 116

Membership.

17. Membership in a mutual insurance company ceases with the expiration of the member's policy and payment of liabilities incurred while the policy was in force. *Commonwealth Mutual Fire Ins. Co. v. Hayden* 636

Proof of Loss.

18. Under a policy requiring proof of loss to be furnished in sixty days, but which contained no forfeiture clause, time *held* not to be of the essence of the requirement, and that failure to furnish such proofs did not work a forfeiture. *Northern Assurance Co. v. Hanna* 29

Interest. See TAXATION.

1. Interest is allowable on the amount found due by a verdict from the date of its rendition to the time judgment is entered thereon. *Hilton v. State* 421
2. Interest is recoverable for the use or destruction of property when the amount which is due the plaintiff may be known or ascertained approximately by reference to market values. *Missouri, Kansas & Texas Trust Co. v. Clark* 406
3. Where a verdict for damages is returned and judgment is delayed by a pending motion for a new trial, it is proper to allow interest upon the verdict from the date thereof to the date of the rendition of the judgment. *Missouri P. R. Co. v. Fox* 531

Intervention.

1. An intervener against whom a judgment has been rendered must be accorded the rights which, under like circumstances, belong to any other unsuccessful suitor. *State v. Holmes* 39
2. Under section 50*a* of the Code any person who can, by proper averments, show that he has an interest in the matters in litigation may, without leave of court, become a party to the suit and obtain an adjudication of his claim. *Idem.*

Intoxicating Liquors.

A prosecution for the sale of intoxicating liquors without a license must be brought within eighteen months from the commission of the offense. *McArthur v. State* 390

Irrigation. See WATER AND WATER COURSES.

Joinder of Causes of Action. See ACTION.

Judge.

1. ———, official oath of. See OFFICE AND OFFICERS, 9, 10.
2. ———, remarks of, not evidence. See JUDGMENT, 10.

Judgment. See CREDITOR'S BILL. EQUITY. MASTER AND SERVANT. OFFICE AND OFFICERS, 2, 3.

1. An irregular judgment is one which is rendered contrary to the course of law and the practice of the courts. *Estate of McKenna v. McCormick* 595
2. Allowance of claim against an estate has the force and effect of a judgment. *McGrew v. State Bank of Humboldt* 716
3. The judgment of a probate court allowing a claim against an estate *held* not to be the clerical act of recording the judgment, but the adjudication itself. *Idem.*
4. Under the evidence, *held* that the entry by the probate judge, acting as his own clerk, on the records of the probate court, of the judgment sought to be vacated was not an act of "mistake, neglect or omission of the clerk," within the meaning of subdivision 3, section 602 of the Code. *Estate of McKenna v. McCormick* 595

Collateral Attack.

5. Where a court is without jurisdiction over a defendant, the judgment rendered is void, and may be attacked collaterally. *Chicago, B. & Q. R. Co. v. Hitchcock County* 722

Conclusiveness of Adjudication.

6. A judgment against a public officer in regard to a public right binds his successor in office. *State v. Kennedy* 300
7. Jurisdiction over a mutual insurance company does not include all ex-members who are not indebted on account of the policies they once held. *Commonwealth Mutual Fire Ins. Co. v. Hayden* 636
8. A stockholder though not personally served with process is concluded by a judgment against him in a suit brought to enforce a corporate obligation, as he is an integral part of the corporation. *Idem.*
9. A stockholder is bound by a decree of a court of equity against a corporation in enforcement of a corporate duty, although not a party as an individual. *Idem.*
10. What the presiding judge may say on the hearing of a motion or trial of a cause, respecting his reasons for granting an order in the case at chambers, is not evidence; and such statement can not be considered for any purpose. *Northwestern Mutual Life Ins. Co. v. Burr* 476

Entry of Judgment.

11. Claim allowed is binding judgment from date of allowance and not of entry. *McGrew v. State Bank of Humboldt* .. 716

Judgment—*concluded.*

Foreign Judgment. Action.

12. In an action to enforce the judgment of a sister state against an ex-member of a mutual insurance company, defendant may plead want of jurisdiction in the foreign court. *Commonwealth Mutual Fire Ins. Co. v. Hayden*..... 636
13. In an action to enforce the judgment of a foreign court of general jurisdiction, the burden is on tne defendant to show the non-existence of jurisdictional facts. *Idem.*
14. Full faith and credit will be given a judgment of a sister state by which an assessment has been made against members of an insolvent mutual insurance company, although such members were residents of this state. *Idem.*

Payment.

15. A judgment is extinguished when paid by one primarily liable therefor, and can not be kept alive by assignment. *First Nat. Bank v. Gibson*..... 767

Proceedings to Vacate.

16. A probate court is without power to vacate or modify a judgment after the expiration of the term at which it is pronounced. *McGrew v. State Bank of Humboldt*..... 716
17. Under the provisions of section 602 of the Code in a proceeding to vacate a judgment on account of irregularity in obtaining it, it is unnecessary to tender an answer. *Fisk v. Thorp* 713
18. Where the record shows the ground for vacating a judgment was fraudulently preventing a party from defending, the remedy is by proceedings to vacate the judgment and motion to vacate on the ground of irregularity will not lie after two years from entry. *Estate of McKenna v. McCormick* 595

State Sovereignty.

19. When a state invokes the judgment of a court, it lays aside its sovereignty and consents to be bound by the decision. *State v. Kennedy*..... 300

Judicial Notice. See EVIDENCE, 9-11.

Judicial Sale. See EXECUTION.

Jurisdiction. See APPEAL AND ERROR. APPEARANCE. COURTS. EQUITY. FORCIBLE ENTRY AND DETAINER. MANDAMUS.

Jury. See CRIMINAL LAW, 4. QUO WARRANTO. TRIAL.

1. The affidavit of jurors relating to the arguments or statements made by them while deliberating on their verdict may not be received to impeach the verdict. *Welsh v. State*.. 101
2. When, at any term of the district court there is no panel of petit jurors, the court may, under section 664 of the Code, direct the sheriff to summon persons having the qualifications of jurors to appear and serve as petit jurors. *Idem.*

Justice of the Peace. See FORCIBLE ENTRY AND DETAINER.

Landlord and Tenant. See FIXTURE.

A tenant is not permitted to dispute his landlord's title. *Brownell v. Fuller* 558

Larceny.

1. No presumption of guilt arises from the mere possession of stolen property. *Williams v. State* 526
2. Instruction, copied in opinion, as to effect to be given possession of stolen goods, *held* erroneous. *Idem.*
3. The inference to be drawn from the fact of the possession of stolen property is a question alone for the jury. *Idem.*
4. Where the statute defining grand and petit larceny is embodied in an instruction, such instruction is not open to the objection that it does not state that the property stolen must be of some value. *Idem.*

Law of the Case. See APPEAL AND ERROR.

License. See PHYSICIAN AND SURGEON.

Lien. See ATTORNEY AND CLIENT. MECHANIC'S LIEN. TAXATION, 1-4.

Limitation of Action. See ADVERSE POSSESSION. INSURANCE.

1. Where the title of a person in the undisputed possession of land is challenged, he may set forth any equitable defense in favor of his right to the property and the statute of limitations does not apply. *Pinkham v. Pinkham* 600
2. In an action to reform a deed for mistake, the statute of limitations begins to run only from the discovery of the mistake, or facts which should lead to such discovery. *Idem.*

Lis Pendens. See ABATEMENT AND REVIVOR.

Locus in Quo. See EVIDENCE, 12.

Lottery.

1. The offense of carrying on a lottery is not a continuing one, but each day the lottery is carried on constitutes a separate and distinct crime. *State v. Dennison* 192
2. An information drawn under sections 225 of the Criminal Code, charging the defendant with opening and establishing a lottery, which omits to describe the capacity in which defendant acted, whether as owner or otherwise, is defective. *Idem* 157
3. An information is bad for duplicity which charges in a single count that on a certain date and on divers days between that and a subsequent date, the defendant did publicly and privately open, set on foot and carry on a lottery. *Idem* 192

Malicious Prosecution. See ACTION. FALSE IMPRISONMENT. JOINDER OF ACTIONS.

Mandamus. See COURTS. OFFICE AND OFFICERS, 7.

1. Mandamus will not issue where the law affords a plain and adequate remedy. *State v. Osborn* 415
Horton v. State 701
2. A private individual, not shown to be either a citizen or to be beneficially interested in the enforcement of the laws, can not invoke mandamus to compel an officer to perform a public duty. *State v. Osborn* 415
3. If the district court mistakes or misconstrues the mandate of this court, its obedience may be enforced by mandamus. *State v. Omaha Nat. Bank* 232
4. Mandamus will not lie to control the discretion of a court as to the allowance of a supersedeas resting in its discretion. *State v. Scott* 98
5. Mandamus will lie in a proper case to compel fixing the amount of the penalty of a supersedeas bond to be given on appeal from an order confirming a sale of real estate. *State v. Fawcett* 393

Party.

6. In action to compel an assessor to assess property at its fair value, it is unnecessary to bring in any taxpayer as a party. *State v. Osborn* 415

Peremptory Mandamus. Notice.

7. A peremptory writ of mandamus will issue only when it is made to appear that the law specially enjoins on the defendant the performance of the act which it is sought by the writ to compel. *State v. Whipple* 650
8. The legislature can not authorize mandamus against a private corporation or its officers without notice. *Horton v. State* 701
9. No person can be deprived of his property or other valuable right by jurisdictional power without notice, and a reasonable opportunity to be heard. *Idem.*
10. The statute authorizing the issuance of a peremptory mandamus without notice has reference to cases in which the refusal of a public officer to discharge an official duty is so obviously inexcusable and the necessity for prompt action so imperative, that notice must be dispensed with in order to prevent a failure of justice. *Idem.*

Pleading.

11. When the trial court has treated a verified petition for a writ of mandamus as a pleading, it will be so considered by this court upon review. *Idem.*
12. Under section 652 of the Code, the plaintiff in the trial of a mandamus proceeding may avail himself of any valid objection to new matter contained in the answer as to its sufficiency, or by proof in denial or by way of avoidance. *State v. Commissioners of Cass County* 567

Mandate. See MANDAMUS, 3.

Married Woman. See HUSBAND AND WIFE.

Marshaling Assets and Securities.

1. The doctrine of marshaling securities applies only to cases in which two or more creditors are seeking to satisfy their claims out of property of the same common debtor. *Citizens State Bank v. Iddings*..... 709
2. Where a creditor has two common debtors, not sustaining to each other the relation of principal and surety, one of them can not claim exemption from liability on the ground that the other ought to be first sued and compelled, if possible, to satisfy the debt. *Idem.*

Master and Servant. See NEGLIGENCE.

1. Evidence in action for injuries to brakeman *held* to sustain verdict for plaintiff. *Missouri P. R. Co. v. Fox*..... 531
2. In an action by employee a finding in his favor because of dangerous condition of premises can only be had where it affirmatively appears that employer had failed to exercise reasonable care. *Swift v. Holoubek*..... 784
3. An employee of a railroad company who has accepted from it damages for injuries sustained can not recover benefit for such injury from the relief department of such corporation under an agreement of membership releasing the company from liability in case of such acceptance. *Clinton v. Chicago, B. & Q. R. Co*..... 692

Maxim.

1. He who invokes equity must do equity. *Frenzer v. Richards*.. 131
2. The law aids the vigilant, not the indolent and listless. *Farrell v. Bouck*..... 771

Measure of Damages. See PRINCIPAL AND AGENT, 1.

Mechanic's Lien.

1. List of Nebraska decisions concerning mechanics' liens in all the reports from 1 to 59, inclusive, on pages 88 to 90.
2. When one furnishes materials for the erection of a house with actual knowledge of an outstanding unrecorded mortgage, his lien for materials is junior to the lien of the mortgage. *Bradford v. Anderson*..... 368
3. The right to a mechanic's lien in favor of a principal contractor is based upon contract, and is for the purpose of securing debts due thereunder. *Rust-Owen Lumber Co. v. Holt* 80
4. Under our statutes a mechanic's lien can not be created upon the land of a married woman for work done or material furnished in improving such lands, under a contract with her husband, acting merely for himself. *Idem.*

Mechanic's Lien—*concluded.*

5. Where the husband places improvements upon the wife's realty, neither knowledge on her part or the mere failure to dissent or her occupancy of the premises with him establishes the agency of the husband to charge her separate estate or fasten upon it a mechanic's lien. *Idem.*

Medicine. See PHYSICIAN AND SURGEON.

Mistake. See EQUITY.

Money Paid.

Plantiff, a freight agent of a railroad company, delivered to defendant, upon his promise to pay therefor, freight upon which was an unpaid balance of charges. *Held* that on plaintiff being compelled to pay the charges to company, defendant became liable to plaintiff therefor. *Grand Island Mercantile Co. v. McMeans* 373

Monopoly.

A contract of purchase the main purpose of which is to secure a monoply, is contrary to public policy and will not be enforced. *Wittenberg v. Mollyneaux* 583

Mortgage. See CHATTEL MORTGAGE. EQUITY. EXECUTION. MECHANIC'S LIEN, 2.

Notice.

1. Actual knowledge of the existence of a real estate mortgage is as binding as constructive notice thereof. *Bradford v. Anderson* 368
2. An agreement to pay a debt although evidenced by a recorded instrument is not conclusive in favor of a party who, in purchasing a lien against property, has acted on the faith of the record. *Hare v. Murphy* 135
3. Evidence examined, and *held* sufficient to sustain the finding that the mortgage debt was paid in full to the duly authorized agent of the owner of the note and mortgage. *Bangs v. Gray* 457

Receiver.

4. In considering the question of the appointment of a receiver in an action to foreclose a mortgage, the collectibility of a deficiency judgment is immaterial. *Waldron v. First Nat. Bank* 245
5. Where mortgaged property is probably insufficient to discharge the debt, the court may, in an action to foreclose the mortgage, appoint a receiver on the application of the mortgagee. *Idem.*
6. In an action to foreclose a real estate mortgage, the district court has power to appoint a receiver, whose duty it is, ordinarily, to rent the mortgaged property. The duty to rent implies authority to reduce rents, within proper restrictions, at the expiration of a lease. *Northwestern Mutual Life Ins. Co. v. Burr* 467

Mortgage—*concluded.*

Release. Penalty.

7. One who, through culpable inertness, fails to inquire when it is his duty to do so, is not entitled to have a release of mortgage set aside on the ground of mistake. *Farrell v. Bouck* 771
8. Before a mortgagor can recover the penalty prescribed by section 29, chapter 73, Compiled Statutes, 1897, for failure to discharge a real estate mortgage after full payment thereof, a prior demand upon the mortgagee or his agent for such release or discharge must have been made. Such demand is a condition precedent to a right of action. *Bangs v. Gray* 457

Remission of Rent.

9. In a foreclosure proceeding a court has no power to remit rent already due for the benefit of a solvent tenant. *Northwestern Mutual Life Ins. Co. v. Burr* 476

Motion. See APPEAL AND ERROR. CRIMINAL LAW, 7. NEW TRIAL. PLEADING. TRIAL.

Municipal Corporation. See INJUNCTION. SCHOOLS AND SCHOOL DISTRICTS. TAXATION.

Action. Appearance. Service. Liability.

1. An attorney of a municipal corporation, without authority therefor, can not waive the issuance and service of summons and enter the voluntary appearance of the defendant. *Chicago, B. & Q. R. Co. v. Hitchcock County* 722
2. A chairman of the board of village trustees has no authority to waive process and enter the voluntary appearance of the defendant village without authority of the board. *Idem.*
3. The service of process upon a municipal corporation as provided by section 57, chapter 14, article 1, Compiled Statutes, is upon the corporation and not upon its individual representative. *Idem.*
4. An action can not be maintained against a city for an act done by its officers outside the actual and apparent scope of their authority. *Wabaska Electric Co. v. City of Wymore* .. 199
5. The question of ratification or adoption of the unauthorized acts of the officers of a municipal corporation is one of fact for the jury. *City of Omaha v. Croft* 57

Assessment. Equalization. Notice.

6. In levying assessments, the record must show affirmatively a substantial compliance with all essential conditions of the statute. *Medland v. Linton* 249
7. In making assessments for benefits received it is presumed that the owners are required to contribute only in proportion as their property is specially benefited. *Idem.*

Municipal Corporation—*concluded.*

8. An unplatted tract of land within the limits of a city is subject to taxation for special benefits received, the same as though it were platted. *Idem.*
9. The doctrine of special assessments for benefits applies especially to property in cities, and a city has the power to levy special taxes for benefits received by opening a street. *Idem.*
10. A notice of the sitting of a city council as a board of equalization to consider a proposed special assessment is sufficient if it comply substantially with the statute. *Idem.*

Improvement of Streets. Abutting Owners.

11. The presentation to the city authorities of a city of the first class having less than 25,000 inhabitants of a petition signed by persons owning a major part of the foot frontage of the lots abutting upon the portion of the street to be improved, is a jurisdictional prerequisite to authorize such city by ordinance to charge the entire cost of paving such street against property abutting thereon. *Henderson v. City of South Omaha* 125

Lighting Streets.

12. A city of the second class, having less than 5,000 inhabitants, has no authority to regulate the rates and charges which an electric light company may charge its customers for lights. *Wabaska Electric Co. v. City of Wymore* 199

Ultra Vires.

13. A municipal corporation is not civilly liable for the acts of its officers when performed *ultra vires. City of Omaha v. Croft* 57
14. In attempting to legislate upon matters beyond its jurisdiction, the governing body of a city does not represent the city; does not act as its agent, nor by color of its authority. *Wabaska Electric Co. v. City of Wymore* 199

Trespass.

15. A municipal corporation is liable for unauthorized acts of its officers, constituting trespass, when adopted and ratified by other officers having authority. *City of Omaha v. Croft* 57
16. A municipal corporation is liable in damages for the trespass of its officers in seizing private property in the opening or widening of streets, if the statutory condemnation proceedings are not complied with. *Idem.*

Murder. See HOMICIDE.

Names.

1. The names "Schmitt & Bro. Co." and "Schmidt & Bro. Co." are *idem sonans. Schmitt & Bro. Co. v. Mahoney* 20
2. Ordinarily, all actions must be prosecuted and defended in

Names—*concluded.*

the true names of the parties thereto, and not by the initials or contractions of the first or Christian name. *Richardson v. Opelt* 180

See BILLS AND NOTES.

Necessaries. See HUSBAND AND WIFE.

Negligence. See HIGHWAYS. INSTRUCTIONS. MASTER AND SERVANT.

1. Where a person is confronted with an obvious peril he is required to exercise care and caution commensurate with the peril, to be determined by the conduct of an ordinarily prudent man under like circumstances. *Missouri P. R. Co. v. Fox* 531
2. Negligence will not be presumed in the absence of facts from which its existence might reasonably be inferred. *Swift & Co. v. Holoubek* 784
3. Evidence in action for negligence found sufficient to support verdict. *Idem.*
4. Evidence against telephone company for injury caused by stump of telephone pole left in highway *held* to support verdict for plaintiff. *Nebraska Telephone Co. v. Jones* 396

Instructions.

5. Giving of two instructions copied in opinion *held* erroneous. *Swift & Co. v. Holoubek* 784
6. The refusal to give the instruction requested copied in the opinion *held* not to be erroneous. *Idem.*
7. An instruction on contributory negligence examined, and, although technically incorrect, *held* to be without prejudice. *Missouri P. R. Co. v. Fox* 531
8. An instruction regarding contributory negligence may be properly refused, when it in effect states that contributory negligence would be imputed to an individual who did not exercise the greatest care and caution that an ordinarily prudent man would exercise under like circumstances, and when, grouping a number of acts together, it calls attention to facts and circumstances to be considered, of which there is no proof of negligence, and omits an important fact connected with the transaction to which it relates. *Idem.*

Negotiable Instruments. See BILLS AND NOTES.

Newspaper. See CONTEMPT.

1. Newspaper admissible as evidence in action for malicious prosecution. *Scott v. Flowers* 675
2. The principal distinguishing feature of a newspaper, in contemplation of the statute, is that it be a publication appearing at regular or almost regular intervals at short periods of time, as daily or weekly, usually in sheet form and containing news, that is, reports of recent occur-

Newspaper—*concluded.*

rences, political, social, moral, religious, and items of a varied character, both local and foreign, intended for the information of the general reader. *Hanscom v. Meyer*..... 68

3. A weekly publication, circulating among various classes of people within the county and state, its printed matter consisting principally of legal notices and information regarding the courts, and of legal matters in general, and also advertising of a miscellaneous character, literature of a general kind, and a limited amount of general news of current events, is a newspaper within the meaning of section 497 of the Code, and the fact that it also makes a specialty of some particular class of business, and conveys intelligence of particular interest to those engaged in such business, will not deprive it of its general classification as a newspaper within the meaning of the statute. *Idem.*

New Trial. See APPEAL AND ERROR.

1. The district court has authority, for one year after rendering final judgment in a case, to entertain an application for a new trial on the ground of newly-discovered evidence, and grant the relief demanded, although the cause may be pending for review in the supreme court. *Hellman v. Adler* 580

Motion. Presiding Judge.

2. A motion for a new trial is proper only where there has been a trial of an issue of fact on the pleadings. *Horton v. State* 701
3. A judge other than the one who tried the case may pass on a motion for a new trial. *Goos v. Fred Krug Brewing Co.*. 783

Newly-Discovered Evidence.

4. A new trial will not be granted for newly-discovered cumulative evidence not of such weight as would probably change the result of the trial. *Hoffine v. Ewings*..... 729
5. A party desiring to obtain a new trial on the ground of newly-discovered evidence must make his application to the district court within one year from the date of the judgment in that court. *Hellman v. Adler*..... 580
6. A new trial on the ground of newly-discovered evidence is properly denied where no diligence was shown. *Nebraska Telephone Co. v. Jones*..... 396
Hoffine v. Ewings..... 729
7. A motion for a new trial on the ground of newly-discovered evidence should, ordinarily, be supported by the affidavit of the party making the application, as well as by the affidavit of his attorney; and the affidavit of the new witness should also be produced or its absence satisfactorily accounted for. *Nebraska Telephone Co. v. Jones*..... 396

Notes. See BILLS AND NOTES.

Notice. See ATTORNEY AND CLIENT. EXECUTION. MANDAMUS, 8-10. NEWSPAPER.

Effect of actual notice of unrecorded mortgage. See MORTGAGE, 1.

Oath.

——— of judge. See OFFICE AND OFFICERS, 9.

Office and Officers. See COUNTY ATTORNEY. COUNTY JUDGE. INJUNCTION, 6. JUSTICE OF THE PEACE. MANDAMUS, 10. MUNICIPAL CORPORATION, 1-5. QUO WARRANTO. STATE AND STATE OFFICERS.

De Facto Officers.

1. The acts and judgment of an officer *de facto* are as valid and binding as though performed and rendered by an officer *de jure*. *Dredla v. Baache*..... 655

Action on Bond.

2. A judgment against an officer is conclusive evidence against his sureties only in case of agreement by them to abide the judgment of their principal. *Barker v. Wheeler*..... 470
3. A judgment against an officer is *prima facie* evidence against his sureties when sued upon an official bond, both actions being grounded upon the same alleged delinquency. *Idem.*
4. In an action against the sureties on an official bond for money converted by their principal during his official term, where the answer is a general denial, it is error to exclude evidence tending to show the date when the conversion actually occurred. *Idem.*
5. In an action on an official bond an allegation of its approval is unnecessary. *Fire Ass'n of Philadelphia v. Ruby*... 216
6. In an action upon an official bond an allegation that the bond was executed as required by law is sufficient to cover every act essential to the making and approval of the bond and will support judgment against the officer and his sureties. *Idem.*

Mandamus.

7. When the law imposes a duty upon a public officer to do an official act at a particular time, the obligation is, ordinarily, a continuing one, and the courts will, when it is practicable, coerce performance after the appointed time has gone by. *State v. Cornell*..... 694

Privity with Predecessor.

8. A public officer is regarded as being in privity with his predecessor when both derive their power from the same source. *State v. Kennedy*..... 300

Official Oath.

9. A judge in qualifying for office is required to take the oath prescribed by section 1, article 14 of the constitution. *Duffy v. State* 812

Office and Officers—*concluded.*

Qualification.

10. Where a judge fails to take the constitutional oath within the time prescribed, because of mistake as to the proper official oath, and soon thereafter subscribes to the proper oath, the failure does not forfeit the office. *Idem.*
11. Where an officer elect presents his official bond, in all respects as required by law, within the statutory time, failure of the approving body to act thereon until after the time limited is not a cause of forfeiture of the office. *Idem.*

Vacancy.

12. The provisions for filling vacancies, in a law creating an office, control those of general laws as to vacancies. *State v. County Commissioners of Saline County* 275
13. Where an individual in the prosecution of a right does all the law requires him to do and fails to attain such right by the neglect or misconduct of a public officer, the law will protect him. *Duffy v. State* 812

Omaha Mercury. See *Hanscom v. Meyer*, 68.

Ordinance. See *City of Omaha v. Croft*, 57. *Henderson v. City of South Omaha*, 125.

Parens Patriae. See *Scott v. Flowers*, 675. *St. James Orphan Asylum v. Shelby*, 796.

Partition.

In partition of real estate the court may allot particular portions of the land to particular individuals. *McClave v. McClave* 464

Partnership.

1. When partnership property is in the hands of a receiver it is in the custody of the law, and is to be administered by the court for the benefit of all the firm creditors. *Veith v. Ress* 52
2. A petition which shows that a partnership is insolvent, that there is dissension between the partners, probability of waste and necessity for an accounting and dissolution, states facts sufficient to warrant the court in taking cognizance of the case. *Idem.*
3. A court may appoint a receiver to take charge of the partnership assets where it appears that the partnership is insolvent, that there is dissension between the partners, probability of waste, and necessity for an accounting and dissolution. *Idem.*

Party. See APPEAL AND ERROR. INTERVENTION.

1. Assent to contract. See CONTRACT, 4.
2. Consent to jurisdiction. See COURTS, 6.

Party—*concluded.*

3. ——— concluded by judgment. See JUDGMENT, 6-9.
4. ——— entitled to appeal. See WILL, 1.
5. A person who files a complaint in a disbarment proceeding is in no sense a party to an action, but a friend of the court. *Morton v. Watson*.....672, 674
6. Under the provisions of section 45 of the Code a party may continue as plaintiff and prosecute to final judgment after having transferred his interest pending the litigation. *Schaberg v. McDonald* 493

Payment. See JUDGMENT, 15. MONEY PAID. MORTGAGE, 3. SUBROGATION.

1. Instruction examined, and *held* not to state the law correctly. *Chamberlain Banking House v. Woolsey*..... 516
2. Where, when mortgaged property is sold and the debt is transferred to the purchaser, a new note and mortgage are executed, the original note and mortgage being retained by the creditor, the new note and mortgage, in the absence of express agreement, will not effectuate payment. *Idem.*
3. Where mortgaged property is sold, the debt transferred to the purchaser and a new note and mortgage are executed, the original note being canceled and surrendered, the presumption is that the new note and mortgage was in payment of the old one, and the burden is upon the creditor to prove to the contrary. *Idem.*

Penalty. See MORTGAGE, 8. PHYSICIAN AND SURGEON.

Personal Injury. See HIGHWAY. MASTER AND SERVANT. NEGLIGENCE.

Physician and Surgeon.

1. One who, without complying with the statute establishing a state board of health and prohibiting the practice of "medicine, surgery and obstetrics" without a license, practices medicine is liable to the penalty prescribed by such. *Little v. State* 749
2. One who practices what is known as osteopathy without obtaining a certificate from the state board of health is a practitioner of medicine as defined by article 1, chapter 55, Compiled Statutes, and is liable to the penalty prescribed for practicing without a license. *Idem.*
3. The law authorizing the state board of health to issue certificates to physicians and surgeons is a police measure. It was not intended by that act to protect medical schools or medical practitioners from competition. *Lincoln Medical College v. Poynter*..... 228
4. An incorporated medical college can not maintain an action to restrain the state board of health from issuing a certifi-

Physician and Surgeon—*concluded.*

cate under article 1, chapter 55, Compiled Statutes, 1899, licensing a physician and surgeon to practice medicine in this state. *Idem.*

5. After the state board of health has placed a construction upon the law under which it is authorized to issue certificates to physicians and surgeons (Compiled Statutes, 1899, ch. 55, art. 1), injunction will not lie to restrain the issuance of a certificate in accordance with such decision. *Idem.*

Pleading. See ADVERSE POSSESSION. APPEAL AND ERROR. ATTORNEY AND CLIENT, 4. BANKS AND BANKING. CORPORATION. EJECTMENT, 2. FRAUDULENT CONVEYANCE. HUSBAND AND WIFE, 6. INDICTMENT AND INFORMATION. INJUNCTION, 7. PARTNERSHIP, 2. REPLEVIN. TROVER.

1. A pleading should state facts and not mere conclusions. *Wabaska Electric Co. v. City of Wymore* 199
State v. Osborn 415

2. It is not error to refuse to receive evidence of facts admitted by the pleadings. *Wittenberg v. Mollyneaux* 583

Allegation Undenied.

3. All material facts pleaded in an answer, not denied by a reply, must be taken as true. *Harlan County v. Hogsett* 362

Judgment on Pleadings.

4. When a party files a motion for a judgment on the pleadings after the jury is impaneled and sworn, the pleading will be liberally construed. *Butts v. Kingman* 224

Petition.

5. Petition in quo warranto proceeding examined and *held* to state but one cause of action. *Duffy v. State* 812

6. A petition which calls for the foreclosure of a mortgage and for a personal judgment in case of a deficiency states but one cause of action. *Richardson v. Opelt* 180

7. A petition which is attacked for the first time in the appellate court, on the ground that it does not state a cause of action, will be liberally construed. *Omaha Nat. Bank v. Kiper* 33

8. Under allegation in petition that qualified voters of district have never voted by a majority vote to change a schoolhouse site, *held* such allegation is insufficient to admit evidence that a person illegally voted at such meeting. *McLain v. Maricle* 359

Reply. General Denial.

9. A reply which states that an answer does not state facts sufficient to constitute a defense to plaintiff's cause of action stated in his petition, is not a denial of the matters pleaded in the answer. *Sutton v. Sutton* 400

Pleading—*concluded.*

10. In an action for alleged conversion of money neither payment nor accord and satisfaction can be shown under a general denial. *Barker v. Wheeler* 470

Preferred Creditor. See CORPORATION, 11. FRAUDULENT CONVEYANCE, 5.

Presumption. See APPEAL AND ERROR. EVIDENCE, 16, 17. NEGLIGENCE, 2.

Principal and Agent. See ATTORNEY AND CLIENT. CORPORATION.

1. In case a debt is lost through the negligence of a collecting agent the measure of damages is the actual loss resulting from such agent's omission of duty. *Omaha Nat. Bank v. Kiper* 33
2. A contract, to be binding upon a principal when executed by another person, must be made in the name of the principal. *Persons v. McDonald* 452
3. Where one contracts in his own name, subscribing himself as attorney for his principal, the contract is the obligation of the attorney. *Idem.*
4. A contract, even though signed by the agent individually, will be held to be the contract of the principal, if it appear by its terms that it was intended and executed as the contract of the principal. *State v. County Commissioners of Cass County* 566

Principal and Surety. See INJUNCTION, 14. OFFICE AND OFFICERS.

Probate Court. See COUNTY COURT.

Process. See APPEARANCE. MUNICIPAL CORPORATION, 1-3.

——— defective for want of seal. See EXECUTION, 23.

Public Policy. See CONTRACT. MONOPOLY.

Quo Warranto.

Consent of County Attorney.

Where the county attorney appears of counsel for the relator in a quo warranto proceeding, such fact is sufficient to show that the action is brought with his consent, as required by section 1, chapter 71, Compiled Statutes, 1899. *Duffy v. State* 812

Rape.

1. Evidence *held* sufficient to establish the crime of rape. *Cardwell v. State* 480
2. Instruction copied in opinion examined, and found applicable, and to correctly state the law. *Idem.*
3. Statements made by the prosecutrix in a conversation with, and in the presence of, the defendant regarding the alleged offense, *held* properly admissible in evidence. *Idem.*

Rape—*concluded.*

4. In a prosecution for rape it is competent for the state to prove that the prosecutrix made complaint of the injury to others immediately after the alleged offense. *Welsh v. State* 101
5. In a prosecution for rape it is not reversible error to inform the jury that they are at liberty to take into consideration the physical condition of the prosecutrix at the time of the alleged assault, in arriving at their verdict. *Idem.*

Ratification. See MUNICIPAL CORPORATION.

Receiver. See APPEAL AND ERROR. BANKS AND BANKING. MORTGAGE, 4-6.

1. An order confirming sale of realty by receiver is appealable and may be superseded. *State v. Fawcett*..... 393
2. A sale made by a receiver of a national bank, under an order of court, is a judicial sale and its confirmation has the force and effect of a judgment, and is not subject to a collateral attack. *Schaberg v. McDonald*..... 493
3. A court has power to appoint a receiver where the parties to a suit waive the statutory notice and consent to the appointment. *Veith v. Ress*..... 52
4. An attorney representing parties interested in the property being administered by a receiver is not a proper person to serve as legal advisor for the receiver where the interests involved are, or may be, conflicting. *Idem.*
5. A creditor who enters his appearance in a receivership case and invokes the powers of the court in his behalf with respect to the execution by the receiver of his trust, can not afterwards be heard to object to the jurisdiction of the court. *Idem.*

Record.

1. Transcript of ———. See APPEAL AND ERROR.
2. There is no law requiring or authorizing the registration of personal contracts to pay debts. *Hare v. Murphy*..... 135
3. The purpose of the registry law is to furnish record evidence of the state and condition of land titles. *Idem.*

Reformation of Instruments.

1. A contract of insurance which does not express the real intention of the parties thereto, may be reformed. *Cook v. Westchester Fire Ins. Co*..... 127
2. A deed intended to operate as a conveyance of land but by mistake of the scrivener made testamentary may be reformed. *Pinkham v. Pinkham*..... 600
3. A deed founded upon a consideration to be paid to a third party therein named, and for labor expended on the premises conveyed, and for care and support of the grantor, is not a voluntary instrument and it may be reformed in a court of equity to cure mistakes. *Idem.*

Reformatory.

1. State industrial school is a reformatory and not a penal institution. *Scott v. Flowers*.....675, 683
2. A complaint under section 5, article 1, chapter 75, Compiled Statutes, charging no crime but incorrigibility merely, states no cause for commitment to the industrial school. *Idem.*
3. Section 5, article 1, chapter 75, Compiled Statutes, to the extent that it prescribes an age greater than that fixed by section 12, article 8, of the constitution for commitment to reform schools, is unconstitutional and void. *Idem.*
4. A youth who is incorrigible is "growing up in crime" within the meaning of section 12, article 8, of the constitution, and a statute providing for his commitment to the reform school, is not for that reason unconstitutional. *Idem.*
5. That part of section 5, article 1, chapter 75, Compiled Statutes, which provides for the commitment to the state industrial school of any boy or girl under the age of eighteen years "who for want of proper parental care is growing up in mendicancy and vagrancy, or is incorrigible," contravenes section 12, article 8, of the constitution and is void. *Baker v. State*..... 691

Registration. See RECORD.

Rents and Profits. See MORTGAGE, 9.

Replevin.

1. A plaintiff in replevin who has given the statutory bond, is entitled to the posssession of the property in dispute during the pendency of the action. *Jenkins v. State*..... 205
2. A finding in replevin of a general ownership in the defendant is not sustained by proof of a special interest in the property. *Schmitt & Bro. Co. v. Mahoney*..... 20
3. In replevin where the value of the property is stated in the petition and admitted by the answer, the question of value is not open to proof. *Idem.*
4. Under a general denial in a replevin suit the defendant may prove any matter of defense as that he has a special interest in and right to the immediate possession of the property by virtue of a chattel mortgage. *Idem.*
5. Where a replevin action is dismissed on motion of the defendant for jurisdictional defects, he is not entitled by virtue of section 1041 of the Code to have his right of property or right of possession determined in that action. *Bolin v. Fines* 443
6. A plaintiff in replevin who fails to prosecute his suit, or against whom judgment has been entered, is not entitled to introduce evidence upon the hearing accorded the defendant under the provisions of section 1041 of the Code to determine the latter's right of property or right of

Replevin—*concluded.*

possession of chattels taken under the writ and delivered to plaintiff. *Idem.*

Reports.

——— of supreme court distributed to judges. See COUNTY JUDGE, 4.

Res Adjudicata. See JUDGMENT.

Restitution. See APPEAL AND ERROR.

Restraint of Trade. See CONTRACT.

Review. See APPEAL AND ERROR.

Revivor. See ABATEMENT AND REVIVOR.

Riparian Rights. See WATER AND WATER COURSES.

Rules of Court. See APPEAL AND ERROR.

Sale. See RECEIVER. TAXATION. VENDOR AND VENDEE.

School and School District.

1. To remove a schoolhouse a majority of those present at the meeting must cast their votes in favor of the proposition. *McLain v. Maricle* 353
2. Under the provisions of section 4, subdivision 2, chapter 79, 1899, *held* that the wife of a person owning a homestead was not, by reason of her homestead interest, an authorized elector in such district. *Idem.*
3. Resident taxpayers of a district are interested so as to maintain injunction proceedings to restrain officers of district from removing a schoolhouse to another location. *Idem.*
4. The question of relocating the site of a schoolhouse and that of constructing a new building are independent of each other and within the discretion of the electors and favorable action upon the former is not a necessary condition to favorable action upon the latter. *Eikenbary v. Porter* 75, 78
5. The exercise by electors of a school district of the power and authority given them by the legislature to levy taxes for building purposes, can not be interfered with by the courts solely on the ground that such action may be regarded as unwise or improvident. *Idem.*
6. A bare majority vote to change a schoolhouse site is void. *Zimmerman v. State* 633
7. Unless a school district includes within its limits an incorporated city having more than 1,500 inhabitants, it is not subject to the provisions of subdivision 14, chapter 79, Compiled Statutes, 1895. *Chicago, B. & Q. R. Co. v. School District* 164
8. Under section 24, subdivision 14, chapter 79, Compiled Statutes, 1895, the aggregate school tax for all school purposes in any one year is restricted to a sum not exceeding

School and School District—*concluded.*

two per cent on all the taxable property of the district. *School District of Central City v. Chicago, B. & Q. R. Co.*..... 454

9. Taxes levied at the annual school meeting held just prior to the commencement of the school year constitute a fund against which warrants may be drawn. *Zimmerman v. State* 633

10. The officers of a school district can not refuse to execute a valid order of the district electors involving the expenditure of money, on the ground that the taxes levied for the expenses of the current year can not, until they have been collected, be made the basis of contracts of such expenses. *Idem.*

11. Where the electors of a school district have, in a lawful manner, ordered the removal of their schoolhouse, and the funds in the treasury, together with the taxes levied for current expenses, are sufficient to meet all district obligations incurred or contemplated, the order is valid and its execution will be enforced by mandamus. *Idem.*

12. Sections 1 and 3, chapter 62, Session Laws, 1899, providing that pupils residing outside the limits of a high school district may attend such high school free of charge, and that a certain sum shall be paid by the county as compensation therefor, is inimical to sections 1, 4 and 6 of article 9 of the constitution. *High School District v. Lancaster County*.. 147

Set-Off and Counter-Claim.

In an action to recover back money obtained by executing a judgment, which was afterwards reversed, the defense of set-off is not available. *Hier v. Anheuser-Busch Brewing Ass'n* 320

Sheriff. See EXECUTION, 21.

Splitting Cause of Action. See ACTION.

State and State Officers. See COURTS. JUDGMENT, 19.

1. The deputy food commissioner, created by chapter 35, Session Laws, 1899, is an officer of the state government, and not a mere employee. *State v. Cornell*..... 276

2. The legislative authority to draw money from the state treasury for the satisfaction of a just claim against the state does not become extinguished by the wrongful refusal of auditing officers to exercise their functions within the proper time. *Idem*..... 694

3. The constitutional restriction that bills making appropriations for salaries of state officers shall contain no other provision extends to all officers of the state, whether their salaries are fixed by the constitution or by the legislature. *Idem* 276

Statute of Limitations. See LIMITATION OF ACTION.

Statutes. See CONSTITUTIONAL LAW.

Amendments.

1. A purely amendatory act must set out the section as amended, and contain a provision for the repeal of the old section. *State v. Byrum* 384
2. Where the title to a bill is to amend a particular section, no amendatory legislation not germane to the subject-matter of the original section proposed to be changed is permissible. *Armstrong v. Mayer* 423
3. The act of 1899 (Session Laws, ch. 31) amending section 3, chapter 28, Compiled Statutes, 1897, entitled "Fees," does not amend or change section 1 of said chapter; nor does such amendatory act trench upon or amend section 43, chapter 19, Compiled Statutes, 1899, respecting the appointment of deputies by clerks of the district court. *State v. Frank* 327

Construction.

4. A statute in derogation of the equal rights of all, is to be strictly construed. *Y. M. C. A. of Omaha v. Douglas County* .. 642
5. In construing a statute, words should be given their usual meaning. *State v. Byrum* 384
6. In construing statutes, effect should be given to the intention of the legislature. *Little v. State* 749
7. "May" used in statutes regulating the duties of public officers is not always tantamount to "shall." *Scott v. Flowers* 675, 685
8. Where the invalid portion of an act formed an inducement to the passage of the residue, the whole act falls. *Crawford Co. v. Hathaway* 754
9. A statute is invalid which is not read in each house of the legislature on three different days. *State v. Burlington & M. R. R. Co* 741

Curative Act.

10. The purpose of the curative act of 1895 (Session Laws, ch. 32) was to legalize findings, orders, judgments and decrees made under the provisions of the decedent's law, which was held to be unconstitutional in *Trumble v. Trumble*, 37 Nebr., 340. *Motley v. Motley* 593

Pleading. Evidence.

11. The enrollment, authentication and approval of an act of the legislature is *prima facie* evidence of its due enactment. *State v. Frank* 327
12. The legislative journals may be looked into for the purpose of ascertaining whether a law was properly enacted. *Idem.*
13. The silence of the legislative journals is not conclusive evidence of the non-existence of a fact, which ought to be recorded therein, regarding the enactment of a law. *Idem.*

Statutes—*continued.*

14. Where the legislative journals are defective or incomplete it may be shown by extrinsic evidence that on the final passage of a bill the yeas and nays were taken and duly recorded. *Idem.*
15. When the legislative journals are defective, mutilated or incomplete, their silence will not, as against the enrolled bill, be taken as evidence that the yeas and nays on the final passage of the bill were not recorded. *Idem.*
16. The General Statutes of 1873 are presumptive but not conclusive evidence of enactment of a law published therein. *State v. Byrum* 384
17. When there is a variance between an enrolled law and a printed publication thereof, the enrolled act governs and controls. *Idem.*
18. An enrolled bill in the office of the secretary of state is only *prima facie* evidence of its passage. *State v. Burlington & M. R. R. Co.* 741
19. Where the legislative journals unequivocally contradict the evidence furnished by the enrolled bill, the former will control. *Idem.*
20. One can not successfully rely upon a statute, when he at the same time insists that a material portion thereof is unconstitutional, where it is obvious that the part claimed to be invalid formed an inducement to the passage of the remainder. *Crawford Co. v. Hathaway* 754

Special Legislation.

21. A law, general in character, although affecting but one city or county, is not violative of the provision of the constitution against special legislation. *State v. Frank* 327

Subjects and Titles.

22. The title to a legislative act is a part thereof, and must clearly express the subject of legislation. *State v. Burlington & M. R. R. Co.* 741
23. Section 17, article 1, chapter 55, Compiled Statutes, relating to practice of medicine, is within the purview of the title of the act. *Little v. State* 749
24. "Surgery and obstetrics," as those terms are popularly understood, are embraced in the title of an act to regulate the art of healing. *Idem.*
25. Bills making appropriations for salaries of officers of the state government are prohibited by section 19, article 3, of the constitution from containing a provision on any other subject. *State v. Cornell* 276

Valid Enactments.

26. Section 2, chapter 78, Session Laws, 1899, authorizing irrigation districts to use bonds instead of the proceeds thereof, is a valid enactment. *Baltes v. Farmers Irrigation District* 310

Statutes—*concluded.*

27. The act of 1899 (Session Laws, ch. 31) amending section 3, chapter 28, Compiled Statutes, 1897, entitled "Fees," limits the compensation which the clerk of the district court may receive for his services, is germane to the section amended, and its provisions are within its title. *State v. Frank* 327

Void Enactments.

28. Chapter 60, Session Laws, 1887, is void, as the act as enrolled was not passed by the legislature in the mode prescribed by section 11, article 3, of the constitution. *State v. Burlington & M. R. R. Co.* 741
29. Chapter 82, Session Laws, 1883, which attempted to amend section 1030 of the Code of Civil Procedure, relating to forcible entry and detainer, is void as inimical to section 11, article 3, of the constitution. *Armstrong v. Mayer* 423
30. The act of 1875 (Session Laws, p. 2) amendatory of certain sections of the Criminal Code including section 208, relating to adultery, is invalid, since it contained no provision for the repeal of the sections amended. *State v. Byrum* 384
31. Section 12 of article 35, Session Laws, 1899, making appropriation for the salary of deputy food commissioner, is inimical to section 19, article 3, of the constitution, since other portions of said act contain legislation upon another subject. *State v. Cornell* 276
32. That part of the statute relating to the state industrial school which provides for the commitment to such school of any boy or girl under eighteen years of age is unconstitutional. *Baker v. State* 691

Subrogation.

1. The holder of a tax sale certificate is subrogated to the rights of the public in any taxes he pays for the purpose of protecting his lien. *Adams v. Osgood* 779
2. Subrogation is enforced to subserve the ends of justice, but will not be applied when it will wrong an innocent party, and where the one invoking the doctrine has been grossly negligent. *Hayden v. Huff* 625

Supersedeas. See APPEAL AND ERROR. MANDAMUS, 4, 5.

Supreme Court Reports. See COUNTY JUDGE, 4.

Tacking. See ADVERSE POSSESSION.

Taxation. See MUNICIPAL CORPORATION. SCHOOL AND SCHOOL DISTRICT.

Distress Warrant. Mortgage. Lien.

1. A lien for taxes upon the property of the tax debtor is inferior to that of a chattel mortgage lien antedating the time the tax lien attaches. *Chamberlain Banking House v. Woolsey* 516

Taxation—*continued.*

2. A statutory lien for taxes due exists upon all personal property of the tax debtor from and after the tax lists are made and delivered to the county treasurer. *Idem.*
3. Where a sheriff levies distress warrants for delinquent taxes for several years upon property of the tax debtor, upon which a valid chattel mortgage exists, the seizure and sale of the property is wrongful and unauthorized to the extent and for the years the mortgage lien is prior and superior to the lien for delinquent taxes. *Idem.*

Enforcement.

4. The owner of a tax sale certificate may enforce his lien in the nature of a suit to foreclose a real estate mortgage. *Adams v. Osgood* 779
5. In a proceeding to compel an assessor to assess property for taxation at its fair value it is unnecessary to bring in any taxpayer of the taxing district as a party. *State v. Osborn* 415

Equalization. Notice.

6. Final action in making a special assessment can not be taken until there has been a sitting of the board of equalization for at least one day, from 9 A. M. until 5 P. M. *Medland v. Linton* 249
7. A board of equalization can not adjourn subject to call of chairman without published notice. *Idem.*
8. A meeting of a board of equalization *held* not to have been in accordance with law and a special levy of taxes made thereat invalid. *Idem.*
9. A city council sitting as a board of equalization must remain in session at least one day from 9 A. M. to 5 P. M., and during the hours advertised for its meeting. *Idem.*
10. The record of a special assessment for a local improvement must show affirmatively a substantial compliance with all the conditions essential to a valid exercise of the taxing power. *Idem.*

Evidence of Valid Tax.

11. An assessment and levy for general revenue are evidence of a valid tax. *Adams v. Osgood* 779
12. An admission by the plaintiff in a tax foreclosure proceeding that a certain tax was charged against his property and that he had made a tender for the purpose of redemption, is, in the absence of countervailing proof, sufficient to establish the validity of such tax. *Idem.*

Exemption.

13. Statutes providing for exemption of property from taxation are to be strictly construed. *Y. M. C. A. of Omaha v. Douglas County* 642
14. An intention to use property at some indefinite future

Taxation—*continued.*

time for a purpose exempting it from taxation, will not preclude its being taxed so long as occupied for some other purpose. *Idem.*

15. An association incorporated for educational, charitable and religious work can not successfully claim exemption from taxation for any of its property rented for business purposes because the rents are applied to the work of the association. *Idem.*

Name of Party. Clerical Error.

16. The primary evidence of the name of a party against whom taxes are assessed is the assessment roll or tax schedule which the party assessed is required to sign and verify. *Chamberlain Banking House v. Woolsey*..... 516

17. Where in transcribing assessments to the book to be returned by the assessor, a clerical error is committed in the name of the party assessed, the same may be corrected without notice. (Compiled Statutes, ch. 77, art. 2, sec. 1.) *Idem.*

Sale. Return.

18. Where no proper return of lands sold at public auction for taxes is made the county treasurer is without authority to dispose of real estate for taxes at private sale, and any sale thus made is invalid. *Medland v. Linton*..... 249

19. A legal private sale of real estate by the county treasurer for delinquent taxes can not be had without complying with section 112, chapter 77, article 1, Compiled Statutes, 1899, by filing with the county clerk a return as therein provided. *Idem.*

20. It is not a compliance with the statute requiring the county treasurer to make a return of tax sales to the county clerk for him to carry to the office of the county clerk the records of the treasurer's office showing such sale and to there certify such record and then return the same to his own office. *Idem.*

Valuation.

21. The valuation of property for taxation must be uniform. *State v. Osborn*..... 415

22. Except as otherwise provided by law the assessor is required to value property at its fair value. *Idem.*

23. The constitution of this state requires not only that the valuation of property for taxation, but the rate as well, shall be uniform. *High School District v. Lancaster County*.. 147

Void Sale. Purchaser. Subrogation. Interest.

24. Between tax sales that are void for mere irregularity and those void for want in the treasurer of authority to sell, the law makes no distinction. *Adams v. Osgood*..... 779

25. A void tax sale is effective as an assignment of the rights of the public to the purchaser. *Idem.*

Taxation—*concluded.*

26. The holder of a tax sale certificate is subrogated to the rights of the public in any taxes he pays for the purpose of protecting his lien. *Idem.*
27. A party claiming under an invalid sale of real estate for taxes can not recover the penalty of 20 per cent interest and attorney's fees. *Medland v. Linton* 249
28. Where parties claim a lien for taxes paid at illegal private sales, they are subrogated only to the rights of the county, and can recover interest only at the rate provided by statute for delinquent taxes. *Idem.*
29. A purchaser at an illegal private sale can recover interest on state and county taxes paid at the rate of 10 per cent per annum and on city taxes at the rate of 12 per cent. *Idem.*

Tender of Proof. See APPEAL AND ERROR.

Time.

A "week" means a period of time beginning on Sunday and ending on Saturday following, and, when a notice is required to be published beginning the first week of a certain month, *held* that if it is published first during the first full week of such month, beginning on Sunday and ending on Saturday, the requirements of the statutes are satisfied. *Medland v. Linton* 249

Torts. See MUNICIPAL CORPORATION.

Joint tort-feasors are jointly and severally liable for their wrongful acts. *Scott v. Flowers* 675

Trade Fixture. See FIXTURE.

Transcript.

——— of record. See APPEAL AND ERROR.

Trespass. See INJUNCTION. MUNICIPAL CORPORATION.

Trial. See APPEAL AND ERROR. CRIMINAL LAW. INSTRUCTIONS. JURY. WITNESS.

Evidence.

1. The test of the admissibility of evidence is upon the questions asked, rather than the answers returned. *Missouri P. R. Co. v. Fox* 531
2. An objection to the introduction in evidence of a written instrument signed by several persons, on the ground that it is "incompetent, irrelevant, and immaterial," is too general to call in question the due execution of the instrument or the genuineness of the signatures thereto. *Jewett v. Black* 173
3. Error can not be successfully predicated upon the admission of testimony, where the same line of testimony has

Trial—*concluded.*

been received in the cause without objection. *Scott v. Flowers* 676

Questions for Jury.

4. The jury are the triers of fact in a conflict of testimony. *Cardwell v. State* 480
Paxton v. State 763

5. When evidence is uncontradicted and reasonable men might draw different conclusions therefrom it is the province of the jury to say what is the proper inference to be drawn therefrom. *Brownell v. Fuller* 558

6. The evidence being contradictory as to whether the machinery by which plaintiff was injured was the same as that in general use, the question of negligence was for the jury. *Swift & Co. v. Holoubek* 784

Trial De Novo.

7. A trial *de novo* may be had where a case has been reversed and remanded generally. *Pinkham v. Pinkham* 600

Withdrawal of Issue.

8. A judgment will not be reversed for the refusal to give an instruction which withdraws from the jury a material issue raised by the pleadings and evidence. *Fulton v. Ryan* .. 9

Witness. Striking Out Answer.

9. Where an answer is not responsive it should be reached by a motion to strike out. *Missouri P. R. Co. v. Fox* 531

10. It is not proper practice to permit a witness to answer a question without objection and then move to have the testimony excluded. *Fulton v. Ryan* 9

Trover.

1. The petition examined and held to state a cause of action. *Butts v. Kingman* 224

2. One who has an interest in property which has been converted by another who obtained possession through a replevin suit, may maintain an action for conversion if he be a stranger to the replevin bond. *Idem.*

3. In an action grounded upon an alleged conversion of money, neither payment nor accord and satisfaction can be shown under a general denial. *Barker v. Wheeler* 470

4. A petition which alleges that plaintiff, as assignee, was in exclusive, open and notorious possession of property assigned for the benefit of creditors, which property was illegally converted by defendants, will resist a demurrer, even though the petition shows on its face that the deed of assignment was not filed for record for ten days after its execution. *Miller v. Waite* 431

Trust.

1. Terms of will under consideration construed to give trustee power to select some particular and definite charity as beneficiary. *St. James Orphan Asylum v. Shelby* 796
2. The doctrine of charitable uses, being a part of the common law, was transplanted into this state. *Idem.*
3. The provision for the administration of charitable trusts under the statute of 43 Elizabeth is not in force in this state. *Idem.*
4. Where a will confers discretionary powers upon a trustee, the exercise of such discretion will be deemed an expression of the will of the testator. *Idem.*
5. If power may be conferred upon a trustee to designate a charitable object for the testator's bounty, unlimited scope may be given regarding the object of the charity. *Idem.*
6. Where ample power is conferred upon a trustee to relieve a bequest of all objections arising from its indefiniteness, and no obstacle exists to the exercise of that power, courts will not interfere to prevent its exercise. *Idem.*
7. In a devise where a certain and ascertainable trustee is appointed, with full power to select the beneficiaries or designate the objects of the charity, and devise a plan for the application of the funds bestowed, the court will execute the charity through the trustee. *Idem.*

Ultra Vires. See MUNICIPAL CORPORATION.

Usury.

1. A borrower under a usurious contract, who pledged property as security for the loan and who has paid or tendered the principal of the loan, is entitled to the possession of the property pledged, divested of the lien. *Frenzer v. Richards* 131
2. It is a settled doctrine in this state that a borrower on a usurious contract will not be given affirmative relief by a court of equity unless he first tender the principal and lawful interest. *Idem* 134

Vendor and Vendee.

1. A purchaser of real estate acquires only the title of his grantor unless he bought on the faith of an apparent ownership, on which he had a right to rely. *First Nat. Bank v. Gibson* 767
2. One who has bought property from the apparent, but not the real owner thereof, must in a contest with the real owner, allege and prove a *bona fide* purchase. *Idem.*
3. The creditors of a vendor who has made an illegal sale of his property can not seize the same unless they can show that such transfer was an invasion of, and prejudicial to, their rights. *Brower v. Fass* 590

Vendor and Vendee—*concluded.*

4. In equity time will be regarded as of the essence of a contract when it clearly and affirmatively appears that the parties intended that time should be essential. *Jewett v. Black* 173
5. An executory contract for the sale of land vests the equitable ownership of the property in the purchaser, and in such case the seller retains the legal title as security for the deferred installments of the purchase price. *Idem.*

Venue. See CHANGE OF VENUE.

Verdict. See INTEREST.

Voluntary Assignment.

1. Under the provisions of section 6, chapter 6, Compiled Statutes, 1899, a deed of assignment must be filed for record in the clerk's office within 24 hours after its execution, or it becomes nugatory. *Miller v. Waite* 431
2. A substantial compliance with the statutory provisions regulating the subject of voluntary assignments is a condition essential to effectuate a valid transfer of title. *Idem.*
3. An assignee in peaceable possession of property assigned for the benefit of creditors has a title sufficient to maintain an action for conversion against those who illegally convert the property to their own use, even though the deed of assignment be invalid from failure to record. *Idem.*

Waiver. See ABATEMENT AND REVIVOR. APPEARANCE. COVENANT. MUNICIPAL CORPORATION.

Water and Water Courses. See INJUNCTION, 2, 3.

1. The irrigation act approved in 1877 (Session Laws, p. 168) did not abrogate the common law rights of riparian owners as they theretofore existed in this state. *Crawford Co. v. Hathaway* 754
2. An irrigation district organized under chapter 70, Session Laws, 1895, is a public corporation and its agents are public agents of the state. *Lincoln & Dawson County Irrigation District v. McNeal* 613
3. Where a contract is entered into with the board of directors of an irrigation district and the district has received the benefit thereof, it is liable for reasonable value of services, not exceeding contract price, though contract was illegally entered into. *Idem.*
4. Proposals for construction work on an irrigation ditch should be advertised as provided in section 22, chapter 70, Session Laws, 1895, and bids received be accepted or rejected before the board can construct the work with the labor of the residents of the district. *Idem.*
5. Under section 24 of the irrigation act, all expenses incurred for the construction of an irrigation ditch are to

Water and Water Courses—*concluded.*

be paid out of the construction fund, and the board of directors is not authorized to incur any indebtedness against the district for labor performed in the work of construction where no such fund has been created. *Idem.*

6. Section 2, chapter 78, Session Laws, 1899, authorizing irrigation districts, under certain circumstances, to use their bonds, instead of the proceeds thereof, in acquiring or constructing irrigation ditches or canals, is a valid enactment. *Baltes v. Farmers Irrigation District*..... 310
7. The legislature may ratify or validate a sale or exchange of district irrigation bonds which was not authorized at the time such sale or exchange was made; and it may provide a method of disposing of such bonds different from the one existing at the time they were voted. *Idem.*
8. A statute which directs officers of a *quasi*-public corporation to immediately issue bonds which have been voted, and which also provides that they "may sell the bonds from time to time" and "before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds," imposes upon such officers a duty which continues until such provision is complied with. *Idem.*

Will. See CHARITY. TRUST.

1. Trustee under will *held* to have sufficient interest to appeal from order refusing its admission to probate. *St. James Orphan Asylum v. Shelby*..... 796
2. A will must be construed with a view of carrying out the intention of the testator and unless there is something in it contrary to law or against public policy, it will not be declared invalid. *Idem.*

Witness. See EVIDENCE.

1. The allowing of leading questions to be put to a witness rests in the sound discretion of the couurt. *Welsh v. State*.. 101
2. The record of conviction of an offense below the grade of a felony is not admissible to affect the credibility of a witness. *Young Men's Christian Association of Lincoln v. Rawlings*.. 377
3. The latitude to be given in cross-examination rests largely with the trial court, and should always be restricted to facts and circumstances brought out in the examination in chief. *Missouri P. R. Co. v. Fox*..... 531
4. Where testimony of a deceased person in regard to any transaction or conversation has been taken and read in evidence, an interested witness may be examined in regard to the facts testified to by such person deceased. *Bangs v. Gray* 457

Words and Phrases.

1. "Adultery." *State v. Byrum*..... 384

Words and Phrases—*concluded.*

2. "Court." *Porter v. Flick* 773
3. "Entered into." *Fire Ass'n of Philadelphia v. Ruby* 216
4. "Executed." *Idem.*
5. "Filing." *Medland v. Linton* 249
6. "First week of a month." *Idem.*
7. "Growing up in crime." *Scott v. Flowers* 675
8. "Head of family." *Hyde v. Hyde* 502
9. "Hostile." *Hoffine v. Ewings* 729
10. "Newspaper." *Hanscom v. Meyer* 68
11. "Populist party." *Porter v. Flick* 773
12. "Trade fixture." *Brownell v. Fuller* 558
13. "Week." *Medland v. Linton* 249